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THE INDIAN LAW REPORTS

MADRAS SERIES,

CONTAINING

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

REPORTED BY

Privy Council C. BOULNOIS, *Middle Temple*.
High Court { K. BROWN, *Inner Temple*.
 J. H. M. RYAN, (*Offg.*) *Middle Temple*.

VOL. XX.—1897.

JANUARY—DECEMBER.

Published under the Authority of the Governor-General in Council,
BY THE SUPERINTENDENT, GOVERNMENT PRINTING IN
BENGAL, SECRETARIAT PRESS, CALCUTTA;
THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;
AND AT THE BOMBAY AND AILAHABAD
GOVERNMENT BOOK DEPÔTS.

JUDGES OF THE HIGH COURT.

1ST JANUARY—31ST DECEMBER 1897.

Chief Justice.

Hon'ble Sir ARTHUR J. H. COLLINS, KT., Q.C.

Puisne Judges.

Hon'ble H. H. SHEPHARD.

„ S. SUBRAMANIA AYYAR, C.I.E.

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Advocate-General.

Hon'ble J. H. SPRING BRANSON (*on leave from 3rd
February; died on the 8th April*).

„ V. BHASHYAM AYYANGAR, C.I.E. (*Offg. from 3rd
February*).

MADRAS:

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IN THIS VOLUME.

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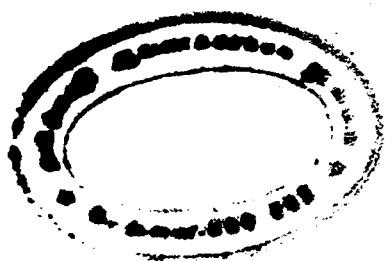
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THE
INDIAN LAW REPORTS,
Madras Series.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

QUEEN-EMPRESS

v.

SUBRAMANIAN AND OTHERS.*

1896.
September
11.

*Penal Code, s. 188—Local Boards Act—Act V of 1884 (Madras), ss. 98, 100—
Disobedience to notice.*

The President of a Local Board, acting under Act V of 1884, issued a notice calling upon a person to remove certain encroachments on a public road within ten days :

Held, that such a notice was not an order within the meaning of section 188, Indian Penal Code, and a person neglecting to obey it could not be convicted under that section.

CASES referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by J. Hewetson, Acting District Magistrate of Malabar.

The facts of this case appear sufficiently from the letter of reference, which was as follows :—

“The accused in each of the cases has been sentenced to a fine
“of Rs. 10, or in default to one week’s simple imprisonment for
“disobedience to an order of the Taluk Board President of Mala-
“puram to remove encroachments on the public road, an offence
“punishable under section 188, Indian Penal Code.

“I am of opinion that failure to remove an obstruction in obe-
“dience to a notice under the Local Boards Act is not punishable

* Criminal Revision Cases Nos. 288 to 290 of 1896.

"under section 188, Indian Penal Code. The procedure to be observed is prescribed by section 100 of the Local Boards Act, which says that the president is to have the obstruction removed and recover the costs from the defaulter.

"In criminal revision case No. 568 of 1885(1) it was laid down that a lawful order for the removal of an obstruction from a public way can only be issued in the mode and by the officer named in chapter X of the Code of Criminal Procedure. The president of a taluk board is not one of the officers named in section 133, Criminal Procedure Code.

"I have the honour, therefore, to request that the convictions in these cases may be set aside and the fines ordered to be refunded."

The material portions of sections 98 and 100 of the Local Boards Act necessary for the purposes of this report are as follows:—

"Section 98. (1) No wall, fence or other obstruction or encroachment shall be erected on any public street without the written permission of the president of the taluk board or some person duly authorised by him in that behalf; nor shall any building be erected without such permission over any sewer or drain or any part of a sewer or drain, or upon any ground which has been covered, raised or levelled wholly or in part by street-sweepings or other rubbish.

"(2) If any person erects such obstruction or building without such permission, or, where such permission shall have been granted in a manner contrary to or inconsistent with the terms of such permission, the president of the taluk board, or other person duly authorised as aforesaid, may by notice in writing require the person who shall have erected the obstruction or building to remove the same within a time to be specified in such notice.

"Section 100. (1) If any person to whom a notice shall have been given under the provisions of this Act requiring him to execute any work omits to comply with such notice, the president of the taluk board, or any person authorised by him in that behalf, may cause such work to be executed.

"(2) The expenses incurred in the execution of such work shall be paid by the person to whom the notice shall have been

(1) Weir, 3rd Ed., 77.

"given, and shall be recoverable in the manner hereinbefore provided for the recovery of the arrears of the tax on houses."

The *Acting Public Prosecutor* (Mr. N. Subramaniam) for the Crown.

The accused persons were not represented.

ORDER.—Reading sections 98 and 100 of the Local Boards Act (V of 1884) together, it is clear that the notice prescribed by the former section is a mere preliminary to the action to be taken by the president himself and not by the party under the latter section. The notice in question is, therefore, merely a notice and not an order of the kind contemplated in section 188 of the Penal Code.

We accordingly agree with the District Magistrate that the convictions were wrong and set them aside and direct that the fines, if paid, be refunded.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

ALLAPICHAIRAVUTHAR

v.

MOHIDIN BIBI.*

Criminal Procedure Code, s. 488—Maintenance—Sentence of imprisonment on default.

The imprisonment provided by section 488, Criminal Procedure Code, in default of payment of maintenance awarded is not limited to one month. The maximum imprisonment that can be imposed is one month for each month's arrear, and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrear.

CASE referred by R. D. Broadfoot, Acting Sessions Judge of Trichinopoly, for the orders of the High Court, under section 438 of the Code of Criminal Procedure.

The case was stated as follows:—

"Mohidin Bibi, on behalf of her minor daughters, put in a petition to the Head Assistant Magistrate against her husband

1896.
September
17, 21.

* Criminal Revision Case No. 170 of 1896.

ALLAPICHAJ
RAVUTHAR
v.
MOHIDIN
BIBI.

"Allapichai Ravuthar for realization of Rs. 83-14-5, being the accumulated arrears of maintenance for 55 months and 28 days.

"After full enquiry the Head Assistant Magistrate was not satisfied that the said Allapichai is unable to pay the said arrears and ordered him either to pay Rs. 83-14-5, or to undergo simple imprisonment for a term of six months.

"I am of opinion that the said order of imprisonment for six months is probably illegal (vide *Queen-Empress v. Narain*(1)), though in *Biyacha v. Mohidin Kutti*(2) the period of imprisonment for default of payment of accumulated arrears was four and-a-half months, and the High Court did not comment on this; still the case was not argued on that point, and I doubt if their Lordships meant to approve of more than one month.

"Any way, I submit that, in my opinion, the sentence of six months is excessive. The man has now served two months and three days.

"Under these circumstances I have the honour to request the Honourable Judges of the High Court to modify the said order of the Head Assistant Magistrate: the prisoner has this day been released on bail."

The parties were not represented.

ORDER.—The question before us is whether the maximum sentence which may be imposed on any one occasion under section 488 of the Code of Criminal Procedure is one month, or whether a longer term may be imposed at the rate of one month's imprisonment for each month's arrear remaining unsatisfied. In High Court Proceedings, dated 19th April 1871(3), this Court remarked that only one month's imprisonment could be awarded, but this observation was made with reference to the terms of section 316 of the Criminal Procedure Code then in force (Act XXV of 1861) which runs as follows:—"The Magistrate may, for every breach of the order by warrant, direct the amount due to be levied in the manner provided for levying fines; or may order such person to be imprisoned with or without hard labour for any term not exceeding one month."

The words of section 488 of the present Code are very different. They are:—"the Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner herein

(1) I.L.R., 9 All., 240. (2) I.L.R., 8 Mad., 70. (3) 6 M.H.C. R., App., 22.

ALLAPICHAJ
RAVUTHAR
v.
MOHIDIN
BIBI.

"before provided for levying fines, and may sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month." The change is significant, and the words "for the whole or any part of each month's allowance" are unmeaning, if, in any case, the maximum sentence can only be one month's imprisonment. In the interpretation put upon the section by the Allahabad High Court (*Queen-Empress v. Narain*(1)) we are therefore unable to agree. The difficulty suggested by Edge, C.J., in determining to which month out of several a sum levied should be appropriated does not seem to be important. The procedure contemplated by the Code appears to be to deduct the sum levied from the sum due, and then to ascertain how many months' arrears the balance represents. The maximum imprisonment that can be imposed will then be one month for each month's arrears, and if there is a balance representing the arrears for a portion of a month a further term of a month's imprisonment may be imposed for such arrear. Our view is in accordance with the construction incidentally put upon the section by this Court in the *Biyacha v. Mohidin Kutti*(2).

In the peculiar circumstances of this case we should not have been prepared to say the sentence was altogether excessive, but as the Sessions Judge has already released the prisoner on bail before the expiration of his sentence, we think it inexpedient that he should be again committed to jail. His bail may, therefore, now be discharged.

(1) I.L.R., 9 All., 240.

(2) I.L.R., 8 Mad., 70.

APPELLATE CIVIL.

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

1896.
October 7.

SRINIVASARAGAVA AYYANGAR AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

MUTTUSAMI PADAYACHI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

*Limitation—Adverse possession—Rent Recovery Act (Madras)—Act VIII of 1865—
Omission by inamdar to obtain registration of title under Regulation XXVI of
1802—Effect of—*

An inamdar had not obtained registration of his title under the registered landlord and could not therefore sue to enforce acceptance of patta and had not collected rent from the tenants for more than twelve years :

Held, that the tenants had not by reason of these facts acquired rights against the inamdar by adverse possession.

SECOND APPEAL against the decree of E. J. Sewell, Acting District Judge of Tanjore, in appeal suit No. 333 of 1894, reversing the decision of R. B. Clegg, Acting Sub-Collector of Tanjore, in summary suit No. 132 of 1893.

The facts of this case set forth in the judgment of the Sub-Collector were as follows :—

“ This is a suit under Act VIII of 1865 to enforce acceptance of patta for fasli 1302. The patta was tendered to the defendants on the 23rd June 1893, but they refused it. There is no question of the tender of patta.

“ The issues in this suit are :—(i) whether the defendants are tenants of the plaintiffs and are bound to accept a patta ; (ii) whether the terms of the patta tendered are correct.

“ On the first issue the plaintiffs allege that they are registered inamdars of the ‘ Nadusetu ’ of Tirupatorai. They produce exhibit A, a sale-deed, dated 19th January 1878, under which they derive their title as inamdars of this ‘ Settu ’ from the former inamdar Sankara Peshwai. Exhibit D is a copy of the revenue register, ordering the patta for the lands purchased from

“ Sankara Row Peshwai to be entered in their names on February 1884.

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“ The defendants’ contention on this issue is that they have never paid any rents to the plaintiffs for over twelve years ; that they have been in possession of their lands with all rights of ownership for over twelve years, and that, therefore, the plaintiffs’ claim is barred by limitation.

“ The defendants rely on a judgment in A. S. No. 419 of 1880 of the District Court, Tanjore. This was an appeal against the decree of the Head Assistant Collector in summary suit No. 84 of 1880 in which Sankara Row Peshwai was first plaintiff and the present plaintiffs second and third, respectively. The District Judge then held that as the present plaintiffs had not then been registered as inamdars in the Collector’s register, they were not entitled to tender patta though he ordered defendants to accept patta from Sankara Row Peshwai. The defect of revenue registry has now been overcome, and the question is whether the defendants have acquired a title to the melvaram rights over the land by adverse possession for more than twelve years.”

The Sub-Collector held that the defendants were bound to accept the patta tendered subject to a modification not now material.

The District Judge reversed this decree and dismissed the suit with costs with the following remarks :—

“ The right of the plaintiffs to take action as the landlords of the defendants was explicitly denied in 1880 and the matter was decided against plaintiffs. If the relation of landlord and tenant had ever existed between them, the tenancy was then put an end to. The defendants have held possession ever since, although the bar stated in the decision to the claim of the plaintiff’s (want of registry of the inam in their name) was removed in 1884. The present suit was not brought until 1893. I am of opinion that the plaintiffs’ suit as landlords is barred, and that the defendants are not their tenants.”

The plaintiffs preferred this second appeal.

Mr. Krishnan for appellants.

No one appeared for the respondents.

JUDGMENT.—No one appears to oppose the appeal. We find ourselves unable to support the decree of the District Judge.

The decree in appeal suit No. 419 of 1880 (exhibit I) did not decide that the then defendants were in adverse possession of

* Second Appeal No. 307 of 1895.

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PADAYACHI.

the lands as against the then landlord. It merely decided that the present plaintiffs (then second and third plaintiffs) had not then obtained registration of their title under the registered landlord, and that they could not maintain a suit to enforce acceptance of patta until such registration had been made. The registration was made in 1884 and by that registration the plaintiffs for the first time obtained a complete title on which to enforce acceptance of pattas. There is no evidence that the possession by the tenants was at any time hostile to the plaintiffs or their vendor. The mere omission to collect rent does not make the tenancy hostile.

We must reverse the decree of the District Judge and restore that of the Sub-Collector. The plaintiffs must have their costs throughout.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

QUEEN-EMPRESS

v.

ABDUL KADAR SHERIFF SAHEB.*

Criminal Procedure Code, ss. 195, 433—Abetment of an offence, s. 109, Penal Code—Sanction to prosecute unnecessary.

Though sanction to prosecute is necessary in cases falling under the sections of the Penal Code set forth in section 195, Criminal Procedure Code, no such sanction is required previous to the prosecution of a person charged with the abetment of such offences.

CASE stated for the opinion of the High Court by W. E. Clarke, Acting Chief Presidency Magistrate, in calendar case No. 18351.

The case was stated as follows:—

“One Beejan Bi accused one Hyath Bi of criminal breach of trust in calendar case No. 3732 of 1896 on the file of this Court. Accused was discharged under section 253, Criminal Procedure Code. Hyath Bi subsequently in calendar case No. 5988 of 1896 applied for sanction to prosecute Beejan Bi and one Abdul Kadar Sheriff who was alleged to have abetted Beejan Bi to

“bring a false charge against Hyath Bi. This Court, after inquiry, sanctioned the prosecution of Beejan Bi for bringing a false charge, but, thinking that a sanction was unnecessary to support an action for abetment of an offence under section 211, Penal Code, declined to grant sanction to prosecute the alleged abetter. Subsequently Beejan Bi complained of Abdul Kadar Sheriff having abetted an offence under section 211, Penal Code, and this Court issued a summons against the said Abdul Kadar Sheriff. It is now argued no proceedings will lie against Abdul Kadar Sheriff for abetment of an offence under section 211, Indian Penal Code, without sanction. I have now the honour to solicit an opinion as to whether abetment being a substantive offence punishable under sections of the Penal Code other than those mentioned in section 195, clause (b) of the Criminal Procedure Code, sanction is necessary before a Court can take cognizance of such an offence as abetment of an offence under section 211, Indian Penal Code. I make this reference, as I am asked to do so, and the point seems one of importance regarding which a definite ruling would be of advantage to the public.”

The Crown Prosecutor (Mr. R. F. Grant) for the Crown.

Srinivasuragava Chariar for complainant.

Mr. Ramasami Raju for the accused.

OPINION.—The abetment of an offence is an offence of itself and is punishable under separate sections of its own. None of those sections is mentioned in clause (b) of section 195 of the Code of Criminal Procedure, and therefore sanction need not be obtained in respect to them.

The fact that the Legislature has not included in section 195 the sections of the Penal Code relating to abetment is probably due to the circumstance that in the generality of cases the facts connected with the abetment are not likely to come before the Court.

The costs of this reference must be paid by the accused at whose instance it was made.

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SHERIFF
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* Criminal Referred Case No. 1 of 1896.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

1896.
October 17.

ABBUBAKER SAHEB (AUCTION-PURCHASER), APPELLANT,

v.

MOHIDIN SAHEB (JUDGMENT-DEBTOR), RESPONDENT.*

Civil Procedure Code, ss. 224, 311—Application to set aside sale—Effect of fraud—Auction-purchaser no party to fraud—Absence of certificate under s. 224—Mere irregularity.

A judgment-debtor cannot have a Court sale set aside on the ground of fraud in the absence of proof that the auction-purchaser was a party to the fraud and that the fraud came to the judgment-debtor's knowledge subsequent to the confirmation of the sale.

The omission to transmit to the Court executing the decree the certificate required by s. 224, Civil Procedure Code, is a mere irregularity which would not vitiate the sale.

PETITION under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of the District Judge of South Malabar in civil miscellaneous appeal No. 26 of 1895, confirming the order of U. Achutan Nayar, Principal District Munsif of Calicut, in civil miscellaneous petition No. 2298 of 1894.

This was an application by the judgment-debtor to set aside a sale of immovable property in execution of decree No. 408 of 1887 on the file of the Cannanore Munsif's Court transferred to the Court of the Principal District Munsif of Calicut for execution. The sale was effected on 6th June 1891 and was confirmed on 6th August 1891.

The grounds alleged for setting aside the sale were: first, that no notice of execution was served upon petitioner; secondly, that the decree-holder was guilty of fraud in preventing service of notice by false representation; and, thirdly, that the transfer of execution to this Court was not accompanied by the certificate required by section 224 of the Code of Civil Procedure.

The District Munsif found that notice was not served on the judgment-debtor, secondly, that the service of notice upon the

defendant was prevented by the fraudulent representation of the decree-holder, and, thirdly, that the absence of the certificate required by section 224 would not vitiate the sale and he set aside the sale as prayed. On appeal the District Judge confirmed the order of the District Munsif and his order was as follows:—

"I am unable to agree with the Munsif that a notice to the judgment-debtor was required in this case, for I consider that the order passed under section 312, Code of Civil Procedure, confirming the sale was distinctly an order passed against the person against whom execution was applied for. Indeed such an order is expressly referred to in the last clause of the section itself as an order made against a party.

"But I can uphold the order of the Munsif on another ground, one that he would not allow, namely, the third objection taken by the judgment-debtors that the decree was not executable by the Munsif in the absence of the certificate required by section 224, Code of Civil Procedure. It must be taken that no such certificate ever existed because (i) it is not found in the record, and (ii) if it had existed, the Court would never have issued execution for the whole amount of the decree when a substantial portion of it over Rs. 1,000, about one-third of the amount, had already been realized. Until the certificate and copies required by section 224, Code of Civil Procedure, are 'filed' (*vide* sections 225 and 226) there is no material for the Court to act upon, in other words, it has no jurisdiction to execute. The execution proceedings in this case were, therefore, null and void *ab initio*, and on this ground I confirm the Munsif's order setting aside the sale and dismiss the appeal with costs."

The auction-purchaser appealed.

Narayana Rau for appellant.

Sankaran Nayar for respondent.

ORDER.—The petitioner, who was appellant in the District Court, seeks to have the order of the District Court set aside on the ground that the Judge exercised a jurisdiction which he did not possess. That order confirmed the order of the District Munsif, which proceeded on the ground of fraud practised upon the judgment-debtor.

It appears that the sale had been confirmed before the application to set it aside was made. That being so we are of opinion that the ground assigned by the Judge for confirming the District

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* Civil Revision Petition No. 474 of 1895.

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Munsif's order is not a valid one, because the omission to send the certificate required by section 224 could not affect the jurisdiction of the Court to sell. It would be a mere irregularity not entitling any party to have the sale set aside after confirmation. The only ground, as it appears to us, on which the order of the District Munsif could be supported would be that the sale had been brought about by fraud to which the purchaser was a party. Fraud as between the decree-holder and the judgment-debtor only could not affect the purchaser.

The District Munsif does not find distinctly that the purchaser was party to the fraud, and he also omits to say whether the fraud was discovered after the confirmation of the sale.

We are of opinion that, unless there was evidence that the purchaser was party to the fraud, and that the judgment-debtor discovered it subsequently to the confirmation of the sale, the District Munsif would have had no jurisdiction to set it aside. In the absence of such evidence the case would be a proper one for interference under section 622. We must ask the Principal District Munsif of Calicut to return a finding on the above question within one month from the date 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 CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

QUEEN-EMPRESS

v.

PAUL AND OTHERS.*

Indian Christian Marriage Act—Act XV of 1872, s. 68—Solemnize.

In Indian Christian Marriage Act, section 68, the word "solemnize" is equivalent to the words "conduct, celebrate or perform." Therefore any unauthorised person not being one of the persons being married, who takes part in performing a marriage, that is, in doing any act supposed to be material to constitute the marriage is liable to be convicted under that section; and a charge of abetment is sustainable against the persons being married.

* Criminal Appeal No. 255 of 1896.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed by E. J. Sewell, Sessions Judge of North Arcot, in sessions case No. 45 of 1895.

The facts of this case were stated in the judgment of the Sessions Judge as follows:—

"The first defendant Paul is a Native Christian. The second defendant Bakkaian is a Hindu by religion. The third defendant Simeon is stated in the charge to be a Native Christian. Paul and Bakkaian are charged under section 68 of the Indian Christian Marriage Act with solemnizing or professing to solemnize a marriage between third defendant, a Christian, and a woman professing Hinduism in the absence of a Marriage Registrar, they not being authorized under the Indian Christian Marriage Act to solemnize marriages. The third defendant, the man married, is charged under the same section with abetting the offence.

"The first defendant's defence is that he was not even present at third defendant's marriage and did not solemnize it. The second defendant's defence is that he took no part in the ceremony but only acted as cook.

"The third defendant's defence is that he had before the date of the marriage—2nd September 1895—ceased to profess the Christian religion. He also denied that the marriage was solemnized by first and second defendants so that, of course, he denies abetting them.

"It appears from the evidence for the prosecution that the Reverend L. R. Scudder, a Missionary of the American Reformed Church in North Arcot, having learnt that some of the Native Christians under his care in the village of Bassoor were contemplating marriage according to non-Christian rites, and without observing the provisions of the Indian Christian Marriage Act went to Bassoor on 1st September and remonstrated with the elders of the church—of whom first defendant is one—and pointed out to them that if they carried out their intention they would expose themselves to legal penalties. Dr. Scudder and other witnesses called, state that the third defendant Simeon alias Vilvanathan attended the church, listened to the proceedings and said nothing whatever in reply to these remonstrances.

"The native pastor of the church, the catechist in immediate charge, and other attendants at the services and members of the

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"church depose that Simeon had up to 1st September been attending the weekly worship and had taken part in the Lord's Supper and that he continued to do so after 1st September up to 15th September. The registers of the church and of attendance at the services are produced and corroborate these statements."

The Sessions Judge found that the defendant continued up to the date of his marriage to profess the Christian religion, but, acquitted him on the charge of abetment, and also acquitted defendants Nos. 1 and 2. He gave judgment as follows as regards the construction of the Act:—

"It appears to me that the word solemnization as used in the Act is different to the mere conducting of the marriage and that it involves the performance by some person possessing or claiming authority to do so of religious rites appropriate to the occasion. There are two cases in which a marriage without religious rites is permissible, viz., in the case of a marriage in the presence of a Marriage Registrar and in the case of marriage between Native Christians certified by a person licensed under the Act to certify marriages of Native Christians; the second case is hardly an exception since by section 60, clause (3), a solemn appeal to the Deity is made a necessary part of the ceremonial. But the marriage in this case is not spoken of as being solemnized by the person licensed to give a certificate, but as solemnized by the parties in his presence (see sections 61 and 62).

"So also in the case of marriages before a Marriage Registrar, the parties to the marriage are left free to solemnize the marriage between them 'according to such form and ceremony as they think fit to adopt' (section 51) and such a marriage is spoken of in section 51 as solemnized 'in the presence of some Marriage Registrar' and in section 53, as solemnized before a Marriage Registrar. In all other cases, the Minister of Religion is spoken of as solemnizing the marriage.

"It is true that in section 5 and in the heading to Part V the phrase is used 'marriages solemnized by or in the presence of a Marriage Registrar.'

"But it is doubtful whether this means that there are two different kinds of marriage, one solemnized by the Marriage Registrar and the other solemnized in his presence. There is in Part V only one procedure laid down and that is in Part V itself

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"spoken of as solemnized by the parties in the presence of the Registrar.

"I think, therefore, that it is most consistent with the whole tenor of the Act to confine the description of a person solemnizing the marriage to some person having or claiming authority recognised by the parties to conduct the religious or ceremonial rites prescribed by his ecclesiastical authority (section 5, clauses 1 and 2) or chosen by himself (Part III, section 25).

"In the cases where there is no such person, the marriage is solemnized between the parties but not solemnized by any one.

"If there be an exception to this, it is the case of a Marriage Registrar, and it exists because he is authorized to require a 'solemn' declaration from the parties (section 51).

"If in the case now under consideration the recognised priest of Pariahs, a Valluvan, had conducted the ceremonial usual in such cases, he would, no doubt, come under the description of a person solemnizing or professing to solemnize a marriage given in section 68.

"But in the absence of any such person, I do not think that any person taking a part, even a leading part, in the ceremonies adopted, but neither claiming nor having any authority recognised by the parties, to do so, can be said to have solemnized the marriage.

"In such a case, I hold the marriage to have been, in the language adopted in the Act, solemnized between the parties, but not solemnized by any one.

"In the only reported case, the person held liable was a 'Hindu priest' (see Weir, 3rd edition, page 565(1)).

"I find therefore that the acts attributed to the first and second defendants did not amount to a solemnization of the marriage by them so that they are not liable under section 68.

"It is therefore needless to go at length into the evidence whether they were present or not. I think that there is room for reasonable doubt whether first defendant was present."

The Acting Public Prosecutor (Mr. N. Subramaniam) for the Crown.

Sundara Ayyar for the accused.

(1) S.C., 6 M.H.C.R., App. XX.

[REPORTER'S NOTE.—Compare Queen-Emress v. Johan and others. I.L.R., 17 Mad., 391.]

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JUDGMENT.—We cannot accept the Judge's interpretation that the word "solemnize" as used in the Act applies to only such marriage ceremonies as are performed by some person possessing or claiming authority to perform them by virtue of ecclesiastical authority. The Judge's view is quite inconsistent with the provisions of the Act which use the word "solemnization" with reference to marriages before the Marriage Registrar who is an official possessing no ecclesiastical character, and before whom no ceremonies are necessary. A marriage before him is a mere civil marriage and yet the word in question is applied to such a marriage equally with marriages accompanied by religious ceremonial. We, therefore, take the meaning of the word to be equivalent to conduct, celebrate or perform. In this view any person, not being the persons being married, who actually took part in performing this marriage, that is in doing any act that was supposed to be material to constitute the marriage was clearly guilty under section 68 of Act XV of 1872 as parties either solemnizing a marriage or professing to do so.

In the case of the persons being married, we consider a charge of abetment is sustainable as without their presence and aid the marriage could not possibly take place. On this ground the acquittal by the Judge of the third accused was wrong. For these reasons we set aside the acquittal of all the accused and direct that they be retried with reference to the merits of the case.

Ordered accordingly.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

KUTTI ALI.*

*Local Boards Act—Act V of 1884 (Madras), s. 87, clause 3—Government
Stores—Equipages.*

Stores and carts belonging to the Government jails come within the words

* Criminal Revision Case No. 340 of 1896.

'Government Stores and Equipages' in clause 3, s. 87, Act V of 1884, and are free from tolls under that Act.

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KUTTI ALI.

PETITION under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the finding of M. Swaminatha Ayyar, Sub-Divisional First-class Magistrate of Calicut Division, in Calendar case No. 12 of 1896, wherein the accused was discharged, under section 253, Criminal Procedure Code, of offences, under section 417, Indian Penal Code, and section 165 of Act V of 1884 (Madras).

The facts are as follows:—

"Sheik Moideen, a warder of the Central Jail, Cannanore, laid a complaint before the Town Second-class Magistrate, Cannanore, charging the defendant, Kutti Ali, the Edakkad Toll-keeper, with illegal collection of the toll from him under section 60, Act V of 1884.

"The evidence shows that articles manufactured at the jail are sent by the jail carts to Public Departments as well as to private parties, and a pass is given by the Superintendent, Central Jail, claiming exemption from payment of tolls. The defendant refused to accept the passes at the Local Fund Toll-gate at Edakkad and stated that the *hukumnamah* given to him by the President, District Board, did not contain any clause to allow the exemption claimed."

Section 87 of Act V of 1884 runs as follows:—

"If the District Board notify under section 60 that tolls on carriages, carts and animals passing along any road within the district shall be levied at the rates specified in the notification, such tolls shall be levied as provided in sections 88 to 92.

"The District Board may compound with any person for a sum to be paid annually or half-yearly in lieu of all such tolls either generally in respect of all roads in the district or specially in respect of any particular road, and may issue licenses to any such person in respect of his carriages, carts and animals;

"Provided always that such composition shall include all the carriages, carts and animals possessed by the person compounding.

"No tolls shall be paid for the passage of troops on their march, or of military and Government stores and equipages, or of military and police officers on duty, or of any person or

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"property in their custody, or for the passage of vehicles and
"animals licensed by the District Board while such licenses are
"in force."

The exemption is claimed on two grounds, namely ;—

(a) That the articles conveyed come within the category of
'Government Stores,' and

(b) That the jail carts come within the meaning of the term
'Equipages.'

The Magistrate acquitted the accused being of opinion that
the articles conveyed were not Government Stores and that the
jail carts are not included in the term 'Equipages.'

The *Acting Public Prosecutor* (Mr. N. Subramaniam) for the
Crown.

Mr. Krishnan for the accused.

ORDER.—We are of opinion that stores and carts belonging to
the Government jails come within the words 'Government Stores
and Equipages' in section 87 of Act V of 1884, and are free
from tolls under that Act.

The First-class Magistrate was, therefore, wrong in discharging
the accused on the grounds assigned by him in his judgment.

We, therefore, direct the said Magistrate to restore the case to
his file and proceed to dispose of it in accordance with law. The
Acting Government Pleader informs us that the object of Gov-
ernment in moving the Court to interfere in this case is merely
to ascertain the law. We are of opinion that, if a conviction
is obtained against the accused, a purely nominal fine will suffice,
as the sense in which the word 'Equipages' is used in the Act
is not free from doubt and the construction placed upon it by the
toll-keeper was not an unnatural one or, in our opinion, so far as
the records show dishonest.

APPELLATE CIVIL.

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

CHINNA KRISHNA REDDI (PLAINTIFF), APPELLANT,

1886.
September 7.

v.

DORASAMI REDDI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

*Specific performance of contract—Sale-deed fraudulently suppressed by defendant
before registration—Cause of action.*

Where the defendant agreed to sell certain land to the plaintiff and executed
a sale-deed in favour of the plaintiff to that effect, but subsequently obtained
possession of it before registration and fraudulently suppressed it:

Held, that the plaintiff was entitled to enforce specific performance of the
contract by the execution and registration of a fresh document.

SECOND APPEAL against the decree of S. Russell, District Judge of
Chingleput, in appeal suit No. 193 of 1893, confirming the decree
of K. Ramachandra Ayyar, District Munsif of Chingleput, in
original suit No. 142 of 1891.

The facts of this case were as follows :—

The suit is for specific performance of a contract of sale.

Plaintiff alleged that in March 1890 the first defendant agreed
to sell to him certain lands and a document was actually drawn
up and executed by first defendant. Plaintiff says the considera-
tion duly passed from him, and it was so recited in the document.

Defendant admitted the execution of a sale-deed, but says
the transaction fell through as plaintiff failed to pay the con-
sideration.

There was a subsequent sale by first defendant to second
defendant, but this was held to be a nominal transaction.

The District Munsif dismissed the suit and his decree was
confirmed on appeal by the District Judge, who however found
that the plaintiff has paid full consideration and that the defend-
ant had in fact executed the document which was delivered to
plaintiff, but subsequently redelivered to the first defendant who
has retained possession, but dismissed the suit on the authority of
Venkatasami v. Kristayya(1).

* Second Appeal No. 687 of 1895.

(1) I.L.R., 16 Mad., 341.

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The plaintiff appealed.

Pattabhirama Ayyar and *Srirangachariar* for appellant.

Masilamani Pillai for respondent.

JUDGMENT.—The case relied on by the District Judge (*Venka-tasami v. Kristayya*(1)) is not in point. In that case the plaintiff was in possession of the document, and it was solely by reason of his own negligence that he was unable to register the document; and it was for this reason that the High Court in that case decided that no suit would lie to compel the defendant to execute a fresh document.

The present case stands on a totally different footing. In it the first defendant fraudulently made away with the document after its execution and before registration. It was therefore impossible for the plaintiff to register it. In such a case the plaintiff is clearly entitled to have a fresh document executed and registered just as he would be so entitled if, after execution, the document had been accidentally lost or destroyed.

The decision in *Nynakka Routhen v. Vavuna Mahomed Naina Routhen*(2) is exactly in point. There a document, after execution, but before registration, was accidentally destroyed by fire, and the High Court held that the plaintiff was entitled to have a fresh document executed in the terms of that destroyed.

The High Court then observed "the execution of a fresh instrument of sale is an act required to perfect the title sold to the plaintiff in the way the contract between him and the first defendant intended it should be perfected; and the cause of action, on which the prayer for the enforcement of that act rests, is not attributable in any way to breach of contract or neglect on the part of the plaintiff, nor does it involve the doing of any thing prejudicial to the first defendant. On every just principle therefore the first defendant is under an obligation to renew the sale-deed . . . and so place the plaintiff in the position to register the sale."

The District Judge has found that the plaintiff has paid consideration for the document and done everything on his part to complete the sale, but that the first defendant has fraudulently made away with the document before registration. On these findings and having regard to the true principles applicable in

(1) I.L.R., 16 Mad., 341.

(2) 5 M.H.C.R., 123.

such cases as set forth above, we must set aside the decrees of the Lower Courts dismissing the suit, and give judgment for plaintiff with costs throughout.

The defendant must execute and register a document in the terms of exhibit A within six weeks from this date.

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KRISHNA
REDDI
v.
DORASAMI
REDDI.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

NARAYANAMMA, PETITIONER,

v.

KAMAKSHAMMA, COUNTER-PETITIONER.*

1896.
October 16,
22.

Civil Procedure Code, ss. 617, 647—Village Court's Act (Madras)—Act I of 1889, s. 13, proviso 3—'Land' includes house.'

In Act I of 1889, s. 13, proviso 3, the word land includes land covered by a house and consequently a suit for house-rent unless due under a written contract signed by the defendant is not cognizable in a Village Munsif's Court.

CASE stated for the opinion of the High Court under sections 617 and 647, Civil Procedure Code, by Y. Janakiramayya, District Munsif of Tirupati, in suit No. 32 of 1895 on the file of the Village Munsif of Puthur.

The facts appear sufficiently from the letter of reference, which was as follows:—

"The counter-petitioner, Kamsala Kamakshamma, brought on 21st September 1895 a suit (suit No. 32 of 1895) against the petitioner Ghandhavady Narayanamma in the Village Court of Puthur for Rs. 19, arrears of rent for a house due on an oral lease. The Village Munsif passed a decree in plaintiff's favour on 18th November 1895, and the defendant preferred an application to this Court under section 73 of the Village Courts Act (Madras Act I of 1889) on the ground, *inter alia*, that the Village Court has no jurisdiction to try the suit. The petitioner's pleader contends that suits for house-rent on oral leases are excepted from the jurisdiction of the Village Courts by section 13, proviso (3), while the counter-petitioner's pleader contends that the expression 'land' in the said proviso does not include house and is meant to cover only agricultural lands, but neither houses

* Referred Case No. 6 of 1896.

NARAYAN-
AMMA
v.
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AMMA.

"nor dwelling sites; relying on this construction of the proviso, the learned vakil contends that the suit in question is cognizable by a Village Court under the main section (section 13).

"The points referred for the decision of Honourable the Judges of the High Court are whether the word 'land' in proviso (3), section 13, of the Village Courts Act includes houses and dwelling sites also, and a suit for rent for a house is cognizable by a Village Court when it is not due "*upon a written contract signed by the defendant.*" My answer to the first question is in the affirmative and to the second question is in the negative. I have no doubt that the word 'land' in section 13 is used in a very wide sense and includes houses and dwelling sites also. The policy of the Village Courts Act seems to me to exclude all rent suits from the jurisdiction of the Village Courts when the rent is not due on any written contract, and the reasons for adopting this policy are obvious. The legislature must have thought it dangerous to invest these illiterate and inferior tribunals, viz., Village Courts, with power to try questions, relating though incidentally, to title to immovable property and to the abatement, increase, or decrease of rents which questions may not unfrequently crop up in rent suits if the terms of the leases are not reduced to writing. A suit for rent for an agricultural land, on an oral lease, is admittedly not cognizable by Village Courts, and I cannot see why a similar suit for a house-rent should be made cognizable by such Courts; the same reasons and considerations are applicable alike to both classes of suits (suits for house-rent as well as rent on agricultural lands). Holding this opinion as I do, I have held that the Village Court of Puthur has no jurisdiction to try the suit in question and set aside with costs the decree passed by it. But, as the counter-petitioner's pleader requests me to state the case for an opinion of the Honourable High Court, and as there are not any decisions on the point I am aware of, and as it is said that the practice in this matter is not uniform in several Courts, I venture to state this case for an authoritative ruling from Honourable the Judges and have made my order setting aside the Village Court's decree, contingent on their opinion."

The parties were not represented.

JUDGMENT.—The house-rent in question was not alleged to be due upon a written contract signed by the defendant. The case

therefore, falls under proviso 3 to section 13 of Act I of 1889, which lays down that a Village Munsif cannot entertain a suit for rent of land, unless such rent is due upon a written contract signed by the defendant. In civil revision petition No. 48 of 1894, BEST, J., held the proviso to be inapplicable to a claim for house-rent. But we are unable to agree with the learned Judge, as we see nothing in the language of the proviso or in the reason for the enactment thereof to make us suppose that the term 'land' is used in a restricted sense excluding land built upon from the operation of the proviso. In the absence of any ground for putting such a limited construction on the term in question, it should, we think, be understood in its ordinary sense, which of course includes land not covered by buildings as well as that so covered. It follows that the Village Munsif had no jurisdiction to entertain the suit, and the conclusion of the District Munsif is right.

NARAYAN-
AMMA
v.
KAMAKSH-
AMMA.

APPELLATE CIVIL.

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

PATTABHIRAMAYYA NAIDU AND OTHERS (DEFENDANTS NOS. 1,
2, 6, 20, 22, 23, 24, 27, 31, AND 33), APPELLANTS,

1896.
September
16.

v.

RAMAYYA NAIDU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Limitation Act XV of 1877, sched. II, arts. 61, 99, 120—Decree for rent against tenants jointly—Execution against one defendant—Suit by him for contribution.

The holder of a zamindari village obtained a decree jointly against sixty-eight persons, including the present plaintiff and defendants, for Rs. 4,100 being rent accrued due on lands in the village and in execution he brought to sale property of the plaintiff and on 28th October 1889 he received, out of the sale-proceeds, Rs. 2,650. The share payable by the plaintiff was Rs. 183-10-10 only, and he instituted the present suit against the defendants on 28th October 1892 to recover the amounts which they were liable to contribute:

Held, that Limitation Act, sched. II, art. 99, did not govern the case and that whether article 61 or article 120 was applicable, the suit was not barred by limitation.

SECOND APPEAL against the decree of J. P. Fiddian, District Judge of Ganjam, in appeal suit No. 48 of 1894, confirming the decree of

* Second Appeal No. 731 of 1895.

PATTABHI-
RAMAYYA
NAIDU
v.
RAMAYYA
NAIDU.

C. Bapayya Pantulu, District Munsif of Sompeta, in original suit No. 625 of 1892.

This was a suit to recover by way of contribution Rupees 1,288-13-4 from the defendants 1-35 according to the shares specified in the list presented with the plaint.

The plaint, presented on 28th October 1892, set out that, on 24th September 1879, that the late Jayanti Kamesen Pantulu rented the village of Nandigam from Gajapaty Radhika Patta Mahadevi, Zamindarni of Tekkali, for three years, faslis 1288 to 1290, and transferred the same to one Attada Kurmi Naidu for Rs. 7,000; that the latter brought a suit in the Ganjam District Court in original suit No. 2 of 1883 against sixty-eight persons including the plaintiffs for Rs. 4,100, rent due for fasli 1289, and obtained a joint decree against all of them; that in execution of this decree, the said Kurmi Naidu put the plaintiffs' lands to sale and received Rs. 2,650 on 28th October 1889 from the sale-proceeds of the lands; that out of this sum the plaintiffs' share of rent, according to the Veelu Jabita (list of rents) of the village, comes to Rs. 183-10-10, and the defendants and other persons not in this suit were bound to contribute to the plaintiffs the remaining sum of Rs. 2,466-5-2, out of which the defendants ought to pay the suit amount.

Both the Lower Courts found that the amounts claimed from each defendant were due, and gave a decree for the plaintiff as prayed overruling the plea of limitation.

Defendants 1, 2, 6, 20, 22, 23, 24, 27, 31 and 33 appealed.

Bhashyam Ayyangar for appellants.

Sadagopachariar for respondents.

JUDGMENT.—The only plea urged before us is that the suit is barred under articles 61 and 99, schedule 2 of the Indian Limitation Act, on the ground that the suit was not brought until more than three years had elapsed from the realization of the money from plaintiffs by sale of their property by the Court.

We think that the words of article 99 show that it cannot apply to a case like this where not the *whole*, but only a *part*, of the money due under a joint decree was realized from plaintiffs.

We think, too, that it may be doubted whether article 61 is applicable to the present case where there was no payment by plaintiffs, but where their property was seized and sold by the Court and the proceeds paid by the Court to the decree-holder. If

PATTABHI-
RAMAYYA
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v.
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NAIDU.

however, that article does apply, then we are disposed to adopt the view of the learned Judges in *Fuckoruddeen Mahomed Ahsan v. Mohima Chunder Chowdhery* (1) and to hold that time begins to run from the date of the payment to the decree-holder, not from the date of the realization of the money by the Court. If article 61 does not apply, then the case falls under the general article No. 120, and the plaintiffs have six years within which to bring their suit. In any view, therefore, the suit is in time.

We confirm the decree of the Lower Appellate Court and dismiss this second appeal with costs.

APPELLATE CIVIL.

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

KANAKAMMAL AND OTHERS (DEFENDANTS), APPELLANTS,

v.

RANGACHARIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1896.
September
18.

Civil Procedure Code, s. 562—Remand—Preliminary point.

Where a District Munsif, without entering into the merits of a case, dismissed a suit on the ground that the plaintiffs had no cause of action, and on appeal the Appellate Court reversed his decree and remanded the case:

Held, that the suit had been disposed of upon a preliminary point within the meaning of section 562, Civil Procedure Code, and that the remand was right.

APPEAL against the order of P. Narayanasami Ayyar, Subordinate Judge at Negapatam, in appeal suit No. 18 of 1895, reversing the decree of N. Sambasiva Ayyar, District Munsif of Trivadi, in original suit No. 38 of 1894.

The facts of the case were as follows:—

“Suit to declare that the alienation made by first defendant to second defendant and the alienations by second defendant to the other defendants Nos. 3 to 5 of the plaint lands are not valid as against plaintiffs who are entitled to succeed to them on first defendant's death.

“The property in dispute belonged to one Allundu Krishna-machariar. He left a daughter named Kanakammal. Her

(1) I.L.R., 4 Calc., 529.

* Appeal against order No. 174 of 1895.

KANAKAMMAL
v.
RANGA-
CHARIAR.

"husband Srinivasachariar left two sons Srinivasaraghavachariar and Venkatachariar. The former had two sons Rangachariar and Raghavachariar. The former is the first plaintiff in this suit and the latter having died, his son is the second plaintiff. The said Kanakammal is the first defendant. Venkatachariar the second defendant and defendants Nos. 3 to 5 are the alienees under second defendant. The plaintiffs' case is that the property in dispute was made a gift of by Allundu Krishnamachariar in 1858 Srinivasaraghavachariar, his grandson by his daughter, that patta was transferred to his name that he enjoyed the property up to 14th February 1875, when he executed a will devising it in favour of his mother, the first defendant, for her maintenance that she continued to enjoy the property up to 17th August 1888, when she executed a deed of settlement making a gift of it in favour of second defendant who since alienated the property to defendants Nos. 3 to 5.

"The defendants deny the said gift of 1858 and state that the property devolved on first defendant by right of inheritance from her father, that plaintiffs have no right to the property and that the second defendant is first defendant's reversioner.

"The District Munsif dismissed the suit on the preliminary point that plaintiffs have no cause of action to bring this suit and they appeal."

On appeal the Subordinate Judge reversed the decree of the Munsif and remanded the suit to be disposed of on the merits.

Exhibit I was as follows:—

"Settlement-deed, dated 17th August 1888, executed by me, Kanakammal, wife of Chakravarthi Sreenivasachariar, caste Brahmin, religion Vishnavite, housewife, residing at Periattheru (Big street), Kumbakonam, in favour of my son Chakravarthi Venkatachariar, caste Brahmin, religion Vishnavite, occupation Miras.

"As you are alone entitled to get, after me, the lands particularized hereunder which belonged to my father Krishnamachariar and which after his death, without male issue, passed into my hands and have been in my enjoyment, and (further) out of the affection which I bear towards you and the service you render to me, I have this day given over to you the nunjah, punjah, &c., lands mentioned hereunder and of the value of Rs. 2,500, together with all samudayams, poramboke, &c., appertaining thereto as per custom of the village; hence you shall yourself enjoy the said

"lands with all rights and with powers of disposition over them, such as gift, sale, &c. I have this day delivered possession of the said lands to you."

Defendants appealed.

Krishnasami Ayyar for appellants.

Seshagiri Ayyar for respondents.

JUDGMENT.—We think that the District Munsif did decide the suit on a preliminary point within the meaning of section 562, Civil Procedure Code (*Ramachandra Joishi v. Hazi Kassim*(1)). The order of remand was therefore legal.

As to the merits of the remand order, it is urged that exhibit I is merely a transfer of the life interest of the first defendant so as to accelerate the succession of the next heir. We observe that there is no statement in exhibit I, that a life interest merely is transferred, and the concluding words in which she speaks of the donee possessing henceforth full powers of sale, &c., indicate that the woman purported to transfer such absolute interest. We observe further that the donee at once proceeded to exercise the rights of an absolute owner and transferred the property to the defendants Nos. 3 to 5. In these circumstances, we think that the view taken by the Subordinate Judge is correct, and that plaintiffs had a cause of action.

We therefore dismiss this appeal with costs.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Subramania Ayyar, and Mr. Justice Davies.

REFERENCE UNDER STAMP ACT, SECTION 46.*

Stamp Act—Act I of 1879, s. 46, Sched. I, Art. 21—Conveyance.

The amount payable on a conveyance under Stamp Act, Sched. I, Art. 21, is properly calculated on the consideration set forth therein; and not on the intrinsic value of the property conveyed.

THIS was a case stated for the opinion of the High Court by the Board of Revenue under section 46 of the Indian Stamp Act, 1879, on the 16th August 1895.

REFERENCE
UNDER STAMP
ACT, SECTION
46.

The Acting Collector of Kistna referred the case to the Board of Revenue as follows :—

“Two persons—Pitchayya and Venkannah—executed a conveyance on 3rd July 1893 on a 30-rupees stamp, transferring their title and interest in a certain estate to one Korrapati Paupiah. In this document Rs. 3,000 was stated to be the amount of consideration for the transaction.

“When the document was presented for registration before the Sub-Registrar of Isallapalli, a petition was presented to this office by one Purnayya of Isallapalli, stating that the document was undervalued for the purpose of evading the payment of stamp duty.

“This petition was forwarded to the District Registrar. In reply, he requested me in his letter No. 1141, dated 25th May 1893, to get the property valued by the Tahsildar of Bandar. It appears also that the District Registrar instructed the Sub-Registrar not to return the document pending inquiry.

“A Revenue Inspector of Bandar taluk, deputed for the purpose, valued the property with the aid of two arbitrators and assessed the value at Rs. 10,041-5-6.

“While the process of valuation was going on, the Registrar and the Sub-Registrar received similar complaints of undervaluation. The Registrar in his letter No. 1239, dated 6th August 1893, informed me that he asked the Sub-Registrar to impound the document and send it to me for adjudication of stamp duty, and the Sub-Registrar accordingly forwarded it to me with his letter No. 216, dated 17th August 1893.

“On this it was ordered that the deficient stamp duty of Rs. 70 plus a penalty of Rs. 350 should be paid, and it was remarked the case did not call for prosecution. The Tahsildar of Bandar was directed to intimate the fact to the parties and report at the end of a month whether this amount had been collected.

“The Tahsildar in his arzi No. 403, dated 12th December 1893, reported that the stamp duty and penalty had been collected.”

The Board of Revenue in referring the matter to the High Court said :—

“The Board ruled that, under article 21 of schedule I of the Stamp Act, the stamp duty must be levied on the amount of the consideration for the conveyance as set forth in the deed, viz., Rs. 3,000; and that if the Collector had reason to believe

“that the amount of the consideration was falsely stated in the deed, he should take action with a view to prosecute the offenders under section 63.

“The penalty levied in the case was ordered to be refunded.

“The Collector now reports that the parties concerned in the above case were prosecuted, but were acquitted, as it was very doubtful that there was an undervaluation fraudulently made for the purpose of depriving Government of stamp duty; that although the property was worth about Rs. 10,000, the vendor had not possession of it, and it had been sold to the vendee for the small sum of Rs. 3,000, as it was probable that protracted litigation with a certain individual who held possession of the lands would be necessary before the vendee could get possession of them.

“Under the circumstances the Board considers that the petitioners are entitled to a refund of the deficient stamp duty erroneously levied, and solicits the orders of the Honourable the Judges of the High Court, as the Board has no power to sanction it.”

Venkatarama Sarma for vendors.

OPINION.—We are of opinion that the proper stamp duty leviable on the conveyance was Rs. 30, that being the amount payable on the consideration as set forth therein.

APPELLATE CIVIL.

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

SAMINATHA AYYAN (DEFENDANT), APPELLANT,

v.

MANGALATHAMMAL (PLAINTIFF), RESPONDENT.*

*Provincial Small Cause Courts Act—Act IX of 1887, Sched. II, Art. 38—
Suit for arrears of maintenance.*

A suit for arrears of maintenance payable under a written agreement does not lie in a Provincial Small Cause Court.

* Second Appeal No. 778 of 1895

REFERENCE
UNDER STAMP
ACT, SECTION
46.

1896.
September
28.

SAMINATHA
ATTYAN
v.
MANGALA-
THAMMAL.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in appeal suit No. 540 of 1894, reversing the decree of J. C. Fernandez, District Munsif of Shiyali, in original suit No. 99 of 1894.

The facts of this case as set forth in the District Munsif's judgment were as follows:—

"The plaintiff sues to recover from defendant Rs. 138-0-6, "being maintenance with interest thereon alleged to be due under "an agreement executed to her by defendant's deceased father "and three others on the 19th May 1874, undertaking to pay her "maintenance at the rate of Rs. 7 per month. The maintenance "claimed is alleged to be due for defendant's father's one-fourth "share from the 20th May 1889 up to the date of the plaint.

"The defendant pleads that plaintiff has no right under the "agreement sued on to claim separately defendant's father's share "of the maintenance stipulated for, and that plaintiff has no cause "of action against him as he did not derive any assets from his "father."

The District Munsif dismissed the suit with costs.

On appeal the Subordinate Judge gave the plaintiff a decree against the defendant as the legal representative of his father deceased.

Defendant appealed.

Krishnasami Ayyar for appellant.

Sundara Ayyar for respondent.

JUDGMENT.—A preliminary objection is raised that no second appeal lies in this case inasmuch as the suit is one for Rs. 138-0-6, and is of a nature cognizable by a Court of Small Causes. The suit is to recover the above sum under an agreement, exhibit A, whereby the defendant's father and others promised to pay maintenance at the rate of Rs. 7 per mensem to the plaintiff. In other words, it is a suit to recover arrears of maintenance fixed by contract at a certain monthly sum.

We are of opinion that this is "a suit relating to maintenance" and therefore excluded from the jurisdiction of a Small Cause Court (article 38, schedule 2, Act IX of 1887). It is argued that the decision in *Komu v. Krishna*(1) is an authority opposed to this view; but we observe that this is not so, for that case was

decided under the law (Act XI of 1865) in force before Act IX of 1887 was passed, and the terms of that Act were quite different from those of the present Act.

Under the old Act certain suits relating to maintenance, viz., those for maintenance claimed on a special bond or contract had been decided by the Courts to be cognizable by a Court of Small Causes, while suits to determine the amount of maintenance had been decided not to be so cognizable (*Sidlingapa v. Sidava Kom Sidlingapa*(1), *Nurbibi v. Husen Lal*(2)). The language of the present Act was apparently adopted so as to exclude from the cognizance of the Small Cause Court suits for maintenance claimed on a special bond or contract, which, under the former law, were held to be triable by a Small Cause Court (*Bhagvantrao v. Ganpatrao*(3)).

We, therefore, disallow the preliminary objection. On the merits the only ground of appeal argued before us is that, as there is no proof that the defendant received assets from his father, the suit against him personally ought to have been dismissed. We observe that the decree is merely against the defendant as the legal representative of his late father, and such decree can only be executed against assets of the father in defendant's hands. The second appeal fails and is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

QUEEN-EMPRESS

v.

KRISHTAPPA.*

*Penal Code, s. 174—Non-attendance in obedience to an order of a public servant—
Absence of public servant.*

The offence contemplated by s. 174, Penal Code, is an omission to appear at a particular time and at a particular place before a specified public functionary. Where therefore the public servant was absent on the date fixed in a summons:

(1) I.L.R., 2 Bom., 624. (2) I.L.R., 7 Bom., 537. (3) I.L.R., 16 Bom., 267.

* Criminal Revision Case No. 415 of 1896.

SAMINATHA
ATTYAN
v.
MANGALA-
THAMMAL.

1896.
October 16.

QUEEN-
EMPRESS
v.
KRISHTAPPA.

Held, that the person summoned could not be convicted under this section, though he failed to attend, having the intention to disobey the summons.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by K. C. Manavedan Raja, Acting District Magistrate of Anantapur.

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

The parties were not represented.

JUDGMENT.—The accused, the karnam of Maravapalli village, on being summoned by the Tahsildar of Gooty to appear before him at Gooty on a particular day, failed to attend. For the non-attendance he was convicted under section 174, Indian Penal Code. It appears that, on the day fixed, the Tahsildar was absent from the station on public business.

Now it is manifest that the offence contemplated by the section is not an omission on the part of the person summoned to be at a particular place and at a particular time, but an omission to appear at such time or place *before a specified public functionary*. Moreover, the object of the summons was the meeting between the two. How could this object be realised unless the person summoning was present to meet the person summoned? Would it not have been futile, even if the latter turned up at the fixed place? But the law compels no man to do that which is futile or fruitless. *Lex neminem cogit ad vana seu inutilia peragenda*. No doubt in this case the accused did not say that he failed to go to Gooty because of the Tahsildar's absence. Assuming that he intended to disobey the summons, such intention alone is, of course, not punishable under section 174, or under any other provision of law.

We, therefore, set aside the conviction and order the fine, if levied, to be refunded.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

RAGAVENDRA AYYAR (PLAINTIFF), APPELLANT,

v.

KARUPPA GOUNDAN AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Rent Recovery Act—Act VIII of 1865 (Madras), ss. 38, 39, 40—Limitation Act—Act XV of 1877, art. 12.

Where a plaintiff sued to recover land alleged to have been sold under the provisions of the Rent Recovery Act, alleging that the provisions of section 7 of that Act had not been complied with and that therefore the sale was illegal:

Held, that the suit could not proceed without setting aside the sale and that the sale having taken place more than a year before the institution of the suit, the suit was barred.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Salem, in appeal suit No. 25 of 1893, reversing the decree of Syed Tajudin Saheb, District Munsif of Namakkal, in original suit No. 411 of 1891.

This suit was brought for the recovery of certain land which had been sold under the provisions of Act VIII of 1865 and purchased by the second defendant, who resold it to the third defendant under the circumstances set forth in the judgment of Subramania Ayyar, J.

The District Munsif gave a decree for the plaintiff, which was reversed on appeal by the Subordinate Judge.

The plaintiff appealed.

Sadagopachariar and *Krishnasami Ayyar* for appellant.

Srirangachariar for respondents.

SUBRAMANIA AYYAR, J.—The facts of the case material for our present purpose are as follows:—The land, for the possession of which the appellant sues, was held by him under a mittadar who is a landlord within the meaning of the Rent Recovery Act (VIII of 1865) and the interest possessed by the appellant in the land was a saleable interest. The landlord, alleging that the rent due by the appellant for fasli 1297 was not duly

1896.
August 10.
September
15.

* Second Appeal No. 419 of 1895.

RAGAVENDRA
AYYAR
v.
KARUPPA
GOUNDAN.

paid, proceeded to recover the amount by sale of the latter's interest in the land under the provisions of the enactment referred to. On the notice prescribed by section 39 of the Act being served by the landlord upon the appellant, he filed a summary suit under section 40, questioning the legality of the landlord's proceedings, chiefly on the ground that exchange of patta and muchilika had not been dispensed with and that there was neither an interchange of such engagements between him and the landlord, nor a tender of a proper patta to the former by the latter as required by section 7. But the suit was dismissed, as the appellant failed to prosecute it. Thereupon the Collector directed the appellant's interest to be sold, and it was sold on the 31st August 1889 and purchased by the second respondent, who subsequently conveyed his right to the third respondent. This suit was brought in September 1891.

The first question for determination is whether the suit is time-barred. Though the plaint does not pray for a cancellation of the sale, there is no doubt that the relief claimed cannot be granted without setting aside the sale, unless it was *ab initio* null and void, and therefore did not require to be set aside as contended on behalf of the appellant. In support of this contention his vakil relied upon the alleged omission, referred to above, on the landlord's part to comply with the provisions of section 7 of the Act. But this argument is palpably unsound.

Special powers, like those exercised by the Collector under the Act, may be circumscribed (a) with respect to place, (b) with respect to persons, (c) with respect to the subject-matter of those powers (*Narohari v. Anpurnabai*(1)). Now, as to the first, no question arises here. As to the second, the appellant and the mittadar were undoubtedly persons falling within the class of tenants and landlords to whom the enactment applies; and as to the third, the interest sold was of a description liable to be seized and transferred at the instance of the landlord.

Therefore the non-compliance with the provisions of section 7 relied on on behalf of the appellant, though it has an essential bearing on the party's right to enforce the terms of the tenancy, has yet none with reference to any of the three matters as to which jurisdiction might be shown to fail.

(1) I.L.R., 11 Bom., 160.

Consequently the order under which the sale in the present case took place was passed with jurisdiction and, if the sale be impeachable, it can be impugned only in a suit instituted within one year from the date mentioned in Article 12 of the Limitation Act. This action, having been brought long after expiry of that period, was clearly barred. It is therefore unnecessary to consider the other questions urged.

The appeal fails and must be dismissed with costs.

BENSON, J.—I am clearly of opinion that the appellant cannot succeed without setting aside the revenue sale, and this can only be done by suit brought, within one year.

No such suit having been brought, the sale stands good.

I agree that the appeal fails and must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

MUTHU VIJIA RAGHUNATHA RAMACHANDRA VACHA
MAHAJI THURAI (SON AND LEGAL REPRESENTATIVE
OF THE DECEASED DEFENDANT NO. 3), APPELLANT,

1896.
August 14.
September 7
8, 29.

VENKATACHALLAM CHETTI AND OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 1, 2 AND 4 TO 10), RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, s. 86—Suit by sub-mortgagee—
Decree for sale.*

A sub-mortgagee is entitled to a decree for the sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief.

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura (East), in original suit No. 14 of 1893.

The plaintiff was the trustee of a temple, and he sued to enforce his mortgage right on certain property which originally belonged to defendants Nos. 2 and 3 jointly. On the 9th of August 1886, those defendants, respectively, borrowed Rs. 3,000 and Rs. 4,825 from defendant No. 1 on the security of the land under a

* Appeal No. 13 of 1895.

MUTHU VIJIA
RAGHU-
NATHA RAMA-
CHANDRA
VACHA
MAHALI
THURAI.
v.
VENKATA-
CHALLAM
CHETTI.

registered mortgage deed. On the following day defendant No. 1 on the security of this mortgage borrowed Rs. 7,300 from one Avichi Chetti under a registered mortgage deed. On 23rd November 1889, Avichi Chetti assigned to the plaintiff his rights under the mortgage of 10th August 1886 for Rs. 10,898-4-8.

The Subordinate Judge passed a decree as follows :—

“It is ordered that the first defendant do pay plaintiff Rs. 9,372-10-0 within six months from this day together with subsequent interest at six per cent. per annum, and in default the interest of the third defendant in items 1 to 7 be sold for Rs. 8,294-4-0 with subsequent interest at six per cent. per annum on Rs. 4,825 from date of plaint up to date of payment; as the plaintiff is entitled to recover only the sum paid by him for the assignment with interest from date of payment to date of decree and the incidental expenses of sale (*Nilakanta v. Krishnasami*(1) and *Ramachandra v. Venkatarama*(2)), the said sum represents third defendant's proportionate share of the debt which he should pay under exhibit A, item No. 4, will be sold subject to eighth defendant's mortgage right in $\frac{2}{3}$ chey therein as admitted by plaintiff, and items Nos. 1, 5, 6 and 7 will be sold subject to first defendant's mortgage right therein as stated in the plaint. The parties are ordered to bear their own costs.”

The representative of defendant No. 3 preferred this appeal.
Krishnasami Ayyar for appellant.

Bhashyam Ayyangar and *Rangaramanujachariar* for respondents Nos. 11 and 12.

Rangachariar for respondent No. 3.

SUBRAHMANIA AYYAR, J.—The late third defendant, father of the appellant, on the 9th August 1886, executed to the first defendant a simple mortgage on the security of the third defendant's moiety of eight villages attached to the Zamindari of Elayathakudi in Madura. The first defendant on the 10th idem sub-mortgaged his mortgage interest to one Avichi Chetti. This man assigned his rights to the plaintiff who instituted this suit upon the sub-mortgage transferred to him.

In the court below the Subordinate Judge took an account of the amount due by the third defendant to the first and by the latter to the plaintiff, and among other reliefs, granted the usual order

(1) I.L.R., 13 Mad., 225.

(2) I.L.R., 13 Mad., 516.

for the sale of the third defendant's interest in the property originally mortgaged, if payment of the amount, due by him, be not made within the time fixed.

The first question for decision is whether a sub-mortgagee is entitled to an order for sale of the original mortgagor's interest, if other circumstances justifying such a decree exist.

In contending that the sub-mortgagee was not so entitled the vakil for the appellant urged that there is no warrant whatever in the Transfer of Property Act, for an order like the one in question being passed. This argument seems to be quite opposed to the express provisions of section 86 of the Act, since the words “where the plaintiff claims by derived title,” which are to be found therein distinctly cover such a case as this. It was said, however, that the clause just quoted refers only to an assignee or other person in whom the whole of the interest of the mortgagee has become vested, but not to a sub-mortgagee who has only a qualified right therein. But I am at a loss to understand how it can possibly be denied that a sub-mortgagee does claim by title derived from the original mortgagee and it is scarcely necessary to point out that “derivative mortgage” is a term used in text books and in decided cases as synonymous with “sub-mortgage.” I am, therefore, unable to see any adequate ground for putting the restricted construction suggested on behalf of the appellant and to exclude, from the operation of the section referred to, the case of a sub-mortgagee, which the words, in question, naturally and grammatically comprehend.

If we turn to the English law, we find there also, from section 12 of chapter 47 of “Seton on decrees” and *Hobart v. Abbot*(1) cited for the respondents, that the point has long been settled in favour of the sub-mortgagee.

Nor is the above view unsupported by principle. It is true that in the case of a simple mortgage, the mortgagor's ownership in the property mortgaged is not, even in form, transferred to the mortgagee. Nevertheless it is impossible to doubt that the mortgagee, so far as the recovery of the debt owing to him is concerned, is treated in law, as an assignee of the mortgagor. This becomes quite evident in the case of a second mortgage. Referring to it, an American author of high repute writes: “Thus a second

(1) 2 Peere Williams, 642.

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"mortgage is as to the second mortgagee, but an assignment of the mortgagor's interest As an assignee of the mortgagor the second mortgagee may insist upon all the rights of a mortgagor against the first mortgagee, such as that of calling him to account, redeeming from him and the like" (Washburn on Real Property, 5th edition, vol. II, pp. 116 and 117). This way of looking at the matter is not peculiar to any particular system of law, but seems well established in jurisprudence, as treatises on the Civil law show. In Salkowski's work on Roman Private Law, it is pointed out that a party who holds a hypothecation acts, in selling the hypotheca, as "the representative of the pawnor or owner, although by virtue of his own right and in his own interest." (Whitfield's Translation at page 491.) Further, it is a recognised rule under that law, that when what is hypothecated is a claim, the hypothecatee may alienate it or enforce it in action instituted in his own name (Mackeldey's Roman Law, Special Part, Book I, section 336, paragraph 2).

There is another argument in favour of the view that a sub-mortgagee has the right in dispute. The original mortgagor and the sub-mortgagee, as the holders of different interests in one and the same specific property, stand to one another in a relation that gives rise to certain rights and duties *inter se*. It is admitted that a mortgagor whose right to redeem originally existed as against the mortgagee alone, becomes by virtue of the sub-mortgage, entitled to exercise that right as against the sub-mortgagee also, who consequently must be made a party to redemption proceedings. Now, as the sub-mortgagee may be redeemed by the original mortgagor, it ought to be held that the former may foreclose the latter, where that relief can be claimed or, where such relief cannot be granted, he may obtain an order for sale and thereby put an end to the other party's right to redeem. For it is only just and reasonable that, whilst the law, on the one hand, recognises a right in the original mortgagor to redeem the sub-mortgage, it should give the latter, as against the former, the generally correlative right (Daniel's Chancery Practice, 6th edition at page 1412) to foreclose or sell.

I confess I am not impressed with the suggestion, made on behalf of the appellant, that to allow a sub-mortgagee to sue the original mortgagor, as was done here, would be productive of general inconvenience to litigants in the position of the present

parties. On the contrary I think that to permit such a course to be adopted would prevent multiplicity of suits and the possibility of conflicting decisions being pronounced in respect of the same matter; since, at all events, the accounts, between the original mortgagor and the original mortgagee on the one hand and the latter and the sub-mortgagee on the other, would be taken once for all and the respective claims of the three parties adjusted and settled at the same time. (See *Narayan Vittal Maval v. Ganoji*(1).)

The Allahabad cases of *Mata Din Kasodhan v. Kasim Husain*(2) and *Ganga Prasad v. Chunni Lal*(3) relied on on behalf of the appellant, cannot be followed here, inasmuch as they proceed upon the supposition that the term "property" as used in chapter IV of Act IV of 1882, means an actual physical object; and does not include mere rights relating to physical objects—a view which, so far as I am aware, has hitherto not been accepted as correct in this court and in which I am myself unable to agree. As to *Padgaya v. Baiji*(4), it is difficult to believe that the learned Judges who decided it, held that there was no sort of legal relation between the original mortgagor and the sub-mortgagee. The actual decision there is itself supportable on the clear ground that the representative of the deceased original mortgagee, as a person interested in the redemption there sought for, was a necessary party to the litigation which could not, therefore, proceed further owing to the omission, on the part of the original mortgagor, to bring on to the record, the legal representative of the original mortgagee who had been made a defendant when the suit was filed. The statement made in the course of the judgment of PARSONS, J., that there was no privity between the original mortgagor and the sub-mortgagee, if intended to lay down that absolutely none of any kind subsisted between those parties, would be totally inconsistent with the unquestionable fact, already referred to, viz., the existence of that relation between them, from which springs the original mortgagor's right to redeem from the sub-mortgagee also.

I am, therefore, of opinion that the appellant's contention, under consideration, is unsound and that a sub-mortgagee can ask for a sale of the original mortgagor's interest in cases and in

(1) I.L.R., 15 Bom., 692.

(3) I.L.R., 18 All., 113.

(2) I.L.R., 13 All., 432.

(4) I.L.R. 20 Bom., 549.

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circumstances which would have entitled the original mortgagee, on the date of the sub-mortgage, to claim such relief.

The second and the only remaining question for decision is, whether the discharge, set up on behalf of the third defendant, is true. I agree with the Lower Court that the evidence, called in support of the plea, is unsatisfactory and unreliable. Nor do I see any reason for discrediting the statement of the first defendant that no portion of the debt due to him was liquidated by the collections made by him from the tenants of two out of the eight mortgaged villages, under the power of attorney, exhibit II, dated 9th August 1886, and that when the said power was revoked, a few months afterwards by exhibit F, he accounted to the third defendant's father-in-law, with that defendant's knowledge, for the comparatively small amount that had been collected by him under the power. The decree of the Lower Court is in my view right. I would confirm it and dismiss the appeal with costs. The appellant will also pay the costs of the second defendant who was unnecessarily brought in.

DAVIES, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

PARVATHI AMMAL (PLAINTIFF), APPELLANT,

v.

SAMINATHA GURUKAL AND OTHERS (DEFENDANT),
RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, art. 118—Suit for possession by Hindu widow as heiress—Defendant in possession under an alleged adoption—Limitation.

A Hindu died in 1884, leaving the plaintiff, his widow, and certain landed and other properties. The defendant claimed, to the knowledge of the plaintiff in 1885, to have been adopted by the deceased, and from that date he had claimed as an adopted son to be entitled to the estate of which the plaintiff never enjoyed

possession. She now sued in 1893 for possession with mesne profits alleging in the plaint that the adoption had been falsely set up, but seeking no declaration with regard to it:

Held, that the suit was barred by limitation.

APPEAL against the decree of E. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in original suit No. 27 of 1893.

The plaintiff was the widow of one Soma Gurukal who died in January 1884. She averred that he left no heirs other than herself and that on his death she entered into possession and remained in enjoyment for some years of the property forming his estate. The plaint further stated that the first defendant falsely claiming to be the adopted son of the deceased disturbed her enjoyment, in consequence of which she brought a declaratory suit in 1890, which was dismissed on the ground that it was not maintainable for the reason that it was not shown that the lands were then in her possession.

Paragraph 5 of the plaint was as follows: "During the pendency of the said suit and subsequently, the first defendant and the other defendants who claim right through him entered upon and usurped the lands from the year 1891."

It was alleged that the cause of action arose in February 1891 and the prayer of the plaint was for possession of the specified properties with mesne profits and for such other reliefs, which to the Court might seem proper. The first defendant pleaded that he was adopted by the deceased on 15th August 1877, from which date he lived with him until his death and that since that event he had been in enjoyment of the property.

The Subordinate Judge held that the alleged adoption was established by the evidence. On the second and third issues which raised the questions as to whether the suit was maintainable as framed, seeing that there was no prayer that the adoption be set aside and whether it was barred by Limitation, the Subordinate Judge expressed an opinion on the first in favour of plaintiff and on the second in favour of the defendant. His judgment on this part of the case was as follows:—

"I am not prepared to say that the suit is unsustainable, because the plaintiff has not expressly sought to have the first defendant's alleged adoption declared untrue. The omission to ask for such a relief is certainly not accidental but intentional. A suit for a declaration that an alleged adoption had never taken

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"place, should be brought within six years from the time when the party suing and entitled to sue for it came to know the alleged adoption under article 118 of schedule 2 of Act XV of 1877. As the plaintiff in this case had known that the first defendant was set up as an adopted son soon after her husband died in January 1884, her advisers must have known that an express claim for such a declaration would be at once met and that successfully by the plea of limitation; and they have accordingly omitted it. But it seems to me upon the latest authorities that, whether she prayed for it or not, the framing of the plaint can give her no advantage. In the case of *Jagadamba Chaodhrani v. Dakkhina Mohun Roy Chaodhri*(1) decided by the Privy Council, it was settled that a suit to set aside an adoption within the meaning of these words in the Limitation Act need not be a suit having declaratory conclusions, but that any suit in which the decree prayed for involves the decision of the question of the validity of an adoption set up in defence a suit to set aside an adoption.' These remarks were emphasised again by their Lordships in the more recent case of *Moresh Narain Munshi v. Taruck Nath Moitra*(2). In the case then for consideration, there was, like the present one, no prayer for a declaration that the defendant's adoption was invalid or never took place, and their Lordships held that that suit was, in substance, a suit 'to set aside an adoption' within the meaning of Article 129 of Act IX of 1871, the Act of Limitation which preceded Act XV of 1877, and which applied to the circumstances of that case. Their Lordships observed in the first case quoted above that the Legislature, having deemed fit to allow 'only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, it should strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession.'

"The plaintiff's vakil in the present case adopted the contention of the learned counsel for the plaintiffs in *Jagadamba Chaodhrani v. Dakkhina Mohun Roy Chaodhri*(1) that she was suing not to set aside any adoption, but to recover possession on her *primâ facie* title as heir to the deceased, that it was the defendant who alleged his adoption and that, on his failure to prove it, it need

(1) I.L.R., 13 Cal., 308.

(2) I.L.R., 20 Cal., 487.

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"not be set aside, but taken as never having existed; and relied on among other authorities *Basdeo v. Gopal*(1), *Ganga Sahai v. Lekhray Singh*(2) and *Sundaram v. Sithammal*(3). The answer given by their Lordships to that argument which they characterised as 'ingenious' was 'that the defendants are in possession in the character of adopted sons; the *primâ facie* title is with them and until that is displaced they ought to retain their possession' (see *Jagadamba Chaodhrani v. Dakkhina Mohun Roy Chaodhri*(4)). The same answer should be given in answer to the plaintiff's contention. If the plaintiff by reason of her laches failed to have the defendant's title in virtue of an adoption declared untrue or invalid, within the time allowed by law, which in the present case is six years from when the fact was known to her, she cannot afterwards sue to deprive the defendant of the possession he has.

"The last Allahabad case, though on all fours with the case now under consideration, is no binding authority against the two rulings of the Privy Council already quoted: and following the same I find that the second issue should be decided in plaintiff's favour and on the third issue that the suit is barred by the six years' rule of Article 118."

In the result the Subordinate Judge dismissed the suit.

The plaintiff preferred this appeal.

Narayana Rau and *Sundara Ayyar* for appellant.

Bhashyam Ayyangar, *Desikachariar*, *Jivaji Rau* and *Kuppusami Ayyar* for respondents.

SHEPHARD, J.—There is no doubt that the plaintiff knew of the first defendant's adoption as long ago as in 1885, that is more than six years before the institution of the present suit. The Subordinate Judge finds that since the death of Swarna Gurukul, the adoptive father, the defendant has been in possession, though for a time after his father's death his possession was disturbed. In 1890, a suit was brought by the plaintiff, alleging that she had all along, since her husband's death, been in possession of all his property. It was found in that suit that the plaintiff was not and never had been in possession of the property. It was necessary for the Judge to find whether the plaintiff was in possession at the

(1) I.L.R., 8 All., 644.

(3) I.L.R., 16 Mad., 311.

(2) I.L.R., 9 All., 253, 267.

(4) I.L.R., 13 Cal., 318.

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date of that suit, because she asked for a declaration of her title. It having been found that she was not in possession, the suit was dismissed on the 28th February 1891. In her present plaint, she alleges that she was dispossessed in that very same month. No attempt is made to prove this allegation, which in itself is most improbable, but it is suggested that the evidence shows that the plaintiff was in possession before 1890 and that it is open to her, notwithstanding the decree in the suit of 1890, to establish that possession. It is argued that, if she was in possession between 1884 and 1890, there was no occasion for her to challenge the first defendant's adoption and therefore article 118 cannot properly be applied. Whatever weight may be due to this argument in a case in which the plaintiff can show an undisturbed possession in defiance of the alleged claim by adoption, the point does not really arise in the present case, because it is clear that the plaintiff's possession was at the best an interrupted and incomplete possession. The evidence seems to show rather that there was a constant struggle for possession on her part than that she was in actual enjoyment.

Holding, then, that the plaintiff is seeking to recover property of which she, since her husband's death, has not been in possession, and which has been all along claimed by the defendant in virtue of his alleged adoption, we have to consider whether the suit is barred by limitation. On the facts stated, it unquestionably would be barred, if the Act of 1871 still remained in force, for it has been decided by the Judicial Committee with reference to Article 129 in the schedule of that Act that a plaintiff, whose claim is met by the assertion of an adoption and cannot be made good without negating the adoption, must bring this suit within the time fixed in that article. It is contended that the ruling of the Judicial Committee is not applicable to cases governed by the existing Act, or, in other words, that the law as it stood under the earlier Act has been altered by the passing of the Act of 1877.

Comparison between Article 129 in the schedule of the repealed Act and Article 118 of the Act of 1877 shows that an alteration of the language has been effected in all three columns. The period has been reduced from twelve years to six; the starting point has been altered by substituting the date when the plaintiff knows of the adoption for the date of the adoption; the description of the suit has been altered. This last alteration is the only

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one material to the present question, for it cannot be suggested that the other alterations affect the applicability of the article. To support the plaintiff's contention, it is necessary to show that the change in the language descriptive of the suit points to a change of policy on the part of the legislature and to the intention to restrict the application of the article to suits in which a mere declaration is sought for. Unfortunately for this contention, we know the reason for the change of language and can, therefore, account for it fully without ascribing any change of policy to the legislature. It is plain, as is pointed out by the Judicial Committee in *Jagadamba Chaudhrani v. Dakhina Mohun Roy Chaudhri*(1), and it also seems to have been pointed out before 1877, that the phrase "a suit to set aside an adoption" is an inaccurate one. Hence the substitution in the 118th article of the expression—"suit to obtain a declaration that an alleged adoption is invalid or never took place." I am at a loss to understand how this substitution, which is in accordance with the observations of the Judicial Committee, though not consequent upon them, can be taken to effect a change of law in favour of the plaintiff. The observations of the Judicial Committee apply to the suit of a person in the present plaintiff's position, whether it is incorrectly called a suit to set aside an adoption or correctly called a suit to declare an adoption invalid. In *Mohesh Narain Munshi v. Taruck Nath Moitra*(2), there is a strong *dictum* to the effect that the plaintiff's position has not been altered for the better by the change of expression and in a later case, it appears to have been assumed that, notwithstanding the change, a plaintiff suing for possession must bring his suit within six years of his knowledge of the defendants' adoption. (*Lachman Lal Chowdhri v. Kanhay Lal Mowar*(3)). A string of cases was cited in which a different view of the law has been taken by other High Courts. I do not find in the judgments in those cases any sufficient reason given for attributing to the legislature an intention, which in itself is most improbable, when it is remembered that before the Act of 1871 was repealed, the interpretation put by the Judicial Committee on Article 129 had not been enunciated.

An argument is founded on the fact that the language descriptive of the suit has not been changed in Article 91 corresponding

(1) I.L.R., 13 Calc., 318. (2) I.L.R., 20 Calc., 494. (3) I.L.R., 22 Calc., 609.

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to Article 92 of the Act of 1871. (*Natthu Singh v. Gulab Singh*(1). The reason for this is plain. The phrase "suit to cancel or set aside an instrument" is not an inaccurate one, and therefore there was no need to alter the language in the new Act. If it had been the object of the legislature to place parties challenging or maintaining an adoption in a position more favourable than that assigned to them by the Act of 1871, as interpreted by the Judicial Committee, the simplest course would have been to repeal Article 129 and leave declaratory suits, relating to adoption to be governed by the general article. The preservation of the special provision for suits in which such questions are raised, shows that the policy which actuated the legislature in 1871, was still maintained in 1877. The reduction of the period from twelve years to six in cases in which the plaintiff has from the first knowledge of the alleged adoption or of the fact that the adoption is denied, points to the desire to restrict, as far as possible, the time within which such questions may be raised. There was no need for the abbreviation of the period or indeed for the retention of any special article, if it was intended to apply only in cases in which the plaintiff seeks a declaration and nothing more.

For these reasons, I am of opinion that the law has not been altered so as to make article 118 inapplicable to the present suit and that, therefore, in the circumstances above stated, the suit is barred by the law of limitation.

DAVIES, J.—I concur in the conclusion of my learned colleague, as it appears clear, for the reasons stated by him, that the plain ruling of their Lordships of the Privy Council has not been in any way affected by the mere change in the wording as to the character of the suit in the new article. It has been urged, however, that the effect of that ruling may not have been foreseen and that it may lead to unnecessary litigation on the one hand or to a denial of justice on the other.

The case is put for instance that supposing the widow here had been in actual possession, there was no occasion for her to sue until she was ousted, and yet if that ouster had taken place more than six years after the adoption became known to her, she would not, under the present ruling, have been able to contest it. This result, it is contended, involved either her bringing a suit at a time

when none was necessary, or the hardship that when it did become necessary, it was not allowed.

But the obvious answer to the first part of the argument is that it was not unnecessary for her to sue, for it was necessary for the purpose of completing her title, which, so long as the adoption stood in the way, was a bad one. And the answer to the second part of the argument is that the widow would be in no worse a position than the adopted son, for, if her six years' possession had begun with a denial of his adoption, he would, after the lapse of that time, be equally debarred under the next article (119) from suing to establish it.

Another case put is that of a reversioner, say a brother, entitled to inherit his divided brother's estate but for an adoption made by the latter. Supposing that adoption to have been made six years before his death, is the brother, it is asked, bound to sue to declare the adoption invalid before his right to inherit accrues, and when if he should happen to predecease his brother, it would never accrue. The answer must be in the affirmative and not unreasonably, for although the litigation may, in a case here and there, turn out to have been in vain, that disadvantage is small compared with the advantage to the community generally in the security of titles, if they are not challenged within a reasonable time. The principle has always been the same. The only difference now is that the time for impeaching an adoption has been changed from twelve years from the date of it absolutely, to six years from the time that it became known to the party ready to dispute it. This is indeed a more favourable starting point for him than the old one.

The only case that could arise of a supposed denial of justice might be the case of a remote reversioner suddenly finding himself in the position of next reversioner but too late to sue. It could be answered to him that it was owing to his want of due diligence to safeguard his rights, while there was yet time.

It is pointed out that to no other status than that of adoption is this six years' rule applicable. That seems to be so, but it is open to the Legislature, I presume, to extend the provision to the cases of marriage and legitimacy, if it so pleased.

The appeal is accordingly dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

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

1896.
October 2,
20.

VENKITI NAYAK AND OTHERS (DEFENDANTS), APPELLANTS,

v.

MURUGAPPA CHETTI (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, s. 14—Cause of like nature—Misjoinder of causes of action—Want of leave under Civil Procedure Code, s. 44.

In March 1891 the plaintiff sued the defendant to recover the sum of money due on the taking of an account between the plaintiff and the defendant, who was his agent, and to recover possession of certain land. The plaintiff did not obtain leave under Civil Procedure Code, s. 44, for the institution of this suit which was accordingly dismissed for misjoinder of causes of action. The plaintiff now instituted on 5th April 1893 two suits, the one for the money and the other for the land:

Held, that the plaintiff was entitled under Limitation Act, s. 14, to have the time occupied in the previous proceedings deducted in the computation of the period of limitation applicable to his suit for money which accordingly was not barred by limitation.

APPEAL against the order of W. Dumergue, District Judge of Madura, in appeal suit No. 200 of 1894, reversing the decree and remanding for trial original suit No. 152 of 1893 on the file of the District Munsif of Tirumangalam.

A suit for Rs. 2,315 due on accounts. The plaintiff was a cotton dealer and money lender and had a shop at Sengapadai, which was managed by defendant as his agent from 5th July 1881 to the 11th January 1889, when his agency ceased. Accounts not having been settled between him and plaintiff, on 19th March 1891 the plaintiff sued to recover the sum of money due on the taking of an account, and also to recover with damages two pieces of land said to have been conveyed benami to the defendant as his agent, without obtaining the leave of the Court under Civil Procedure Code, section 44. The District Munsif, in whose Court the suit was instituted, made an order on the 17th June, in which, after quoting section 44, he said that the suit was liable to be dismissed, on the ground of misjoinder of causes of action, but that he would give the plaintiff

* Appeal against order No. 78 of 1894.

an opportunity to amend the plaint and file separate suits in respect of these different causes of action and allowed 7 days for that purpose. No amendment was made, and on the 25th June the District Munsif made an order dismissing the suit which was confirmed on appeal on 24th October 1892. The plaint in the present suit was presented on 5th April 1893.

The District Munsif held that the claim was *res judicata* by reason of the previous order which he said was passed under section 158 of Civil Procedure Code; he also held that the suit was barred by limitation, the plaintiff not being, in his view, entitled to the deduction under Limitation Act, section 14, of the time occupied by the previous proceedings and he accordingly dismissed the suit. On appeal the District Judge held that there was no bar by *res judicata* and also that the suit was not barred by limitation, as to which he quoted *Narasimma v. Muttayan*(1). He accordingly reversed the decree and remanded the suit for trial on the merits.

The defendants preferred this appeal.

Bhashyam Ayyangar for appellants.

Krishnasami Ayyar for respondent.

This appeal coming on for disposal before BEST and SUBRAMANIA AYYAR, JJ., on 3rd May 1895, they made the following order of reference to Full Bench.

ORDER OF REFERENCE TO FULL BENCH.—We defer our decision in this case pending decision of the Full Bench of the question “whether misjoinder of causes of action is a cause for which time “should be deducted under section 14 of the Limitation Act.”

The case came on for hearing before the Full Bench on 2nd October 1896.

Bhashyam Ayyangar for appellant.

There is a conflict of decisions upon the question referred. The decision appealed against is inconsistent with the judgment in *Tirtha Sami v. Seshagiri Pai*(2) where it was held that misjoinder is not a cause of like nature within the meaning of Limitation Act, section 14, dissenting from the case followed in *Narasimma v. Muttayan*(3). That case follows *Deo Prosad Sing v. Pertab Kairee*(4) which is approved in *Mullick Kefait Hossein v. Sheo Pershad Singh*(5) and dissented from *Jema v. Ahmad Ali Khan*(6).

(1) I.L.R., 13 Mad., 451. (2) I.L.R., 17 Mad., 299. (3) I.L.R., 13 Mad., 451.
(4) I.L.R., 10 Calc., 86. (5) I.L.R., 23 Calc., 821. (6) I.L.R., 13 All., 207.

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The leading cases in Bombay are *Bai Jamna v. Bai Ichha*(1) and *Krishnaji Lakshman v. Vithal Ranji Ranje*(2). The expression cause of a like nature cannot on the right construction be held to include those which are due to the action of the suitor. This is deducible from the cases last cited. See also *Chunder Madhub v. Bissessure Deba*(3), *Rajendro Kishore Singh v. Bulaky Mahton*(4) and *Nobin Chunder Kurr v. Rojomoye Dossee*(5).

Krishnasami Ayyar for respondent.

Most of the cases quoted in favour of the appellant are really cases of defective jurisdiction. The term jurisdiction being used generally and not restricted to the pecuniary or territorial limits of jurisdiction. In section 14 the expression "cause of like nature" must include formal defects which render the Court incompetent to entertain the suit. Moreover the subsequent suit must be, in effect, the same suit as the first and the other cases quoted for the appellant proceed on this ground. See also *Mohun Chunder Koondoo v. Azeem Gazeer Chowkeedar*(6), *Dhan Singh v. Basant Singh* (7) and *Subbarau Nayudu v. Yagana Pantulu*(8).

The Court (COLLINS, C.J., SHEPHARD, SUBRAMANIA AYYAR and DAVIES, JJ.) delivered judgment as follows:—

JUDGMENT.—In the case which gave rise to this reference, it appears that the former suit was dismissed, because, without leave of the Court, claims in respect of movable and immovable property had been united in one plaint in violation of the provisions of section 44 of the Civil Procedure Code. The real question to be decided is whether the reason for the failure of that suit was of such a character as to entitle the plaintiff in the present suit to take advantage of section 14 of the Limitation Act. It was argued on behalf of the plaintiff that any misjoinder of causes of action rendering the Court unable to entertain the suit, should be deemed to be "a cause of a like nature" with defect of jurisdiction within the meaning of section 14. The argument, indeed, was pushed to this length, that any plaintiff, whose plaint had been rejected under section 53 or 54 of the Civil Procedure Code, might, provided that other conditions were fulfilled, claim to have the time expended on the abortive proceeding deducted in the computation

(1) I.L.R., 10 Bom., 604.

(4) I.L.R., 7 Calc., 367.

(7) I.L.R., 8 All., 519, 527.

(2) I.L.R., 12 Bom., 625.

(5) I.L.R., 11 Calc., 264.

(8) I.L.R., 19 Mad., 90, 95.

(3) 6 W.R., 184.

(6) 12 W.R., 45.

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the period applicable to his new suit. If it had been intended embrace such a large class of cases within the scope of section 14, one would have expected correspondingly general words to be used. The phrase "defect of jurisdiction or other cause of a like nature" seems quite inadequate to denote the miscellaneous cases of defect mentioned in sections 53 and 54. For the purpose of the present case, however, it is unnecessary to deal with the argument of the plaintiff's vakil.

The case was not one in which mere misjoinder of causes of action had proved fatal to the first suit. It was rather the absence of the leave required by section 44 of the Civil Procedure Code which rendered the Court unable to entertain it. Such defect as absence of leave was held in a recent case decided in this Court to bring the case within the provisions of section 14, and we think that case was rightly decided. *Subbarau Nayudu v. Yagana Pantulu*(1).

Following that case, we hold that the question, whether such misjoinder as there was in the present instance was a cause for which time should be deducted under section 14 of the Limitation Act, must be answered in the affirmative.

This appeal coming on this day for final hearing, the Court SUBRAMANIA AYYAR and BODDAM, JJ.) dismissed the appeal.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

PAYYATH NANU MENON (PLAINTIFF'S REPRESENTATIVE),
APPELLANT,

v.

THIRUTHIPALLI RAMAN MENON AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Malabar Law—Adoption by the Karnavan of a Marumakkatayam tarwad—Want of consent by the rest of the tarwad—Civil Procedure Code s. 365.—Legal representative.

A tarwad in Malabar subject to Marumakkatayam Law was reduced in number to two persons, viz., the karnavan and his younger brother the plaintiff.

1896.
August 25.
September
15.

(1) I.L.R., 19 Mad., 90.

* Appeal No. 38 of 1895.

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They quarrelled, and the former without the consent of the latter adopted as members of the tarwad his son and daughter and her children. On his death the plaintiff sued for possession of the tarwad property and for a declaration that the adoptions were invalid :

Held, that the plaintiff was entitled to the relief asked for.

After an appeal was presented by plaintiff, who had obtained a decree for possession but no other relief, he died leaving a will making certain dispositions of the property to which he was solely entitled on the assumption that the adoptions in question were invalid and his executor was admitted as his legal representative for prosecuting the appeal.

APPEAL against the decree of A. Venkatramana Poi, Subordinate Judge of Calicut, in original suit No. 39 of 1892.

The facts of the case and the decree of the Subordinate Court are stated sufficiently for the purposes of this report in the judgment of SUBRAMANIA AYYAR, J.

Plaintiff preferred this appeal.

Krishnasami Ayyar and Sundara Ayyar for appellant No. 2.

Bhasyam Ayyangar, Sankaran Nayar and Sankara Menon for respondents Nos. 1, 2, 6 and 7.

Subramania Sastri for respondents Nos. 3, 4 and 5.

SUBRAMANIA AYYAR, J.—One Govindan Nair and his younger brother Nanu Menon were, in the year 1892, the only surviving members of a tarwad subject to the Marumakkatayam law. The former, who was the karnavan, adopted on the 21st April of that year four persons, viz., his son Raman the first defendant, and his daughter Lakshmi the second defendant, and her children Paru and Krishnan the sixth and the seventh defendants. He made the adoptions without the express or implied consent of Nanu Menon, who had, prior to the date of the adoptions, been for many years on unfriendly terms with his brother. In June 1892 Govindan Nair died. Subsequently Nanu Menon brought the suit, out of which this appeal arose, for a declaration that the said adoptions were invalid, for possession of the property which had been held and managed by Govindan Nair as the karnavan and for certain minor reliefs. In the Court below, he got a decree for the property, &c., but his prayer as to the adoptions was not granted. He preferred this appeal chiefly against such refusal to declare them to be invalid. After the appeal was presented, he having died leaving a will making certain dispositions of the property to which he was solely entitled if the adoptions in question be found to be invalid,

his executor was admitted as the legal representative for prosecuting the appeal.

On the one side, the adoptions were impeached, among other grounds, for the reason that one essential requisite for a valid adoption, viz., the assent of all the members of a tarwad was wanting in this case, inasmuch as Nanu Menon had not consented. On the other side, it was urged that such consent was unnecessary since Govindan Nair, as karnavan, had sole authority in the matter. Without entering into the question whether the consent of all, or only that of the majority of, the members of a tarwad is necessary, it is sufficient for the purposes of this case to determine whether the latter contention is sound.

No decision of this court or of the local courts directly bearing on that contention was cited.

Nor has any satisfactory evidence been adduced to show that the actual usage of the people is in favour of the view urged on behalf of the defendants. The evidence as to custom, called for them, is that of their ninth, tenth and eleventh witnesses. The first of these, the Zamorin of Calicut, was not very consistent in the evidence he gave. At first he stated that the karnavan can adopt without the consent of his anandravan. But later on he qualified this statement by adding that if the anandravan was neither an outcaste nor an insane person, his assent also was necessary. He, however, again, changed his answer and adhered to his original statement. The tenth witness, a Nambudri, was more positive in asserting that an anandravan's consent was unnecessary. The eleventh witness, another Brahman, gave it as his opinion that a karnavan was entitled to adopt, even against the will of the anandravans. But he contradicted himself as to a point intimately connected with that under consideration, viz., the question whether, if a karnavan was opposed to any adoption being made, but the anandravans insisted upon one, whose will should prevail? As to this in his chief examination the witness observed that the adoption should take place in spite of the karnavan's dissent. But in cross-examination he said it should not—a statement which was subsequently retracted. None of the three witnesses was able to speak even to a single instance in which a karnavan did in fact adopt without the consent of his anandravan or anandravans. Without such corroboration, the bare opinions of these witnesses are hardly of much value.

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Nor does the evidence on the other side throw any light on the question. The documentary evidence, which consists of exhibits UUU, VVV, WWW, only shows that, in each of the cases to which they relate, all the persons interested in the particular adoption concurred in it. But it would be wrong to accept such inconclusive conduct in so very few cases as evidence of a general consciousness on the part of the people that without the consent of his anandravan a karnavan cannot adopt. As to the oral evidence neither the third nor the tenth witness, relied upon, possesses any special qualifications that would lend weight to their view that the karnavan alone cannot act in the matter.

In the absence, therefore, of judicial decisions or satisfactory proof of custom for or against the defendants' contention, the question has to be dealt with on principle.

But before doing so, it will be convenient to say a few words with reference to an authority, cited as one distinctly in favour of the defendants, viz., paragraph 403 of Mr. Justice Strange's *Manual of Hindu Law*, second edition, published in 1863, which contains the statement that "on failure of the sister's progeny, male and female, the head of the family may make adoption." If it were clear that, in penning the words just quoted, the learned author had in contemplation a case like the present, his opinion, though unsupported by any other authority than his own, would having regard to his great experience of the people of Malabar be entitled to much weight. But in the passage in question, the author merely glances at the general subject of adoption in Marumakkatayam families, and seems to mean nothing more than that when a tarwad finds it necessary to make an adoption, it acts through its chief member—the karnavan. That a question, like the one now under discussion, was present to the mind of the author, there is nothing in the paragraph itself to suggest. Consequently, the passage relied on, cannot be treated as an authority in favour of the view for which it was cited.

How then does the matter stand on principle? No doubt, a karnavan possesses, under the law, large powers with reference to the concerns of his tarwad. He is by birth the head of the family, holds possession of its property, receives the income and distributes the same according to his own discretion among those under his protection. And no doubt, in transactions with outsiders as well

as in litigation with such persons, he generally represents the family. But it does not follow that he possesses similar independent authority with reference to adoptions into the family. For the powers just above referred to, are obviously all more or less connected with management only; whereas adoption, on the other hand, is an act which clearly falls outside the scope of mere management. Such affiliation involves bringing in strangers into a tarwad and the exercise of the power so to affect its very constitution is *primâ facie* not a matter to be entrusted to any one member, however prominent the position he occupies in that body is. Here it may be asked, is not a similar power vested in a father of a Hindu family to whom a karnavan has been compared? (*Vide in Eravanni Revivarman v. Ittapu Revivarman*(1).) It is true that such a father has full authority to sanction the introduction of a stranger into the family by empowering a widow of one of his sons to make an adoption to her husband. But that exceptional power of the father rests upon a special provision of the Hindu law. So far therefore as the present question goes, there appears to be no analogy between the father and the karnavan. Moreover, considering that, unlike under the Hindu law, a practically unlimited number of persons of both sexes can be adopted under the Marumakkatayam system, it is scarcely necessary to point out that the power in question, if it were exercisable by a karnavan alone, is, should he happen to be an unscrupulous man, capable of being used by him with impunity so as to cause serious detriment to the other members of his tarwad.

In these circumstances, with every desire not to weaken the established authority of a karnavan, one cannot, especially when called upon to lay down almost for the first time a definite rule on the subject, ignore altogether the inexpediency of recognising that a karnavan by himself is entitled to adopt; since that would only add one fresh ground for discord and dissension between a karnavan and those subject to his authority, of which the constant conflict of the former's interest with his duty referred to in *Eravanni Revivarman v. Ittapu Revivarman*(1) is a fruitful cause, and which are said to be so rife in many families in different parts of Malabar.

Before concluding this discussion, it remains to notice an argument urged on behalf of defendants, viz., that should it be found

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(1) I.L.R., 1 Mad., 153, 157.

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that an adoption made by a karnavan was, having regard to all the circumstances of the case, prejudicial to the true interests of the other members of the tarwad, it is open to a Court to cancel the same, as it would cancel a sale of property belonging to the family but improperly alienated by a karnavan without the assent of the other members. It is hardly necessary to say that there is more than one solid distinction between the two classes of cases. In the first place, it cannot be denied that, under certain circumstances, the power to transfer, even by way of sale, is part of the powers of a manager like a karnavan (compare the observations in *Kalliyani v. Narayana*(1) whereas, as already pointed out, the power to import strangers into the family by adoption is essentially of a different and higher nature. In the second place, while the courts, in interfering with an unwarranted transfer of property by a karnavan, exercise a jurisdiction, on the whole beneficial to the family, they would be instruments of doing little but harm if they are also required to set aside adoptions, not on the ground that they contravene some definite rule of law, such as that relating to the vamsam or tribe of the person to be adopted, but on the ground of the undesirableness of the adoption, the unsuitability of the person or persons selected, or for other like reasons. Surely these are matters for the final decision of the party making the adoption. To leave such questions open for adjudication by courts cannot but introduce a mischievous element of uncertainty and doubt as to the status of the persons adopted, operate as a premium to vexatious litigation, and, above all, throw upon the tribunals a duty that, from its very nature, they are not in a position to discharge satisfactorily.

It would seem, therefore, that the view, that a karnavan, at his sole unfettered discretion, can adopt, finds little or no support even in principle. And as on this ground the adoptions in question fail, it is unnecessary to consider the other reasons urged against their validity.

The only other point to be noticed is the objection taken by the appellant as to the amount of damages awarded in respect of certain materials of a dilapidated building removed and used by the defendants. There is no good reason to think that those

materials were worth more than the sum granted by the Subordinate Judge.

The decree of the Lower Court will be modified by declaring that the adoptions are invalid, and in other respects it must be confirmed. The respondents will pay the appellant's costs here.

DAVIES, J.—I quite agree in the conclusions of my learned colleague. I would, however, add two additional reasons in support of the view we have taken on general principles, namely, that the karnavan as such has not the sole power to make an adoption.

In the first place, there has been no attempt to prove that a legal or moral obligation is cast on the member or members of a moribund tarwad to make an adoption. On the contrary, the witnesses in the case do not go further than saying it is proper—not that it is obligatory. This is confirmed by the fact that the practice is by no means universal or there would not be the frequent escheats to the State of tarwad property for want of a successor. The making of an adoption then being optional, how can the karnavan, without the consent of his anandravans, forestall them and deprive them of that option which in the nature of things must reside in the last surviving member or members of the tarwad? If they should agree there is an end of the matter, but if they do not agree, the karnavan in acting on his sole authority is arrogating to himself a power of making a final disposition of the family property. The powers of a karnavan are great, but none of the powers so far recognized in him is so large as that now claimed for him. It is tantamount to allowing him to make a gift of the tarwad property, which he cannot ordinarily do.

And in the second place, even if it be obligatory, there is no actual necessity for making the adoption until the tarwad is reduced to a single member. As the occasion for the exercise of the power really arises only then, it would seem to follow that the right, when disputed, must be held necessarily to vest in the last surviving member. The necessity has then become absolute.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, Mr. Justice Subramania Ayyar and Mr. Justice Davies.

SEENI CHETTIAR (DEFENDANT NO. 1), APPELLANT,

v.

SANTHANATHAN CHETTIAR AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 & 3), RESPONDENTS.*

Registration Act—Act III of 1877, ss. 3, 17 (d)—Interest in land—Timber—Lease—Specific Relief Act—Act I of 1877, s. 36—Injunction.

The plaintiff, (who held on lease a share in a village and in the trees standing in the village tank,) in consideration of Rs. 200 and a promissory note for Rs. 3,200, executed in favour of the defendant a document by which he assigned to the latter the right "to cut and enjoy the trees, &c.," for a period of four years from its date. The instrument was not registered. The defendant felled the trees which were mature at the date of the instrument and subsequently felled others since matured. The plaintiff now sued for a declaration of his title to the remaining trees and for an injunction to restrain the defendant from intermeddling therewith, alleging that he had sold to the defendant orally the right to fell only such trees as were then matured :

Held, that the unregistered instrument purported to convey an interest in immovable property, and was not a lease and was inadmissible in evidence; and that the plaintiff was not entitled to relief by way of injunction or otherwise.

APPEAL under Letters Patent, section 15, against the judgment in second appeal No. 319 of 1894, which was preferred against the decree of F. H. Hamnett, Acting District Judge of Tinnevely, in appeal suit No. 214 of 1893, confirming (save as to costs) the decree of S. Gopalachariar, Subordinate Judge of Tinnevely, in original suit No. 12 of 1892.

The plaintiff alleged that he and defendant No. 2 were joint lessees under a lease in the village of Pattampattur and in the trees standing in the village tank, that in October 1890 when there were 3,500 trees fit for felling, defendant No. 2 sold his half share therein to the plaintiff who conveyed them orally to defendant No. 1 in January 1891 for Rs. 200 paid in cash and Rs. 3,200 secured by a promissory note, that defendant No. 1, having felled the trees above referred to, proceeded to fell others since matured,

alleging that his rights remained in force during the whole currency of the lease to the plaintiff and defendant No. 2. The plaintiff prayed for a declaration of his right to the trees standing in the tank and for an injunction restraining defendant No. 1 from felling them.

Defendant No. 1 claimed to be in possession and to be entitled to the trees under an instrument executed in his favour by the plaintiff on 1st January 1891. That instrument which was not registered was in the following terms :—

"In respect of the transaction of business heretofore taken on contract from Madura Pattamars in Fasli 1294 by me and A. N. Meenakshisundaram Settiar Avergal, I have paid on 16th December 1890 in current Fasli 1300, value for the said Meenakshisundaram Settiar's half share, excluding my share, in the karuvela, velvala, margosa and manjanatti trees, &c., in Pattambudur tank to the north of the said village and in the gum (resin) karuvalam nuts, grass, kora, &c., standing thereon; and been enjoying the same till this day. As I have settled a value of Rs. 3,400 for the said two shares together with the tank and bed of the said tank so that you may cut and enjoy the trees, &c., and the grass, korai, gum, karuvela nut, &c., from this day till the close of Fasli 1304, and executed a yadast to you on receipt of a note from you promising payment within a period of six months, you will enjoy in the said tank, as mentioned above. Should there be any trees or other materials whatever in the said tank on 1st day of the Fasli 1305, the above said person shall not interfere (with it)."

The Subordinate Judge held that the instrument relied on by the defendant was inadmissible for want of registration on the ground that it dealt with immovable property and he passed a decree for the plaintiff as prayed with costs. On appeal the District Judge was of opinion that the unregistered instrument could operate only with regard to the trees ready to be felled, at the date when it was executed. He modified the decree appealed against only by directing that each party should bear his own costs.

Defendant No. 1 preferred the above second appeal which came on for hearing before SHEPHARD and BEST, JJ.

Ramachandra Rau Saheb for appellant.

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*Bhashyam Ayyangar, Ramakrishna Ayyar, and Tiruvengkata-
chiar* for respondent No. 1.

Krishnasami Ayyar for respondent No. 3.

SHEPARD, J.—The first question is whether the yadast tendered in evidence by the defendant is a lease, and, as such, requires registration. The interest acquired by the defendant under the instrument consisted in the right to enjoy the produce of all the trees in the tank bed as also the grass and the reeds, and further to cut and remove the trees for a period exceeding four years. It was not merely the trees and grass then growing and ready to be cut that the defendant was to acquire. He was further to be at liberty to take all the trees which might grow on the ground within the period named. The intention was, in my opinion, to create an interest in immovable property and certainly it was intended that the defendant should have exclusive enjoyment of the products named in the yadast.

There was, therefore, a lease of immovable property and not a mere license (see *Sukry Kurdeppa v. Goondakull Nagireddi*(1)) and as the enjoyment was given for term exceeding one year, registration of the yadast was compulsory. Failing the evidence which the instrument would afford, the defendants' claim to continue cutting the trees cannot be substantiated. The question, however, remains whether the plaintiff is entitled to relief by way of injunction.

The judgments of the Courts below, while discussing at length the question of law, do not state the facts with sufficient fullness and adequacy. It appears, however, to be found that the plaintiff received from the defendant Rs. 200 in cash and Rs. 3,200 in the shape of a promissory note and that this payment was made in consideration of the plaintiff allowing the defendant to cut the trees and take the other produce for a period of years. It also appears to be found that the defendant was not, at the time of the suit, in actual possession of the ground. The District Judge finds against the plaintiff on his contention that a particular number of trees only were sold to the defendant. He also appears to think that all the timber and grass standing at the date of the yadast had been removed. It is not stated explicitly, but I think it may be inferred, that the note for Rs. 3,200 which was produced by

(1) 6 M.H.C.R., 71.

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the plaintiff has never been liquidated by the defendant. Under these circumstances, the question which I suggested at the hearing does not arise. I mean the question whether the court should assist by an injunction a plaintiff who, while he has himself received the greater part of the agreed consideration, is endeavouring to prevent the defendant from enjoying that for which he has paid. Seeing that the defendant has actually paid only Rs. 200 and must have had in the shape of timber and other things a sufficient *quid pro quo*, I do not think he has any cause to complain of the injunction. I would dismiss the appeal with costs.

BEST, J.—The yadast on which appellant relies is no doubt an instrument creating an interest in immovable property for a period of four and a half years extending from its date (1st January 1891) to the close of Fasli 1304 (30th June 1895). It is not merely a license to cut trees and grass in existence on the tank bed at its date, but to "cut and enjoy the trees, &c., and the grass, korai, "gum, nuts, &c., from this day till the close of Fasli 1304." It is, therefore, a document that should have been registered and in default of registration, is inadmissible as evidence of any transaction affecting immovable property. Consequently it would be of no avail to defendant if produced by him in support of a suit for possession of the tank—or for enforcement of his right to take grass, nuts, &c. (see *Sukry Kurdeppa v. Goondakull Nagireddi*(1)). Nor would it be admissible as evidence to resist a claim by the plaintiff for possession of the tank. The present suit, however, is not for possession of the tank, but only for a declaration of plaintiff's right to certain standing trees and for an injunction restraining defendant from felling the same. An unregistered document inadmissible as evidence affecting immovable property is none the less admissible when the question relates only to movables (see *Thandavan v. Valliamma*(2)). Standing timber is movable property according to the definition given in section 3 of the Registration Act itself. Consequently, the non-registration of the document in question is no bar to its admissibility for the purposes of this suit. The genuineness of the yadast is found as a fact and the payment by defendant of Rs. 3,400 as consideration is not denied.

(1) 6 M.H.C.R., 71.

(2) I.L.R., 15 Mad., 336.

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The District Judge would no doubt have dismissed the plaintiff's suit, had it not been for his finding that the unregistered yadast could not be considered.

As, in my opinion, the yadast is admissible as evidence for the purposes of this suit, in which no immovable property is sought to be affected, I would allow this appeal, and setting aside the decrees of the Courts below, dismiss the plaintiff's suit and direct him to pay first defendant's costs throughout.

In consequence of the difference of opinion between their Lordships, the following order was made by Mr. Justice Best under section 575 of the Civil Procedure Code.

ORDER.—Under section 575 of the Code of Civil Procedure Mr. Justice Shephard's judgment prevails and the appeal is dismissed.

Defendant No. 1 appealed as above under the Letters Patent.
Ramachandra Rau Saheb for appellant.

Bhashyam Ayyangar and *Ramakrishna Aiyar* for respondent No. 1.

Seshachariar for respondent No. 3.

Ramachandra Rau Saheb for appellant referred on the question whether the instrument was a lease or not to *Venkatachellam Chetti v. Audian*(1), and he contended on the authority of *Sukry Kurdeppa v. Goondakull Nagireddi*(2), *Misri Lal v. Mozhar Hos-sain*(3) and *Bansidhar v. Sant Lal*(4) that the property dealt with thereby was movable property. He also contended that the transaction was in the nature of a contract to sell property(5), *Raja Sahib Prahlad Sen v. Baboo Budhu Sing*(6).

He also argued that in any view of the above questions the suit was not maintainable under Specific Relief Act, section 42, against the defendant who was legally in possession of the trees and finally that the conduct of the plaintiff had been such as to disentitle him to receive relief by way of injunction, which a court was not bound to grant under Specific Relief Act, section 56, save in the exercise of a sound discretion.

Bhashyam Ayyangar for respondent contended that the plaintiff was in possession and that in second appeal the High Court should not interfere with the discretion, which the Lower Courts had

(1) I.L.R., 3 Mad., 358. (2) 6 M.H.C.R., 71. (3) I.L.R., 13 Calc., 262.
(4) I.L.R., 10 All., 133. (5) Mad., L.I., 1895, 253. (6) 2 Beng. L.R., 111.

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exercised in granting to the plaintiff the relief by way of injunction. On the construction of the document it is clear that it deals with an interest in immovable property and consequently it is inadmissible in evidence for want of registration unless it is a lease exempted under the notification of 3rd May 1871. But it is not a lease under the definition in the Indian Act which are based on English decisions of which see *Marshall v. Green*(1), moreover the notification is only applicable to leases in which a rent is reserved and in the document now in question no annual rent is reserved.

COLLINS, C.J.—This second appeal No. 319 of 1894 was originally heard before SHEPHARD and BEST, JJ., and those learned Judges disagreed in the conclusion they arrived at; and in consequence of BEST, J., having left the court, the Letters Patent Appeal had to be heard before three other Judges.

The principal point in dispute was whether the yadast, dated 1st January 1891, created an interest in immovable property, and, if so, whether it could be used as evidence not being registered. The yadast is as follows:—"In respect of the transaction of business heretofore taken on contract from Madura Pattamars in Fasli 1294 by me and A. N. Meenakshisundaram Settiar Avergal, I have paid, on 16th December 1890 in current Fasli 1300, value for the said Meenakshisundaram Settiar's half share, excluding my share, in the karuvela, velvala, margosa and manjanati trees, &c., in Pattambudur tank to the north of the said village, and in the gum (resin), karuvela nuts, grass, korai, &c., standing thereon; and been enjoying the same till this day. As I have settled a value of Rs. 3,400 for the said two shares, so that you may cut and enjoy the trees, &c., and the grass, korai, gum, karuvela nut, &c., on bank and the bed of the said tank from this day till the close of Fasli 1304, and executed a yadast to you on receipt of a note from you promising to pay within a period of six months, you will enjoy in the said tank, as mentioned above. Should there be any true or other materials whatever in the said tank on the first day of Fasli 1305, the above said person shall not interfere (with it)."

It appears to me that there can be no doubt but that the yadast does convey an interest in immovable property: the

(1) L.R., I.O.P., 35.

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contrary proposition is not arguable. It has long been settled that an agreement for the sale and purchase of growing grass, growing timber or underwood, or growing fruit, not made with a view to their immediate severance and removal from the soil and delivery as chattels to the purchaser, is a contract for the sale of an interest in land. I, therefore, hold that the yadast does convey an interest in immovable property and is not receivable in evidence being unregistered.

The next question is to what relief (if any) is the plaintiff entitled. For the reasons given by SUBRAMANIA AYYAR, J., in his judgment, I am of opinion that the plaintiff is not entitled to any relief. I would, therefore, reverse the decree passed in plaintiff's favour and dismiss the suit. The other Judges having decided that each party should pay his own costs throughout, I am not inclined to differ from them on that point.

SUBRAMANIA AYYAR, J.—The first question argued in this case was whether the document, dated the 1st of January 1891, found to have been executed by the plaintiff to the first defendant, was rightly held to be inadmissible in evidence for want of registration.

The determination of the question depends upon the soundness or unsoundness of the contentions urged on behalf of the plaintiff, viz., first, that the transaction evidenced by the said document amounted to a lease of the plaintiff's interest in the tank of the village of Pattambadur mentioned therein for a term of a little more than four years, and secondly, if that contention fails—that the document created in favour of the said defendant an interest in immovable property of the value of more than one hundred rupees.

First, as to the contention that there was a lease, it is to be observed that, to constitute such a transfer, it is essential that exclusive possession of the property which is the subject of the transfer, should be intended to be vested in the transferee (Woodfall on Landlord and Tenant, 14th edition, page 129). If the possession is, however, not of that character, the transaction, whatever else it may be, is not a lease. This being clear, we have to see whether the instrument in the present case secured to the defendant any possession, and, if so, exclusive possession.

Neither the language of the instrument nor the nature of the case, in my opinion, supports the view that the plaintiff, who, as

the lessee of a sharer of the village, had joint possession of the tank, divested himself of such possession and transferred it to the first defendant under the document.

The term "lease" does not occur in the instrument at all. Nor is anything stated therein which, in the slightest degree, suggests that the plaintiff's right to the possession of the tank was in any way to be affected by the instrument. Again, the tank being a work of irrigation attached to the village, it cannot be supposed that the plaintiff, in entering into the contract with reference to the trees, &c., growing or likely to grow upon the bed or the embankment of the tank, agreed that, during the period mentioned in the document, the tank was not to be enjoyed, either by himself or by others entitled thereto, as a reservoir for the water required by them for the irrigation of their lands, or that such parties should not be at liberty to use the tank in any other way in which they were entitled to use it, provided their action did not injuriously affect the special rights conferred upon the first defendant with respect to the trees, &c., already referred to. It follows, therefore, that the plaintiff did not part with such possession of the tank as he had and that the first defendant obtained merely a right of access to the place for the reasonable enjoyment of what he was entitled to under the contract. Further, even if by a stretch of language the first defendant were to be considered to have acquired a right to some sort of possession of the tank bed, it is quite clear that such right was not exclusive, or, in the language of Lord Hatherley, it was not unattended by a simultaneous right of any other person in respect of the same subject-matter *Cory v. Bristow*(1).

My conclusion, therefore, is that the transaction was not a lease.

As to the second contention, it is scarcely necessary to observe that though standing timber is, under the Registration Act III of 1877, movable property only, still parties entering into a contract with reference to such timber may expressly or by implication agree that the transferee of the timber shall enjoy, for a long or short period, some distinct benefit to arise out of the land on which the timber grows. In a case like that, the contract would undoubtedly be not one in respect of mere movables, but would

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(1) L.R., 2 App. Cases, 262, 276.

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operate as a transfer of an interest in immovable property. Therefore, the point is whether the contract in question falls under the latter description. Taking all the provisions of the document together, I think there was here more than a sale of mere standing timber and that, in the words of Sir Edward Vaughan Williams quoted with approval in *Marshall v. Green*(1) cited for the plaintiff, "it was contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land." The fact that the comparatively long period of a little more than four years was granted to the defendant for cutting and removing the trees is, to my mind, strongly in favour of the above view.

I am, therefore, of opinion that the document in question did create an interest in immovable property, as urged on behalf of the plaintiff, and, being unregistered, it was rightly rejected.

The next question is whether the plaintiff is entitled to any relief. As to the injunction which is the more important of the reliefs claimed by him, I think he is not entitled to it for several reasons. According to *Castelli v. Cook*(2) "a party who seeks such relief is bound to tell the court what the case is on which he relies; and when he brings forward prominently, and relies upon a given case, the court will not allow him, if he should fail in that case, to spell out another and say he might have framed his case so as to show a title to the relief asked." In the present instance, the plaintiff came into court alleging that the contract between him and the first defendant, the terms of which the latter was said to be violating, was for the sale of a specific number of trees, to be cut and removed within six months from the date of the contract. This allegation has been established to be untrue, and yet the plaintiff seeks now to rest his prayer for the injunction on a ground absolutely ignored in the plaint, namely, the invalidity of the totally different contract set up by the defendant, which the plaintiff denied but which has been found to be true. The case last cited seems to me to prohibit relief being granted on such a change of ground. Moreover, the state of things, from which the plaintiff asks the court to extricate him, is the direct outcome of the fact that the document was not registered; and as the plaintiff

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himself, equally with the first defendant, is responsible for it, the former cannot complain if the court declines to assist him on the principle laid down by Lord Eldon in *Rundell v. Murray*(1), viz., a court frequently refuses an injunction, where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application. For another reason also the case is one which falls under the comprehensive rule embodied in clause J of section 56 of the Specific Relief Act. That rule rests on the maxim that he who seeks equity must do equity and implies that a plaintiff seeking an injunction must come with clean hands. With reference to this point, it is laid down in Kerr on Injunctions, on the authority of the case therein cited, that a plaintiff, who asks for an injunction, must be able to satisfy the court that his own acts and dealings in the matter have been fair and honest and free from any taint of fraud or illegality, and that if, in his dealings with the person against whom he seeks relief or with third parties, he has acted in an unfair or inequitable manner, he cannot have relief (3rd edition, page 16).

Now turning to the facts here, according to the contract Rs. 3,400 was payable not merely for the trees already taken away by the first defendant, but also for a considerable number still on the ground as well as any others that may grow during the remaining period of the contract. As the defendant cannot now enjoy the full benefit of the agreement, it is not just that he should have to pay the whole of the consideration. The plaintiff, who, in addition to Rs. 200 paid in cash, had received a promissory note for Rs. 3,200, has not offered unconditionally or on terms to return the note to the first defendant. On the contrary, he has throughout maintained that he has a right to the entire amount. There is nothing to prevent his suing the first defendant upon the note. What amount, if any, the plaintiff might recover in that suit, it is not now possible to say. However that litigation may end, it is quite clear that the plaintiff has it in his power to harass the first defendant by suing him for the whole amount. In these circumstances, the plaintiff's conduct seems to be unfair and inequitable within the meaning of the authorities on the point. Whilst refusing an injunction on the above ground, it would not be a sound exercise of the discretion, vested in the court under section 42

(1) L.R., 1 C.P.D., 35.

(2) 7 Hare, 99, 99.

(1) Jacob, 311, 316.

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of the Specific Relief Act, to grant the plaintiff the other relief claimed, viz., declaration of his right to the trees.

I would, therefore, allow the appeal, reverse the decree passed in favour of the plaintiff and dismiss the suit, each party being made to pay his cost throughout.

DAVIES, J.—I entirely concur.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

1896.
December 16.

PANCHENA MANCHU NAYAR AND OTHERS (DEFENDANTS
Nos. 2 TO 6), PETITIONERS,

v.

GADINHARE KUMARANCHATH PADMANABHAN NAYAR
(PLAINTIFF), RESPONDENT.*

*Companies Act—Act VI of 1882, s. 4—Unregistered association for gain—
Illegal contract.*

The prize winners in a lottery in which more than twenty persons took tickets covenanted with the promoters of the lottery to continue their subscriptions in respect of the successful ticket for two more years in accordance with the arrangement under which the lottery was established. The money not having been paid the promoters brought a suit on the covenant:

Held, that there was no association of twenty persons for the purpose of gain or at all, and consequently, that the plaintiffs were not precluded from suing for want of registration under Companies Act, section 4.

PETITIONS under Small Cause Courts Act, section 25, praying the High Court to revise the proceedings of E. K. Krishnan, Subordinate Judge of South Malabar, in Small Cause Suit No. 1072 of 1895.

The Subordinate Judge described the suit as “a suit to recover Rs. 119-3-6, principal and interest due on a kuri scheme in which defendant No. 1, and her deceased son, Sankaran Nayar, held “three-fourths of a ticket.” The defence was based on Companies Act, 1882, section 4, and it was pleaded that the suit was not maintainable because the claim arose out of a numerous association for

gain which had not been registered. The so-called kuri scheme was embodied in the document (exhibit I), which was translated as follows:—

“Programme of lottery drawn up on 15th Edavam 1064 (27th “May 1889). We, Puliakkot Devaki Amma’s sons, Kunhi-
“krishnan Nayar and younger brother Panku Nayar of Peruvemba
“Amsom and Desam in Palghaut taluk, do hereby start a kuri
“(lottery) with the following terms:—The lottery shall be to the
“total value of Rs. 325, and shall consist of thirteen tickets each
“worth Rs. 25. The tickets shall be drawn twice a year, i.e., on
“15th Edavam and 15th Vrischigam. The amount for the first
“drawing, i.e., the proprietor’s lot, shall be collected and taken by
“proprietors on 15th Edavam current. The lottery shall come
“to a close on 15th Vrischigam 1070. All the members that
“have come in for lots, shall be prepared to pay the amount due
“by them at 12 o’clock noon on the day of each drawing at the
“proprietor’s house. The amount so brought in shall be received
“by the proprietors, and a receipt written in the hand of Panku
“Nayar, executant No. 1, and signed by Kunhikrishanan Nayar,
“executant No. 2, shall be granted to each member who pays
“money. If any member fails to pay the amount due by him on
“the date of drawing, he shall pay a penalty of 8 annas a day for
“those days, for which the sum remains unpaid. In the receipt
“granted for the first time the amounts paid at subsequent draw-
“ings shall be credited as having been received for respective
“drawings. The tickets shall be drawn before 4 P.M. on the day
“fixed therefor. From the amount due to the winner of the prize
“at a drawing, Rs. 25 shall be taken off, and the remainder alone
“paid to the winner. This sum of Rs. 25 shall be distributed in
“equal shares among the non-winners of prizes towards the interest
“on the amount paid by them. This system of reserving and dis-
“tributing Rs. 25 shall continue till the last drawing but one.
“The winners of prizes shall give the proprietors such amount of
“security as may be required by proprietors for the money which
“has yet to be paid by them. If the winners fail to pay at subse-
“quent drawings the amount by them in time, they shall, without
“any consideration of the term, pay the whole amount remaining
“unpaid by them with interest at 2 per cent. per mensem. If,
“before winning the prize, any member remits money regularly at
“some drawings but fails to pay at some others, the proprietors

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"shall either by themselves or by admitting some others, conduct the lottery, and pay the whole amount to the winner at the time of drawing, and to the defaulter only the amount he has already paid, and that too without interest and after the termination of the lottery. If, after obtaining security from the winners, the proprietors fail to pay them the amount due, they shall pay it with interest at the rate mentioned above. The proprietors shall insert to this programme an account of the money collected by them from the date of first drawing, *i.e.*, proprietor's lot to the last one, and shall also insert in a schedule subjoined hereto, the names of members who have come in for lots, with number and amount of tickets purchased by them. Giving their assent to these stipulations, all the members have subscribed to, and signed in, this."

The first schedule to this document gave the names of twenty-seven persons therein described as members and stated that each had purchased either one ticket or a fraction of a ticket as therein specified. The whole amounted to thirteen tickets of Rs. 25 each. The other schedules were lists of the amounts received and credited for interest as the result of seven drawings of which the last was dated 15th Edavam 1067.

The first defendant and her son executed a document filed as exhibit A, which bore date 26th May 1891, and was translated as follows:—

"Deed executed jointly by Punchena Chimmu Amma's daughter Narayani Amma, and son Sankaran Nayar of Peruvemba Amsom and Desam in Palghat taluk, to Cheria Puliakkottu Kunhi Krishnan Nayar, and younger brother Panku Nayar jointly, of the said amsom and desam. Whereas in the lottery in which interest is distributed among non-winners for the total value of Rs. 325 started by you as proprietors on 15th Edavam 1064 (27th May 1889) with thirteen tickets in all including the proprietor's lot, each ticket being worth Rs. 25, and the lots having been arranged to be drawn twice a year, we have gone in for three-fourths of a lot and having won the prize at the fourth drawing including the proprietor's lot which took place on 16th Vrischigam 1066 (November 1890), we do hereby acknowledge receipt of Rs. 225 (two hundred and twenty-five rupees) due to us exclusive of interest, in accordance with the terms of the lottery, and agree to pay regularly at future

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"drawings, in accordance with the said terms the sum of Rupees 168-12-0 (one hundred and sixty-eight rupees and twelve annas), obtaining receipt therefor on the back of this document. Should we fail at any drawing to remit the amount in time, we hereby agree to pay in a lump the whole amount which may remain unreinstituted by us, with interest at 2½ per cent. per mensem from the day on which default is made by us. Written on 14th Edavam 1066 (26th May 1891) in the hand-writing of Pekkan-chath Sekharan Nayar of Peruvemba Amsom and Desom in presence of the undersigned witnesses."

The Subordinate Judge overruled a plea based on the want of registration under Companies Act, 1882, section 4, and held that the sum claimed was due by the first defendant on the footing of the above arrangement, and that it was a family debt for which the other defendants were liable as members of the tarwad, and passed a decree as prayed.

Some of the defendants preferred this petition.

Narayanan Nambiar for petitioners.

Sundara Ayyar for respondent.

JUDGMENT.—From the instances which have come before this Court since *Ramasami Bhagavathar v. Nagendrayyan*(1) was decided, it would seem that a notion is coming to be entertained that every chit or kuri in which more than twenty persons are concerned falls within section 4 of the Indian Companies Act and, therefore, if unregistered, is illegal. It is scarcely necessary to point out that whether an undertaking which generally goes by the name of chit or kuri falls within the said section, depends, of course, not upon the mere name given to the undertaking, but on the existence of the essential characteristics required by that provision of the law. Whether these requirements are present must be ascertained in each case. In the present instance the Subordinate Judge has paid attention to this matter. He has taken evidence as to it and has come to the conclusion that the case is not governed by the above-mentioned section 4 and is distinguishable from *Ramasami Bhagavathar v. Nagendrayyan*(1).

The question is whether the Subordinate Judge's view is correct upon the facts established by the evidence. Now, in cases like the present, to warrant the application of the section in

(1) I.L.R., 19 Mad., 31.

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question, the first point to be made out is that there is a 'company' or 'partnership' or 'association' consisting of more than twenty persons. It cannot be pretended that there is here either a 'company' or a 'partnership.' Is there then an 'association' of more than twenty persons within the meaning of the Act? The answer to this question depends upon the signification to be attached to the word 'association' in the section. This and certain other points as to the construction of the corresponding section of the English statute, the words of which are identical with those of the section of the Indian Act, underwent elaborate consideration in *Smith v. Anderson*(1). There JAMES, BRETT and COTTON, L.JJ., differed from the construction put upon the section by JESSEL, M.R.

For our present purpose it is enough to quote a couple of passages from the judgments of BRETT and COTTON, L.JJ., which deal with the interpretation of the term 'association.' The former observed:—"In order to come within this clause, there must be a 'joint relation of more than twenty persons for a common purpose' I confess I have some difficulty in seeing how there 'could be an association for the purpose of carrying on a business' which would be neither a company nor a partnership, but I should 'hesitate to say that, by the ingenuity of men of business, there 'might not some day be formed a relation among twenty persons' which, without being strictly either a company or a partnership, 'might yet be an association. But according to all ordinary rules 'of construction, if the association mentioned in section 4 is not, 'strictly speaking, a company or a partnership, it must be some-thing of a similar kind. It must be a relation established 'between twenty persons or more 'for the purpose of carrying on 'business,' i.e., in order that such company, association, or partner-ship may carry on the business. The business, therefore, whatever 'the word 'business' may mean is to be carried on by those 'twenty persons or more.'" COTTON, L.J., used the following language:—"I do not think it very material to consider how far 'the word 'association' differs from company or partnership, but 'I think we may say that if 'association' is intended to denote 'something different from a company or partnership, it must be 'judged by its two companions between which it stands, and it

(1) L.R., 15 Ch. D., 247.

"must denote something where the associates are in the nature 'of partners.'"

Clearly, therefore, to constitute an association, within the meaning of the section, the existence of a legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary. Otherwise there would be a mere conglomeration of persons as COTTON, L.J., put it, but not an 'association.'

Turning now to the facts of the present case it is perfectly plain from exhibit I, which sets forth the terms on which the kuri is carried on, that no such relation exists between the various persons who have executed the document. The contracting parties are on the one hand, Kunhi Krishna Nayar and Panku Nayar, who organised the kuri, and who are called the proprietors in exhibit I, and on the other, each of the remaining ticket-holders individually. The right to collect the subscriptions due periodically by each ticket-holder rests only with the two organisers. The duty of paying the amount collected to the person entitled is cast upon them. It is to them that unlike in the case of *Ramasami Bhagavathar v. Nagendrayyan*, (1) the particular ticket-holder who, as the prize winner, has received the periodical collection, has to give the necessary securities for the payment of the future instalments due by him. Further, if any ticket-holder commits any default in paying his subscriptions according to the instalments, the proprietors alone are responsible to make up the deficiency caused by such default and are, consequently, at liberty to admit at their discretion persons not mentioned in exhibit I as ticket-holders in lieu of the defaulters. The only obligation each ticket-holder lies under, is to pay his subscription from time to time to the proprietors; and the only right possessed by him is to get from them his several share of the Rs. 25 deducted at the drawing of each lot out of the total collections and distributed among the ticket-holders other than those who have received prizes and also to receive from the same parties the amount of the prize when he in his turn becomes the prize winner. It is thus manifest that the only persons associated with each other in the sense of possessing joint rights or being subject to joint obligations or of having mutual rights and duties are the two proprietors, whilst the other ticket-holders are

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in the language of JAMES, L.J., "from the first entire strangers "who have entered into no contract whatever with each other."

It follows therefore that the very first condition laid down by the section relied on is wanting here.

In arriving at the above conclusion, we have not overlooked the observation made in one of the cases cited, to the effect that no hypercritical attempt should be made to withdraw from the operation of the legislative provision in question any case which reasonably falls within its purview. This is no doubt true. On the other hand, it is to be borne in mind that the enactment was intended, as stated by JAMES, L.J., "to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and so might be put to great difficulty and expense, which was a public mischief to be repressed." When an Act framed with such intention is sought to be availed of for getting rid of obligations incurred in connection with comparatively small undertakings like the present, carried on on the responsibility of a very few known individuals and resorted to by ticket-holders from prudential motives as a means of effecting some savings from their petty incomes, it is the duty of the Courts to guard against the extension of the statute, from an undue zeal for carrying out the policy of the enactment, to cases clearly not within its meaning.

Being satisfied, as already stated, that here the very first requisite under the section has failed, it is unnecessary to consider the other question which was argued at length, viz., assuming that the ticket-holders and the proprietors do constitute together an association of the kind contemplated by the section, whether the association can be said to have been formed for the purpose of carrying on business, having for its object the acquisition of gain.

We agree, therefore, with the Subordinate Judge's conclusion and dismiss the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

CHENGAMA NAYUDU (PLAINTIFF), APPELLANT,

MUNISAMI NAYUDU AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1896.
November
12, 20.

Hindu law—Partition—Subsequent acquisitions—After-born son—Right to partition.

A Hindu having two sons divided his property between them, reserving no share for himself. A third son was subsequently born who now sued for a partition of the property which had been divided and other property subsequently acquired by his brothers by means of its proceeds:

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

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of North Arcot, in appeal suit No. 113 of 1893, confirming the decree of T. Swami Ayyar, District Munsif of Chittore, in original suit No. 337 of 1892.

The plaintiff sued for partition of certain property as the ancestral estate and property acquired with profits derived from the ancestral estate of the family, of which the plaintiff and his brothers, defendants Nos. 1 and 2, were the members. Defendant No. 3 was alleged to be a stranger in possession of part of the property of which partition was sought.

The first defendant pleaded that his share of the ancestral property had been separated and delivered to him many years before suit, and that part of the property now in question had been acquired by him since that date. Defendant No. 3 claimed to be an illatom member of the family, and raised other pleas similar to those of defendant No. 1.

The Subordinate Judge found that the third defendant was a member of the family as he claimed to be; that there had been partition of the family property before the plaintiff was born; that in 1891 when the plaintiff was an infant, the partition was re-adjusted under an instrument executed by the adult members of the family. He also found that at the time of the original partition the father had reserved no share for himself. The

* Second Appeal No. 880 of 1895.

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Subordinate Judge, upon those findings confirmed the decree of the District Munsif, under which the plaintiff obtained a one-third share of the lands originally divided between defendants Nos. 1 and 2, but not in the subsequent acquisitions. He said :—"The acquisitions could not be considered as self-acquired if there was no previous division. There having been already a division, subsequent acquisition made by their profits must be held the acquirer's separate properties in ordinary circumstances. Here, we have a case of an after-born son. The father reserved no share for himself and the whole property was distributed among the sons in existence at the time of partition. There is no contention that the father had any subsequent acquisitions. In such a case Yagnavalkya says, that the posthumous son, whose mother's pregnancy was not manifest at the time of partition, must receive, out of his brothers' allotments, a share equal to their shares after computing the income which has accrued and the father's debts that have been discharged.

"Mitakshara, chapter I, section VI, paragraph 8, ordains that in such case the allotments must be made out of the visible estate, and paragraph 9 explains the meaning of the visible estate by saying 'Received by the brethren.' From this it is evident that the Mitakshara contemplates a share to be allotted out of the shares previously allotted, but not out of acquisitions subsequently made by the brethren.

"I think, therefore, that the finding of the Lower Court in regard to plaintiff's share out of the shares allotted to first and second defendants is not open to question."

The plaintiff preferred this second appeal.

Sriranga Chariar for appellant.

Jambulinga Mudaliar for respondents.

JUDGMENT.—There was a partition between the appellant's brothers, the first and second respondents, and their deceased father before the appellant was born. At that partition the father reserved no property to himself. The Lower Courts have held that the appellant is entitled to a share out of the property taken by the said respondents at the partition. The appellant was, however, not allowed a share out of certain other items of property in the hands of his brothers. These were excluded from the partition decreed to the appellant, not because they were the separate property of the parties in possession having been acquired by

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them without the aid of the ancestral estate, but, as we understand the Subordinate Judge, simply on the ground that acquisitions after the partition, even though made with the aid of the property obtained at the partition, belong solely to the acquirer. This view is clearly not supported by the authorities, to some of which the Subordinate Judge himself refers. The word 'income' or 'profit' in Yagnyavalkya's text "The visible estate corrected for income or expenditure" (as translated by Colebrooke)(1) or "the visible estate corrected by profit or loss" (as rendered by Mandlik)(2) on which the Mitakshara in chapter I, section VI, 8 and 9, bases its conclusion on this point, undoubtedly includes accretions made to the shares taken on partition and gives to the after-born son a right to obtain his allotment out of the subsequent additions also, provided, of course, they are shown not to have been acquired without the aid of ancestral property. The principle of the rule as pointed out by Subodhini when commenting on Mitakshara, chapter I, section VI, 9, cited above, is that so far as the after-born coparcener is concerned, the individual shares taken by the parties who made the division prior to his birth are as much patrimony after the division as before it and consequently he, the after-born son, is entitled to participate in the gain arising out of such patrimony(1).

The appellant is thus entitled to his share also out of the properties in the hands of the first and second respondents in respect of which his claim was rejected by the Lower Courts. The decree passed by them must, therefore, be modified accordingly. The said respondents will pay the appellant's costs disallowed in the Lower Court as well as his costs in this second appeal. But as against the third respondent the appeal is dismissed with costs.

(1) Stokes' Hindu Law Books, p. 395.

(2) Mandlik's Hindu Law, p. 216.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

1896.
November
27.

ANNA PILLAI (PETITIONER), APPELLANT,

v.

THANGATHAMMAL (COUNTER-PETITIONER), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, ss. 88, 99—Form of decree.

In November 1882 a decree was passed on a hypothecation bond for the payment of the secured debt and it contained the following words:—"the property hypothecated in the bond being also held liable for the whole amount thus awarded":

Held, that the decree was in reality a decree for sale and could be executed as such.

APPEAL against the order of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, on civil miscellaneous petition No. 606 of 1895, which was an application for the dismissal of a petition for execution preferred by the decree-holder in original suit No. 32 of 1882.

The decree in question was in the following terms:—

"Claim for the recovery of Rs. 5,679-11-0 due under the bond A executed to the plaintiff by the first and second defendants and Amirthanatham Pillai, the deceased father of the third, fourth and fifth defendants, hypothecating the immovable property specified in the bond on the 25th September 1877, the principal being repayable on the 25th September 1881 and the interest once a year.

"This cause coming on on the 15th November 1882 for final disposal before M.R.Ry. R. Vasudeva Rau Avergal, Subordinate Judge, in the presence of Mr. G. T. Oliver, vakil on the part of the plaintiff, and of A. Kannoosami Pillai, vakil on the part of the defendants, this Court doth order and decree that plaintiff do get from first and second defendants the sum sued for with costs and further interest at 6 per cent. per annum until payment on the principal from the date of the suit and on the costs from the present date, the property hypothecated in the bond A being also held liable for the whole amount thus awarded, and the Court doth further order and decree that the defendants do bear their costs."

The decree-holder objected that the boundaries of the land in question were not sufficiently specified either in the decree or in the mortgage, and that the decree, not having been made in accordance with the Transfer of Property Act, gave the decree-holder no right to have the property sold and could not be executed.

The Subordinate Judge dismissed the application and permitted execution to proceed.

The petitioner preferred this appeal.

The memorandum of appeal comprised, among others, the following paragraphs:—

"The suit having been brought after the coming into operation of the Transfer of Property Act, the decree herein in the form in which it has been passed cannot be executed by attachment and sale of the mortgaged properties.

"Under section 99 of the Transfer of Property Act the property cannot be sold, unless the suit had been brought under section 67 and the decree be passed under section 88 of the Act."

Tiagaraja Ayyar for appellant.

Respondent did not appear.

JUDGMENT.—The decree was not so formal as it should have been under the Transfer of Property Act. This is no doubt due to the fact that that Act had only just come into force at the time when the decree was passed. The decree is in reality a decree for sale. There is nothing to show that the property to be sold is not liable to the debt.

The appeal is dismissed under section 551, Code of Civil Procedure.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

NANJUNDA RAU.*

Penal Code, s. 211—False charge of dacoity made to a police station-house officer.

A false charge of dacoity was made to a Police Station-house officer, who, after some investigation, referred it to the magistrate as false, and the magistrate

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ordered the charge to be dismissed without taking any action against the parties implicated. The person who preferred the charge was now tried under Penal Code, s. 211, and was found to have acted with the intent and the knowledge therein mentioned, and he was convicted and sentenced to four years' rigorous imprisonment:

Held, that the prisoner had instituted criminal proceedings within the meaning of that section, and that the conviction and sentence were in accordance with law.

APPEAL against the conviction and sentence of T. M. Horsfall, Acting Sessions Judge of Bellary, in session case No. 57 of 1896.

The accused was convicted of having made a false charge against the complainant with intent to injure him and was sentenced to four years' rigorous imprisonment under section 211, Indian Penal Code. The charge in question was one of dacoity, and it was made to the Police Station-house officer of Bellary. That officer being of opinion, after some investigation, that the charge was unsupported, referred it as false, and the case was struck off the police file. The Sessions Judge and assessors were of opinion that the charge was substantiated and the prisoner was sentenced as above.

The prisoner preferred this appeal.

Mr. Smith and Venkatarama Sarma for appellant.

The Public Prosecutor (Mr. Powell) for the Crown.

JUDGMENT.—The appellant was convicted of having made to the police a false charge of dacoity against certain persons and was sentenced under section 211, Indian Penal Code, to suffer four years' rigorous imprisonment.

In appeal it is urged that, though the charge to the police may have been false, yet, as they referred the charge to the magistrate as false, and as the magistrate ordered the charge to be dismissed as false without taking any action against the accused, there was no 'institution of criminal proceedings' within the meaning of section 211, and the offence was therefore only punishable with a maximum of two years' imprisonment under the first part of the section, instead of with seven years' imprisonment under the second part of the section.

In support of this view the rulings of the Allahabad High Court in *Empress of India v. Pitam Rai*(1) and *Queen-Empress v. Bisheshar*(2) and *Queen-Empress v. Karim Buksh*(3) were relied

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upon. These cases no doubt support the construction of the section for which the appellant contends, but that construction was considered and dissented from by a Full Bench of five Judges of the Calcutta High Court in the case of *Karim Buksh v. Queen-Empress*(1), when they followed a long series of earlier rulings of the same Court. We think that the view taken in the latter case is correct. We are unable to find any warrant for holding that the words 'the institution of criminal proceedings' should be limited to the bringing of a charge before the magistrate, or to action by the magistrate or police against the person charged. It seems to us that when, as in this case, a charge of a cognizable offence is made to the police against a specified person, criminal proceedings within the meaning of the section have been instituted just as much as if the charge had been made before the magistrate. It is argued that, when a charge is preferred to the police, it merely sets them on enquiry, and they may find the charge to be false and refuse to proceed with the charge without the accused being even aware that any complaint has been made against him; but precisely the same may be the case when a complaint is made to a magistrate. He is not bound to take any action against the person accused. He may refer the charge to the police for enquiry, and on receipt of their report may refuse to proceed or take any action against the accused person. In such a case the accused might be unaware that any complaint had ever been made, yet it could hardly be contended that the complaint to the magistrate did not amount to 'the institution of criminal proceedings' within the meaning of the section.

We are of opinion, as already stated, that the true construction of the section is that laid down by the Calcutta High Court in the case we have referred to. Adopting that construction we find that the offence of the appellant in the case before us falls under the latter part of section 211, Indian Penal Code, and the sentence is not illegal.

Looking to the gravity of the offence charged and the malice of the complainant, we certainly do not consider the sentence excessive. We confirm it and dismiss this appeal.

(1) I.L.R., 17 Cal., 574.

(1) I.L.R., 5 All., 215.

(2) I.L.R., 16 All., 124.

(3) I.L.R., 14 Cal., 633.

APPELLATE CIVIL.

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

KUPPU NAYUDU (DEFENDANT), APPELLANT,

v.

VENKATAKRISHNA REDDI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, s. 43—Transfer of Property Act, s. 85—Ejectment suit by a mortgagor's vendee against the purchaser under a mortgage decree—Subsequent suit to redeem.

Certain land mortgaged to A was sold to B. A brought a suit on his mortgage without joining B as a party, obtained a decree for sale and became the purchaser under the decree. B then sued to eject him praying for a declaration that the sale was not binding on him. The suit having been dismissed, he now sued to redeem :

Held, that the suit was not barred under Civil Procedure Code, s. 43, and the plaintiff was entitled to redeem.

SECOND APPEAL against the decree of S. Russel, District Judge of Chingleput, in appeal suit No. 245 of 1894, affirming the decree of T. A. Krishnasami Ayyar, District Munsif of Chingleput, in original suit No. 114 of 1893.

The plaintiff sued to redeem certain land which had been conveyed to him on 12th August 1884, and placed in his possession. In original suit No. 859 of 1884 the present defendant, being mortgagee under an instrument, executed by the father of plaintiff's vendor sued to enforce his mortgage, obtained a decree for sale without joining the present plaintiff as a party, and purchased the land at the Court sale. In original suit No. 259 of 1888 the plaintiff sued to eject the defendant; but the suit was dismissed on the ground that his remedy, if any, was by a suit for redemption. It was now contended, *inter alia*, that the plaintiff was precluded from maintaining this suit under Civil Procedure Code, section 43. This objection was overruled by the District Munsif who passed a decree as prayed, which was confirmed by the District Judge on appeal.

Defendant preferred this second appeal.

Pattabhirama Ayyar and Narayana Ayyangar for appellant.
Mr. Krishnan for respondent.

* Second Appeal No. 1777 of 1895.

JUDGMENT.—The first ground of appeal urged is that the suit is not sustainable with regard to section 43, Civil Procedure Code, and we are referred to the decision of this Court in *Muthunarayana Reddi v. Rayalu Reddi* (1). The case referred to is not in point, for there the plaintiff in his first suit ignored the existence of the defendant's mortgage and falsely alleging that the defendant was a trespasser sued to eject him as such. In the present case, the plaintiff in his earlier suit (original suit No. 259 of 1888) did not ignore the defendant's earlier mortgage. On the contrary he recited it and the sale under it, but he complained that the defendant had fraudulently failed to make him a party to the suit (original suit No. 859 of 1884) on the mortgage and he, therefore, sought for a declaration that the auction-sale was not binding on him and that the land should be restored to him (plaintiff). The final decree in that suit was that plaintiff could not get possession without redeeming the defendant's mortgage, and the Court expressly refused to decide the other issues. The plaintiff was not then suing to redeem, nor was he bound to do so. He merely wished to get rid of the effect which the defendant's purchase at the auction might have on his rights. He was clearly entitled to do this without, at the same time, suing to redeem, inasmuch as the defendant had omitted to make him a party to the suit on the mortgage, as he was bound to do under section 85, Transfer of Property Act. There is thus no foundation for the plea that plaintiff's suit is *res judicata*, or is barred under section 43, Civil Procedure Code.

The plaintiff not having been made a party to original suit No. 859 of 1884 is not bound by the sale thereunder. It was the defendant's duty to have made him a party so as to give him an opportunity of exercising his right (as purchaser of the equity of redemption) to redeem the defendant's mortgage. The defendant having failed in that duty cannot now take advantage of his own omission so as to shut out the plaintiff's right to redeem. Even if the defendant was ignorant of plaintiff's purchase, which may well be doubted in the present case, that will not affect the plaintiff's inherent right to redeem nor will the fact that plaintiff became aware of the defendant's suit (original suit No. 859 of

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(1) Second Appeal No. 181 of 1895 unreported.

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1884) before the judgment therein was pronounced. The decree of the Lower Appellate Court was, therefore, right. We confirm it and dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

KRISHNAPPA CHETTI (PLAINTIFF),

v.

ADIMULA MUDALI (DEFENDANT).*

Contract Act—Act IX of 1872, s. 23—Unlawful agreement—Promissory note given in fraud of Insolvency law.

In a suit on a promissory note it appeared that it had been given by the defendant to the plaintiff in consideration of his withdrawing his threatened opposition to the discharge of an insolvent and consenting to an arrangement among the general body of creditors, who were not though the insolvent was aware of this transaction whereby the plaintiff was to obtain a special advantage:

Held, that the contract was unlawful and the suit could not be maintained.

CASE referred for the opinion of the High Court under Civil Procedure Code, section 617, and Presidency Small Cause Court Act, section 69.

The case was stated as follows:—

“The plaintiff sues to recover from the defendant Rs. 763 due on a promissory note, payable on demand, executed by the latter on the 4th November 1893.

“The defendant’s pleas are (i) no consideration; (ii) consideration, if any, is unlawful; (iii) not liable for interest.

“The facts of this case are not disputed; they are spoken to by the plaintiff, who was examined as the defendant’s witness, and are as follows:—

“One Kondalswamy Naidu, who failed in business and was indebted to several creditors, applied to the Insolvent Court for the benefit of the Act. At the same time efforts were made to enter into an arrangement with the creditors to pay them 4 annas in the rupee, and defendant and another were appointed trustees to carry out the arrangement. Most of the creditors

* Referred Case No. 15 of 1896.

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“consented to this arrangement, but plaintiff, a creditor to whom a sum of Rs. 1,400 was due, would not consent, and threatened to oppose the discharge of Kondalswamy by the Insolvent Court. He, however, agreed with Kondalswamy that if he would pay him a sum of Rs. 700, being 8 annas in the rupee, separately, he would sign the agreement along with others to take 4 annas in the rupee, and would not oppose the discharge of Kondalswamy by the Insolvent Court. Accordingly Kondalswamy got defendant to execute the promissory note A on which this suit is now brought; the plaintiff at the same time executed a counter-agreement (exhibit II), and it was only after this that he executed the agreement (exhibit I), by which all the creditors agreed to take 4 annas in the rupee. This arrangement between plaintiff Kondalswamy and defendant for the payment of Rs. 700 by Kondalswamy through the defendant to the plaintiff was a secret one, and made without the knowledge of the other creditors, well knowing that, if they knew of it, they would not enter into the composition deed. All the creditors except the plaintiff were paid 4 annas in the rupee; and the plaintiff was offered a similar sum of 4 annas in the rupee if he would give up the promissory note; but he would not give it up and has not been paid as per agreement I.

“The point for determination is whether, upon these facts, the plaintiff is entitled to a decree in the suit. I am of opinion that he is not. The consideration for the promissory note is unlawful within the meaning of section 23 of the Indian Contract Act, as being against public policy and in fraud of creditors; and therefore the promissory note is void. It is only necessary in support of my view to refer to the case *Agar Chand v. Viraraghavalu Chetti*(1); see also *McKewan v. Sanderson*(2). But my attention has been drawn to a recent decision of the Madras High Court in *Anthul Lathief Syed Onissa Begum Saheba v. Choonoolaji Soucar*(3): and it is argued that the promissory note being executed by a third party, and not by the debtor, it is not invalid. This question was not necessary to be decided in that suit, as upon the other finding that the promissory note was executed in the settlement of her and her husband’s

(1) 3 M.H.C.B., 172.

(2) L.R., 20 Eq., 65.

(3) O.S. Appeal No. 16 of 1895 unreported.

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"accounts, the judgment must be against the defendant. In *ex parte Milner in re Milner*(1), it was decided that there was no difference between an agreement executed by the debtor himself or by a third party.

"The question I refer for the opinion of the High Court at the request of the plaintiff is, whether, upon the facts as found by me, the plaintiff is entitled to a decree on the promissory note, or whether it is void as being against public policy or in fraud of creditors or for any other reason; and subject to such opinion I reserve judgment."

Mr. K. Brown for plaintiff.

Krishnaswami Chetti for defendant.

JUDGMENT.—The circumstances under which the promissory note was given by the defendant are stated in the reference. The consideration was the withdrawal of threatened opposition to the discharge of the insolvent and the plaintiff's consent to the arrangement among the creditors.

By the promissory note the plaintiff secured for himself a larger payment than he was entitled to under the composition deed, and this was unknown to the other creditors.

It is contended on plaintiff's behalf that the circumstance that the note was given by a third party and not by the insolvent rendered the transaction an innocent one as far as the law of Insolvency is concerned.

In our opinion it makes no difference whether the note is given by the insolvent or by a stranger if it is given with the insolvent's knowledge and as a part of an arrangement for securing to one creditor an advantage over the others. The case is on all fours with *Knight v. Hunt*(2). The case cited (*Anuthal Lather Syed Omisa Begum Saheba v. Choonoolaji Soocur*(3)) is distinguishable, for there it was expressly found that there was no fraud.

Here the other creditors being ignorant of the arrangement must be taken to have been deceived.

Tiruvengadasami & Subbaya, Attorneys for plaintiff.

(1) L.R., 15 Q.B.D., 605.

(2) 5 Bing., 432.

(3) O.B. Appeal No. 16 of 1895 unreported.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

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1896.
October 1.

KARUPPA UDAYAN AND OTHERS.*

Criminal Procedure Code—Act X of 1892, s. 419—Presentation of appeal petition by the clerk of the appellants' pleader.

Presentation of an appeal petition by the clerk of the appellants' pleader is equivalent to a presentation by the pleader himself when it is signed by him and he is duly authorised.

PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the proceedings of T. Gopalan Nayar, Deputy Magistrate of Salem, in criminal appeal No. 33 of 1896.

The petitioners were convicted by Second-class Magistrate of the offence of voluntarily causing hurt. The petition of appeal against this conviction was presented by the clerk of the appellants' pleader who duly signed it, to the Court of the Deputy Magistrate. The Deputy Magistrate rejected the appeal as not having been properly presented. A similar appeal subsequently presented by the pleader in person was dismissed as being barred by limitation. The accused preferred this petition.

Ragarendra Rau for the petitioners.

The Acting Public Prosecutor (Mr. N. Subramanyam) for the Crown.

JUDGMENT.—The Deputy Magistrate's reason for not accepting the appeal at first made by the four petitioners was that it was not presented by themselves or their pleader, but only by their pleader's clerk. Such presentation has been held by this Court to be equivalent to a presentation by the pleader himself, when the petition of appeal is signed by the pleader and he is duly authorised as was the case here (vide *Queen-Empress v. Gudiyati Samuel*(1), *Queen-Empress v. Virappan Chetti*(2), and *Queen-Empress v. Chinna Basura Chetti*(3)).

* Criminal Revision Case No. 305 of 1895.

(1) Criminal Revision Case No. 153 of 1894 unreported.

(2) Criminal Revision Case No. 50 of 1895 unreported.

(3) Criminal Revision Case No. 652 of 1895 unreported.

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We must therefore direct the original appeal to be replaced on the file and heard and disposed of according to law. The order on the second appeal filed by the petitioners is set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Davies.

1896.
November 5.

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v.

KANDAPPA GOUNDAN.*

Criminal Procedure Code—Act X of 1882, s. 88—Attachment of property as of an absconding person—Claim to property attached—Procedure.

When a claim is made to property attached under section 88 of the Code of Criminal Procedure, the Magistrate should stay the sale to give the claimant time to establish his right. If the Magistrate errs, the remedy of the aggrieved party is by civil suit and not by criminal revision petition.

CASE referred for the orders of the High Court by W. J. Tate, Sessions Judge of Salem, being criminal revision case No. 35 of 1896 on the file of that Court.

The facts of the case were as follows:—

The brother of the petitioner in the District Court was accused of an offence and suspected of absconding to avoid a warrant, and the Magistrate ordered the attachment of his property under Criminal Procedure Code, section 88. Cattle, grain and other property having been attached, the petitioner preferred a petition to the Magistrate stating that they belonged to him. The Magistrate dismissed the petition without examining the witnesses cited in support of his allegation, and this was the order complained against. The District Judge was of opinion that the Magistrate erred in not giving the petitioner an opportunity of proving his case. He accordingly referred the case to the High Court. In his letter of reference he cited *Queen v. Ohumroo Roy*(1), *In re Chunder Bhon Singh*(2), *Queen-Empress v. Sheodihal Rai*(3), and *Queen-Empress v. Umayan*(4).

* Criminal Revision Case No. 478 of 1896.

(1) 7 W.R. Cr. 35. (2) 17 W.R. Cr., 10. (3) I.L.R., 6 All., 487.
(4) Criminal Revision Case No. 560 of 1893 unreported.

Parties were not represented.

JUDGMENT. — We do not think this is a case for interference.

In the first place the Magistrate, whose action is impugned, gives in our opinion good reasons for his order. But secondly we are deposed to agree with the view taken in other Courts of section 88, Criminal Procedure Code. What may be said with regard to that section would equally apply to section 386. In both cases we think, if the Magistrate errs, the remedy of the aggrieved party is by civil suit. All that we can say is that, in cases of dispute, the Magistrate should stay the sale of the property seized to give the claimant time to establish his right.

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APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

CHINTAMALLAYYA (PLAINTIFF), APPELLANT,

v.

THADI GANGIREDDI (DEFENDANT), RESPONDENT.*

1896.
December 2.

Civil Procedure Code—Act XIV of 1882, ss. 521, 522, 526—Application to file award—Objection that submission was revoked before award made—Jurisdiction of court to determine objection—Subsequent suit to annul award.

The plaintiff's case was that arbitrators, to whom differences between him and the defendant had been referred, had out of enmity to him and at the defendant's instance, made a fraudulent award on 17th February after he had revoked his submission and had antedated it as on 1st February; that the defendant had instituted proceedings under Civil Procedure Code, chapter xxxvii, and his objections to the above effect having been overruled, a decree was passed in terms of the award. He now sued to have it declared that neither the decree nor the award was binding:

Held, that the Court had jurisdiction to determine the genuineness or validity of the award in the proceedings under chapter xxxvii, and that the present suit was not maintainable.

APPEAL against the decree of K. Krishna Rau, Subordinate Judge of Cocanada, in original suit No. 40 of 1894.

The plaintiff alleged that he and the defendant had carried on business in partnership till 29th July 1892, when the partnership

* Appeal No. 199 of 1895.

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was dissolved, and that certain differences between them were referred to arbitration; "that one of the arbitrators afterwards "misappropriated Rs. 1,800 which had been deposited with him by "the plaintiff as part of the assets of the partnership firm, and "entertaining feelings of animosity, induced the other arbitrator to "join with him at the defendant's instance in making an incorrect "and fraudulent award against the plaintiff after 17th February "1893, on which date the plaintiff had sent the arbitrators a "notice of revocation, but they antedated the award making it "appear that it was made on the 1st February 1893." The defendant having applied under Civil Procedure Code, chapter XXXVII, to have this award filed in Court, the above objections were advanced by the present plaintiff and were overruled and a decree was passed in the terms of the award. The plaintiff now sued "for declarations setting aside the decree and cancelling the "award and for such further relief as he may be found entitled to."

The Subordinate Judge held that the Court had power to overrule the present plaintiff's objections in the proceedings under chapter XXXVII and that the present suit was not maintainable. He referred to *Micharaya Guruvu v. Sadasiva Parama Guruvu*(1), *Hurronath Chowdhry v. Nistarini Chowdrani*(2), *Surjan Raot v. Bhikari Raot*(3), *Dandekar v. Dandekars*(4), *Samal Nathu v. Jaishankar Dalsukram*(5) and *Amrit Ram v. Dasrat Ram*(6).

The plaintiff preferred this appeal.
Krishnasami Ayyar for appellant.

Ramachandra Rau Saheb and *Subba Rau* for respondent.

JUDGMENT.—The argument is that the Subordinate Judge had no jurisdiction to inquire into the genuineness or validity of the award apart from such grounds as would fall under sections 520 and 521 of the Code of Civil Procedure, his authority being limited under section 526 to the matters mentioned in those two sections.

It is true that different views of this matter have been taken by the different High Courts. In our opinion the correct view is that held by the Full Bench of the Allahabad High Court in *Amrit Ram v. Dasrat Ram*(6). It is also in accordance with the opinion expressed by this Court so far back as 1881 in *Micharaya Guruvu v. Sadasiva Parama Guruvu*(1) which we believe has

(1) I.L.R., 4 Mad., 319.

(4) I.L.R., 6 Bom., 663.

(2) I.L.R., 10 Calc., 74.

(5) I.L.R., 9 Bom., 254.

(3) I.L.R., 21 Calc., 213.

(6) I.L.R., 17 All., 21.

always been acted on. The weight due to that opinion and practice is not lessened by the fact that the decision in that case, so far as it relates to the right of appeal, has since been overruled in *Husananna v. Linganna*(1). No doubt, Parker, J., in that case, expressed himself as inclined to take a different view, but we, however, are unable to do so.

The objection that the Subordinate Judge had no jurisdiction therefore fails and his decision in the previous case must be held to be binding in the present suit.

The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

SUBBARAYA PILLAI (PLAINTIFF) APPELLANT,

v.

VAITHILINGAM (DEFENDANT), RESPONDENT.*

*Trustees of composition deed—Managing member of a firm appointed as trustee—
Right of suit after dissolution of the firm.*

Certain traders having been adjudicated bankrupts in the Courts of Mauritius, the creditors agreed to a composition deed, which was sanctioned by the Court, whereby the present plaintiff therein described as the managing member of the firm of S. and Company was appointed trustee and his firm guaranteed the payment of a dividend of 50 per cent. The firm was subsequently dissolved and its assets were assigned to a third party. The plaintiff now sued to recover costs decreed to him in his capacity as trustee in various suits in Mauritius, and it was objected that he was precluded from suing by the dissolution of his firm and the assignment away of its assets:

Held, that the plaintiff was entitled to maintain the suit.

SECOND APPEAL against the decree of E. J. Sewell, Acting District Judge of Tanjore, in appeal suit No. 300 of 1894, confirming the decree of V. Srinivasacharu, Subordinate Judge of Kumbakonam, in original suit No. 21 of 1893.

The plaintiff sued to recover the costs incurred in suits brought by the defendant against him in the Courts in Mauritius and

(1) I.L.R., 18 Mad., 423.

* Second Appeal No. 720 of 1895.

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awarded to him by the final decrees of those courts. It appeared that the plaintiff had been the managing member of a firm now dissolved which carried on business as V. Subbarayan and Company and were creditors of Coo. Vaithilingam and his firm Coo. Vaithilingam and Company carrying on business in Mauritius. In 1887 the debtor and his partners were adjudicated bankrupts and Mr. G. Newton, the Accountant in Bankruptcy, was appointed receiver and manager of their respective estates, effects and properties. Exhibit C filed in this suit was a report of proceedings had in the Bankruptcy Court of Mauritius in this matter, and it appeared that at a meeting of creditors held in that court under the chairmanship of the Judge in bankruptcy, the following resolutions were passed:—

“First, that a composition of fifty cents in the rupees be accepted in full satisfaction of the debts, principal and costs, due to the creditors of the bankrupts, exclusive of all privileged costs and preferential claims which are to be paid in full and on condition that the two orders of adjudication in this matter, respectively, dated the 25th April last and 23rd May also last, be annulled by the court; second, that such composition be payable in eight equal monthly instalments to be paid one month after the date of the annulling by the court of the above orders of adjudication, the privileged costs lawfully incurred to be paid cash on the annulment of the orders of adjudication; third, that the security of V. Subbarayan and Company of Port Louis, traders, be accepted for the payment of the above composition and that, in consideration of such security all the joint and separate estate, effects and property both real and personal of the firm Coo. Vaithilingam and Company and of the individual members thereof, situate in Mauritius and in India be assigned to the said V. Subbarayan and Company, and fourth, that Naga Pillai Subbarayan, the managing member of the said firm, V. Subbarayan and Company, be appointed trustee to recover and realise all the estate, effects and property assigned as aforesaid and to carry out the above arrangement.”

A deed was drawn up to give effect to these resolutions and having been approved by all parties and duly executed by the receiver and manager, the insolvents and Subbarayan and Company, and also by the Judge in bankruptcy who sanctioned it, an order was made on the 22nd July by which it was, *inter alia*, ordered as

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follows:—“It is further ordered that the orders of adjudication of “bankruptcy in this matter, dated, respectively, the 25th day of “April and the 23rd day of May last, be and the same are hereby “annulled, and it is further ordered that all the estate and property “of the bankrupts both in Mauritius and in India, and all the “books, papers and documents of the bankrupts be and the same “are hereby vested in Naga Pillai Subbarayan of Port Louis, “trader, managing member of the firm V. Subbarayan and Com- “pany, who is hereby appointed trustee to carry out the said com- “position with full power to recover and realise all the said estate “and property.”

By the composition deed V. Subbarayan and Company to whom the official receiver and manager and the bankrupts assigned all the joint and separate estates, effects and properties, both real and personal of the said bankrupts, situate in Mauritius and in India, bound themselves jointly and in solido with the bankrupts to the payment of 50 per cent. and of the privileged costs and preferential claims as therein stated.

The firm of V. Subbarayan and Company, on the termination of the period of their partnership, entered into an agreement with Rayappan Appon, which was reduced to writing and filed in this suit as exhibit B, in July 1891, whereby the firm conveyed and assigned to Rayappan Appon “all that the firm of V. Subbarayan “and Company could touch and receive at whatever title from “Coo. Vaithilingam and Company or from Coo. Vaithilingam “personally and principally all sums whatever in general that “could fall due to the said firm in connection with the law suits “which are actually pending before the tribunals of India and “which are instituted against Coo. Vaithilingam and Company “and against Coo. Vaithilingam personally by V. Subbarayan “acting for and in behalf of the firm V. Subbarayan and Com- “pany, because V. Subbarayan, as P. Kandasami in his capacity, “declares it in name only as of Coo. Vaithilingam and Company “and because all the sums paid by him in that capacity are coming “out of the funds belonging to the said firm of V. Subbarayan and “Company.”

In December of the same year, and on 29th March 1892, two other deeds were entered into between Naga Pillai Subbarayan as trustee of the above composition deed and Rayappan Appon of

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which the second containing a recital of the first was filed as exhibit A.

This document was in the following terms:—

“Mr. Jean Baptist Rayappan Appon was only the guaranteed cessionary of the rights of the society, V. Subbarayan and Company *versus* Mr. Coo. Vaithilingam and Company and Coo. Vaithilingam in person; and in order to facilitate the recovery of the above-mentioned rights by the trustee of the arrangement, Coo. Vaithilingam and Company and Coo. Vaithilingam in person, the above-named Jn. Appon made over again to Mr. Naga Pillai Subbarayan, trustee of the above-mentioned arrangement, the rights yielded to himself, by virtue of a private deed, registered on the seventh of last December.

“And now, the undersigned agree to annul purely and plainly the above-mentioned private and registered deed of the seventh of last December.

“The parties do will and mean that things be put again in the same state as before the signing of the mentioned private deed as if this latter one were not made.

“Mr. Naga Pillai Subbarayan, in his capacity as trustee, promises and engages himself to do all diligence in India, in order to realise and recover the rights given over to V. Subbarayan and Company by Coo. Vaithilingam and Company and Coo. Vaithilingam in person; and he engages himself to make every settlement with the above-mentioned Jn. Appon in order to cover him and the other securities of V. Subbarayan and Company with all the balances that could be due to him for all the sums guaranteed and paid by him to the creditors of V. Subbarayan and Company.”

Various suits were brought in the Mauritius Court by the present defendant against the present plaintiff in his capacity as trustee and decrees for costs were given against the former. These decrees were unsatisfied and the present suit was brought to recover the amounts payable under them. It was objected by the defendant that the plaintiff had no right to sue by reason of the dissolution of the firm of Subbarayan and Company, and the assignment contained in exhibit B. This objection prevailed with the Subordinate Judge, who passed a decree dismissing the suit and his decree was confirmed by the District Court.

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The plaintiff preferred this second appeal.

Krishnasami Ayyar and Srinivasa Ayyangar for appellant.

Sundara Ayyar and Ramachandra Ayyar for respondent.

JUDGMENT.—The facts in this case have set out with sufficient accuracy by the Lower Appellate Court, but we are of opinion that some of the documents have been misconstrued, and the rights of the plaintiff have been misunderstood. We are clearly of opinion that the plaintiff is entitled to maintain this suit as trustee appointed by the Mauritius Court under its order of the 22nd July 1887. The District Judge has misunderstood the intention of the composition deed, exhibit C, and has not given due weight to the language and intention of the above order of the court, made with a view to effectually carry out the object of the compensation deed. We do not doubt but that Naga Pillai Subbarayan (the plaintiff) was nominated in exhibit C, as trustee in consequence of his being the managing member of the firm of V. Subbarayan and Company, who had undertaken to pay the creditors of the insolvents—Coo. Vaithilingam and Company—for whose benefit the estate of the insolvents was to be collected. But we find it difficult to understand what the courts below mean by holding that plaintiff was appointed a trustee in his capacity as manager of that firm.

If the intention was that the manager, for the time being, of that firm, should be *ex-officio*, trustee, it would have been easy to have said so; yet, if this is not the meaning, we are unable to attach any definite meaning to the expression. Exhibit C does not say that N. Subbarayan should be appointed in his capacity as managing member. It merely describes him as holding that position. The words are “that Naga Pillai Subbarayan, the managing member of the said firm, V. Subbarayan and Company, be appointed trustee,” &c.

That these words are merely descriptive appears even more clearly from the vesting order of the Court of Bankruptcy, dated 22nd July 1887. It runs: “It is further ordered that all the estate and property of the bankrupts both in Mauritius and in India . . . be, and the same are, hereby vested in Naga Pillai Subbarayan of Port Louis trader, managing member of the firm, V. Subbarayan and Company, who is hereby appointed “trustee” to carry out the said composition with full power to “recover and realise all the said estate and property.” The

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interposition of the plaintiff's address and of his description as a 'trader' between his name and the words 'managing member,' &c., seems to us to show clearly that the latter words are merely descriptive just as the word 'trader' undoubtedly is. It is, we think, this fundamental misconception that has led the courts below to misunderstand the plaintiff's position.

The arrangement evidenced by the above two documents is that V. Subbarayan and Company should pay the creditors of the bankrupts fifty per cent. of their debts, that, in consideration of this, the bankrupts assign their property for the benefit of V. Subbarayan and Company and the plaintiff is appointed by the court a trustee to collect the property of the bankrupts for the benefit of the firm of V. Subbarayan and Company and the property is 'vested' in him as such trustee. The Subordinate Judge thought that, as the plaintiff was suing for costs awarded against defendant after the date of the composition deed, the plaintiff as trustee could not sue for those costs, but the District Judge has pointed out that those suits were brought by the defendant against plaintiff for acts done by him as trustee and the costs were awarded to plaintiff as trustee. There is nothing to prevent the plaintiff from now suing as trustee to recover costs awarded to him in suits maintained by him as trustee, though those suits were maintained for the benefit of V. Subbarayan and Company and were financed by that firm. Plaintiff, no doubt, may be bound to account to the firm for such costs, but that cannot affect the plaintiff's right to recover them from the defendant in accordance with the decrees. If any of the costs were awarded, as the Subordinate Judge seems to think they were to the firm, the plaintiff alone could not sue for them, but we understand that this is not the case.

The District Judge has also, we think, misapprehended the effect of exhibit B. He rightly states that what may be called the legal estate of the bankrupts vested in the plaintiff, though their equitable estate vested in the firm of V. Subbarayan and Company, but when he adds that exhibit B assigns the whole estate both legal and equitable to Rayappan Appon and that the latter is, therefore, the only person entitled to maintain this suit, we think he misconstrues exhibit B. Exhibit B transfers to Appon all the interest which the firm of V. Subbarayan and Company had acquired in the estate of the bankrupts. It neither could nor

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did transfer anything more. Plaintiff, as a member of the firm, assented to and admitted that he was bound by that document, but it did not, and could not, assign either the rights or the duties of the plaintiff as trustee.

Even if the plaintiff desired to do so, he could not delegate his rights or duties as trustee, but there is nothing to show that he attempted to do so.

The only effect of the document (exhibit B) is that Rayappan Appon, instead of the firm of V. Subbarayan and Company, thereby became the beneficiary for whom the plaintiff is to collect the bankrupt's assets, and to whom he must account for the same, or for other moneys received by him as trustee. Exhibit A shows that Appon and the plaintiff both correctly understood their respective rights, and the duty of plaintiff as trustee.

The result, then, is, that the plaintiff as trustee can maintain this suit. We may observe that the position which we have assigned to plaintiff is in harmony with that which held in the case reported in *Subbaraya v. Vythilinga*(1), a case arising out of the same transactions and practically between the same parties.

We set aside the decrees of the courts below and direct that suit be restored to the file of the Subordinate Judge, and be disposed of according to law.

Plaintiff must have his costs in the Lower Appellate and in this court. The costs in the Subordinate Judge's Court will abide and follow the result.

APPELLATE CIVIL.

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

KONDAYYA CHETTI (PLAINTIFF), APPELLANT,

v.

NARASIMHULU CHETTI (DEFENDANT),

RESPONDENT.*

Contract Act—Act IX of 1872, s. 122—Agency to sell, coupled with interest—Discretion as to price left with agent—Power of principal to impose limits as to price:

The defendant consigned goods to a firm in London for sale, and in respect of each consignment he received an advance from the plaintiff who was the

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agent of the London firm, and signed a consignment note, which contained the following passage :—

"I hereby authorize you to sell the above goods at the best price obtainable without reference to me and I give you full discretion and power to act on my behalf to the best of your judgment in regard to such sale and in all matters connected with the management of this consignment. Should there be any shortfall after realization of the above consignment, I hereby authorize you to draw on me for the amount, and I engage to honour such draft and to pay it on presentation."

The plaintiff guaranteed the payment of the redrafts to the London firm on whose account he made the advances to the defendant. Shortfalls having occurred on certain consignments and the London redrafts having been dishonoured, the plaintiff paid them, and now sued to recover the amount from the defendant. It appeared that consignments had been sold at prices less than certain limits which have been fixed by the defendant subsequent to the receipt of the advances and the signature of the consignment notes :

Held, that the defendant had no right (regard being had to the terms of the consignment note and the course of dealing between the parties) so to impose limits of price, and that the plaintiff was entitled to recover.

APPEAL against the judgment of Mr. Justice Subramania Ayyar, in civil suit No. 120 of 1894, on the original side of the High Court.

The plaintiff sued to recover Rs. 4,765 under the circumstances stated in the judgment of Subramania Ayyar, J.

Mr. K. Brown for plaintiff.

Mr. R. F. Grant for defendant.

SUBRAMANIA AYYAR, J.—The plaintiff sues for Rs. 4,765 being the amount paid by him on the 13th July 1894 to Messrs. Robert Von Glehn & Co. of London on account of two Bills of Exchange, drawn by them on the defendant for the difference between the amount advanced by them on certain consignments of Salempores or blue cloths forwarded by the defendant through the plaintiff to Von Glehn & Co. for sale in London, and the price realized by the sale of the goods, which fell short of the advances; the plaintiff, in consequence of the defendant's refusal to honour the bills having had to pay the amount due under them as drawee in case of need, in accordance with a contract of guarantee he had entered into with Von Glehn & Co. to make good to them any deficiency that might arise in circumstances similar to those in the present instance.

The substantial defence is that Von Glehn & Co. allowed the goods to be sold for prices below those limited by the defendant

that if an account be taken with reference to the rates fixed by the defendant, Von Glehn & Co. would be found indebted to him, that Von Glehn & Co. were not entitled to claim the deficiency caused by their wrongful act and the plaintiff is therefore not entitled to the amount sued for.

The main questions raised and discussed at the trial were (i) whether assuming that the defendant did place limits as alleged, Von Glehn & Co. were entitled in law to sell under the limits without the assent of the defendant; (ii) whether the defendant did in fact place limits and Von Glehn & Co. did sell in disregard of such limits.

With reference to the question of law stated above, one contention urged on behalf of the plaintiff was that, in consequence of the advances admittedly received by the defendant from Von Glehn & Co., the consignments became a pledge in their hands entitling them to sell the goods, for the purpose of reimbursing themselves the amount advanced, irrespective of the wishes of the defendant. This proposition is quite unsustainable, for "the relation of principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee" (*Smart v. Sandars*(1)). The factor acquires only a lien which gives no right to sell the goods (*Donald v. Suckling*(2)).

Another contention urged on behalf of the plaintiff was that the relation between Von Glehn & Co. and the defendant was, in consequence of the advances, an agency coupled with interest which was irrevocable. Now in *Smart v. Sandars*(1) already cited it was laid down that a factor, to whom goods have been consigned generally for sale and who has subsequently made advances to his principal on the credit of the goods, has no right to sell them contrary to the orders of his principal on the latter neglecting on request to repay the advances, although such sale would be a sound exercise of discretion on his part; his authority to sell not becoming, by reason of the unpaid advances, irrevocable as an authority coupled with an interest. And in *De Comas v. Prost*(3) the Judicial Committee of the Privy Council followed *Smart v. Sandars*(1) and held that mere advances made by a factor whether at the time of his employment as such or

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(1) 3 C.B., 400, 401; S.C., 5 C.B., 895.

(2) L.R., 1 Q.B., 585.

(3) 3 M.P.C. (N.S.), 158.

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subsequently cannot have the effect of altering the revocable nature of an authority to sell unless the advances are accompanied by an agreement that the authority shall not be revocable.

The learned Counsel for the plaintiff drew my attention to *Parker v. Brancker*(1) where the Supreme Judicial Court of Massachusetts held that a Commission merchant, having received goods to sell at a certain limited price and made advances upon them, had a right to reimburse himself by selling such goods at the fair market price, though below the limit, if the consignor had refused on application and after a reasonable time to repay the advances. Substantially the same view was taken in *Brown v. McGran*(2) and in *Field v. Farrington*(3) and in section 371 of Story on Agency the law is stated in accordance with that view. But *Brown v. McGran*(2) was brought to the notice of the Court in *Smart v. Sandars*(4), and since the judgments contain no reference to that case, I think it must be taken that the American rule did not commend itself to the Court of Common Pleas whose decision, having been adopted by the Judicial Committee, should be followed by the Courts in this country. Even if it be contended that *De Comas v. Prost*(5) was a Colonial case, it will be seen from the observations in *Murtunjoy Chuckerbutty v. Cockrane*(6) the Judicial Committee held that in the absence of any usage or custom qualifying the general mercantile law of England that law applied to India also.

A third contention was that if the law before the Indian Contract Act was as stated above, that enactment has changed the law in conformity with the American rule. In support of this contention the learned Counsel relied on illustration (b) to section 202. But the case put in that illustration seems to be an ordinary instance of a power coupled with interest coming within the well established rule stated by Wilde, C. J., in *Smart v. Sandars*(7) thus: "Where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority such an authority is irrevocable." For, the language of the illustration in question shows distinctly that the power to sell was given

(1) 22 Pickering, 40.

(3) 10 Wallace, 141.

(5) 3 M.P.C. (N.S.), 158.

(7) 5 C.B., 917.

(2) 14 Peters, 479.

(4) 3 C.B., 400, 401; S.C., 5 C.B., 895.

(6) 10 M.I.A., 229.

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expressly for the purpose of enabling the consignee of the goods to repay himself the advances made, see observations of Sargent, C. J., in *Jafferbhoy Ludhabhoy Chattoo v. Charlesworth*(1). The result of the authorities (to borrow the language of the Chief Justice in the case just cited) is "Where the factor for sale who has made advances claims the right to sell *invito domino*, the question is whether there was an agreement between the parties express or to be inferred from the general course of business or from the circumstances attending the particular consignment that the factor should, under any and what circumstances, have the power to sell against the will of the owner of the goods, the onus of proving which lies on the factor who has made the advances.

Let us now see whether any agreement express or implied can be made out from the facts of this case. The plaintiff's counsel relied on paragraph two of the consignment letters (exhibits B to N) and contended that taking them along with the advances, it should be held that the defendant created expressly an agency coupled with interest. This contention is unsustainable; for although the paragraph in question authorizes Von Glehn & Co. to sell the goods at the best price obtainable without reference to the defendant, and gives them full discretionary power to act on his behalf to the best of their judgment in regard to such sale and in all matters connected with the management of the consignments, it does not say that the defendant agreed that the power so conferred will not be altered or modified. In truth the contention is only another way of asking me to hold that mere advances made by a factor at the time of his employment has the effect of altering the revocable nature of the authority to sell, which, the Privy Council ruled, they had not. It is thus clear there was in this case no express contract not to revoke. Nor are there any circumstances from which such a contract can be implied. I must therefore hold that the plaintiff has failed to make out that Von Glehn & Co. were entitled to sell irrespective of the limits, if any imposed by the defendant.

The next question is whether the defendant did place limits as alleged by him and whether the goods were sold in disregard of such limits. The defendant's evidence on this point is supported not only by the admissions made by the plaintiff in the course of

(1) I.L.R., 17 Bom., 543.

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his examination but also by the correspondence produced on both sides.

[The learned Judge then proceeded to discuss the evidence on this point, and in the result dismissed the suit with costs.]

The plaintiff preferred this appeal.

Mr. K. Brown, for appellant, contended, firstly, that regard being had to the nature of the contract between the parties, the factor had a right to sell regardless of the limits imposed on the defendant, under the rule deducible from *Smart v. Sanders*(1) and other English authorities relating to the subject, and, secondly, that, even if it were not so, the case was governed by the Contract Act, which in section 202 laid down without qualification the rule which Wilde, C. J., in the case above cited (see p. 915) explained to be subject to various qualifications in England. *Bank of England v. Vagliano*(2), *Damodara v. Secretary of State*(3).

Mr. R. F. Grant, for respondent, supported the judgment on the grounds stated therein.

JUDGMENT.—Plaintiff and defendant are merchants trading in Madras. The defendant used to consign goods to Messrs. Von Glehn and Co. of London for sale. The consignments were made through the plaintiff. As each consignment was shipped, the defendant drew on Von Glehn and Co. for the value in favour of the plaintiff, who negotiated the drafts with a Bank, and paid the proceeds to the defendant. The course of business was to have the goods valued and sold in London by Von Glehn and Co., who repaid themselves out of the proceeds, and, in case of a shortfall, drew on defendant for the amount. If defendant failed to pay the redraft plaintiff was bound to do so. He, in fact, guaranteed Von Glehn and Co. On certain transactions of the above character which took place in 1893-94, there was a shortfall amounting in all to Rs. 4,765. Von Glehn and Co. drew on defendant for the amount, but he refused to honour the drafts, and the plaintiff then paid them. The plaintiff's present suit was to recover the sum so paid.

The substantial defence was that Von Glehn and Co. sold the goods under the limits imposed by the defendant, and that the latter was, therefore, not bound to pay the shortfall.

(1) 3 C.B., 400, 401; S.C., 5 C.B., 895.

(2) [1891] A.C., 144.

(3) I.L.R., 18, Mad., 91.

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The learned Judge who tried the case found for the defendant on the above issue and dismissed the suit. Plaintiff appeals on the ground, *inter alia*, that under the terms of the contract with defendant, and in all the circumstances of the case Von Glehn and Co. had power to make the sales, notwithstanding the limits imposed by the defendant. The learned Judge has referred at some length to the English authorities which deal with the right of a factor who has made advances on goods consigned to him for sale to sell them *invito domino*; and we are not disposed to dissent from his conclusions as to the general result of those cases. We are, however, of opinion that those cases do not decide the exact question which arises in the present case, nor do we think that the present case can be decided by a reference to the English authorities alone. The Indian Contract Act (IX of 1872) is the law with reference to which the rights of the parties in the present case must be decided. We are not prepared to say that the law on the matter in issue, as laid down in the Indian Contract Act, differs from the law which prevails in England, but if it does differ we are bound to decide in accordance with the Indian Act. This proposition is, indeed, self-evident, and the principle has recently been strongly affirmed by Lord Herschell in *Bank of England v. Vagliano*(1) in these words:—"I think the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specially dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was." He then refers to circumstances in which a reference to prior authorities is legitimate and proper, as, for

(1) [1891] A.C., 144.

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instance, where the words of the statute are of doubtful import, and adds "What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

It is to be observed that no evidence of the general custom of merchants in Madras in reference to the matter in issue has been given, so that we are left to decide it by applying the provisions of the Indian Contract Act to the terms of the contract entered into between the parties and the general course of their business.

Section 202 of the Contract Act runs as follows:—"Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest"; and illustration (b) shows how the rule may be applied in a concrete case, as follows:—A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death."

The terms of the contract between the parties, so far as those terms are express, are contained in the consignment notes, which are all worded in the same way. The following is one of them:—

"Madras, 10th October 1893.

TO MESSRS. ROBERT VON GLEHN AND SONS,
LONDON.

DEAR SIR,

I have the pleasure to advise consignment to your care for sale on my account through Mr. A. Kondayya Chetti.

V. N. $\frac{1}{2}$ = 2 B 1 Blue Salempores.

" 29/35 = 7 B/

" 1/5 = C 1 Bees wax.

per C/Macdonald against which I have valued on you at three months' sight for £205 and I beg your acceptance of my drafts.

I hereby authorize you to sell the above goods at the best price obtainable without reference to me and I give you full discretionary power to act on my behalf to the best of your judgment in regard to such sale, and in all matters connected with the management of this consignment.

Should there be any shortfall, after realization of the above consignment, I hereby authorize you to draw on me for the amount and I engage to honour such draft and to pay it on "presentation, without disputing the sales or the accuracy of "account sale and account current, rendered by you.

"I further hereby declare that this letter has been read and "explained to me and I fully understand its meaning.

I remain, Dear Sirs,

Yours faithfully,

V. NARASIMMULU CHETTI."

It seems to us that the reasonable interpretation of this contract is that the consignee shall have authority to sell the goods at his discretion, and repay himself the advance out of the proceeds, drawing on the consignor in the event of a shortfall. The course of business between the parties shows that Von Glehn and Co. were intended to recoup themselves out of the sale-proceeds and to draw on the defendant for any shortfall.

Illustration (b) seems to us to be in point. The learned Judge in one passage, following a remark of Sir C. Sargent, C.J., in *Jafferbhoy Ludhabhoy Chattoo v. Charlesworth*(1), denies the applicability of the case in illustration (b) to the present case on the ground that the power to sell is, in illustration (b), given 'expressly' for the purpose of enabling the consignee of the goods to repay himself the advances made. No doubt in the illustration the authority to so appropriate the sale proceeds is expressly given, but in the section itself there is no limitation to cases where the authority is so expressly given. In the section itself all that is necessary is that the agent should himself have 'an interest in the property,' to be sold, and it seems to us that such interest may be inferred from the language of the document and from the course of dealings between the parties, and need not be expressly given. It is the existence of an interest, not the mode in which it is given, that is of importance. The terms of an illustration are not always co-extensive with the terms of the section, or proposition of law, intended to be illustrated; and it is contrary to true principles of interpretation to cut down the scope of a section by a reference to its illustrations. Apparently

(1) I.L.R., 17 Bom., 543.

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if the consignment note had said in express words "you are to repay yourself the above advance out of the sale-proceeds of the consignment" the learned Judge would have considered section 202 applicable, and the authority to sell irrevocable, and would have decided in plaintiff's favour. As already stated there is nothing in the section to show that the authority to appropriate the sale-proceeds to the debt must be 'expressly' given, nor can we find any ground in reason for such a limitation. The provision in the consignment note that the consignee is to sell at his discretion and in the event of a shortfall is to draw on the defendant, taken with the course of business between the parties, shows that it was their intention that Von Glehn and Co. should repay themselves the advances out of the proceeds. That intention, being clearly indicated, is as valid and as effectual for the creation of an interest in the consignees as if it were expressly stated. If the consignees had such an interest the authority to sell could not be revoked to the prejudice of such interest, except in accordance with an express contract reserving such power to the defendant, but of such express contract there is no proof in this case.

The authority to sell at the consignee's discretion, and without reference to the consignor, is given in the consignment note in the widest terms, and the only limit imposed is that the price should be 'the best obtainable.' The plain meaning of the words is that the consignee is to choose the time and mode of sale without reference to the consignor and obtain the best price available in the market. It was open to the consignor to have made it a part of the contract that he might impose limits from time to time, and, had he done so, the consignee who was making advances, would have been able to protect himself against the greater risk that he would have thus run. But the consignor expressly gave up to the consignee the discretion with regard to sale, and it can hardly be doubted but that his doing so enabled him to obtain better terms in regard to the advances. It seems to us unreasonable to hold that, under these circumstances, the consignor could on the next day revoke the authority to sell, or that the consignee would allow him to do so without consideration. The consignor by placing too high a limit on the goods might keep the consignee out of the money he had advanced for a far longer time than that contemplated, and in the end leave him without remedy, except the slow and inadequate one of a suit to recover the

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advances. No doubt the letters between defendant and Von Glehn and Co. show that the former imposed limits after the consignments were sent, and neither plaintiff nor Von Glehn and Co. at first repudiated, or protested against, his right to do so. Von Glehn & Co. protested against the advisability of his holding out for impossible prices, and put off sales in deference to his wishes, but we do not think that this action amounts to an admission by Von Glehn & Co. that they were bound, in all circumstances, to obey his instructions. They were naturally anxious to please a client and to defer to his wishes but when the market continued to fall month after month, and the security in their hands to become less and less, they at length resorted to the power of sale given to them and sold without regard to the limits named by the defendant. They would, no doubt, have postponed the sales still further if defendant had complied with their request to remit them a sufficient sum to cover the estimated fall in the value of the goods, so that the security in their hands might still be sufficient, but this the defendant did not do. In these circumstances it seems to us that the consignees were justified in exercising their legal right of sale, instead of allowing the security in their hands to diminish still further.

We must, therefore, reverse the decree and give judgment for plaintiff as sued for with costs throughout.

Wilson & King, attorneys for appellant.

Branson & Branson, attorneys for respondent.

APPELLATE CIVIL.

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

KOMMACHI KATHER (PLAINTIFF), APPELLANT,

v.

PAKKER AND OTHERS (DEFENDANTS), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, s. 295—Rateable distribution—Decree
for money—Mortgage decree.*

The plaintiff and defendant, respectively, held successive mortgages on the same land. The defendant obtained a decree on his mortgage against the land and

1896.
October
8, 20.

* Second Appeal No. 819 of 1895.

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in respect of any unrealized balance against the mortgagor, two months' time for redemption being given. The plaintiff then obtained a like decree. The defendant abandoned his claim on the mortgage premises and attached other property of the mortgagor. The plaintiff applied to execute his decree against the mortgage premises and the other property, but with regard to the latter his application was rejected. The defendant, having brought to sale the property attached, the plaintiff applied under Civil Procedure Code, section 295, for rateable distribution which was refused. The plaintiff then brought to sale the mortgage premises which did not realize the amount of the debt, and he now sued to recover the sum which would have been payable to him under section 295:

Held, that the plaintiff's decree was a decree for money within the meaning of section 295, and that he was entitled to recover the sum claimed:

Per cur, the property ought not to have been sold and the money paid to the defendant until the mortgaged property had been sold and had been found insufficient to pay his debt.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in appeal suit No. 445 of 1894, confirming the decree of K. Imbiehumi Nayar, District Munsif of Taliparamba, in original suit No. 199 of 1894.

The facts of this case were stated by the District Munsif in paragraph 8 of his judgment as follows:—

"The plaintiff in the present case was the mortgagee of eight items of real properties under one K. V. Chintan and five of his Anandiravaus. The first defendant held a puisne mortgage on two or three of the same items. In original suit No. 76 of 1893, the first defendant sued his mortgagors and the present plaintiff for the recovery of his mortgage amount by the sale of the properties mortgaged and from the persons of the mortgagors. A decree was recorded in his favour to the effect that in default of the defendants' paying the amount of his claim within two months, the properties mortgaged should be sold subject to the prior claim of the present plaintiff and if the sale-proceeds be insufficient to satisfy the whole of his decree, the balance should be paid by the mortgagors personally. The present plaintiff then brought a suit on his prior mortgage and a decree worded almost as above was recorded in favour of him also. The present defendant was a party to it. He then gave up his claim on the properties mortgaged to him and caused attachment of the parambas mentioned in the present plaint which were finally sold in auction for Rs. 1,377. The sale-proceeds were set off against the first defendant's decree amount. Over two months before the aforesaid sale, the present plaintiff applied for the realization of his decree

"by the sale of the properties mortgaged, and by attachment of other properties. The first part of his prayer was allowed while the second part was disallowed. In the case of the plaintiff, then, the judgment-debtors applied for an adjournment of the sale and obtained time till September 1893. The sale, at the instance of the first defendant, took place in the meantime and the plaintiff asked for rateable share. His application was rejected on the ground that he had then no decree which was capable of being executed against the judgment-debtors personally. The plaintiff appealed and the appeal was rejected as being not maintainable. In a subsequent application for share made by the plaintiff after the properties mortgaged to him were sold and the sale-proceeds were found to be insufficient to fully meet his claim, he was given Rs. 25. The plaintiff now sues to recover Rs. 495-15-0, alleging that he was entitled to get the same when he first applied for share."

The terms of the decree in question are given in the judgment of the High Court.

The District Munsif dismissed the plaintiff's suit and the District Judge upheld his decision for the reasons stated by the High Court.

The plaintiff preferred this second appeal.

Ryru Nambiar for appellant.

Sankara Menon for respondents.

JUDGMENT.—The facts of the case are correctly stated in paragraph 8 of the District Munsif's judgment.

The District Munsif, assuming that the plaintiff had a 'decree for money' within the meaning of section 295, Civil Procedure Code, still dismissed the suit on the ground that it was incapable of execution, except as against the mortgaged property, at the time when the plaint property was sold at the instance of first defendant.

The District Judge confirmed the District Munsif's decree for two reasons, firstly, because section 295 (c) in his opinion barred the plaintiff's claim, and secondly, because the plaintiff's decree was not 'a decree for money' within the meaning of section 295, Civil Procedure Code.

The plaintiff appeals, and we think, with good reason. The District Judge is manifestly in error in supposing that clause (c)

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of section 295 governs the case. That clause refers only to property sold "in execution of a decree ordering its sale for the discharge of an incumbrance thereon." In the present case, the property sold by first defendant was not the encumbered property, but other property of the judgment-debtor.

The plaintiff and defendant had respectively a first and a second mortgage over other property of the same mortgagor, but neither of them held any incumbrance on the property sold by first defendant. It seems to us that the plaintiff and first defendant were in exactly the same position with regard to this property, and each was equally entitled to a rateable share of the sale-proceeds.

The District Judge is, in our opinion, wrong in holding that the present decree is not 'a decree for money' within the meaning of section 295, Civil Procedure Code. No doubt, his view is supported by the language used in *Ram Charan Bhagat v. Sheobarat Rai*(1); but the opposite view was held by the Calcutta High Court in *Hart v. Tara Prasanna Mukherji*(2). The exact terms of the decree in the Allahabad case are not reported, nor is the Calcutta case referred to therein; but in our opinion the law is correctly stated in the latter case.

The decree before us runs as follows:—"That the defendants do pay plaintiff within two months from this date Rs. 2,500 with interest and costs and that in default plaintiff do recover the same by sale of the plaint property, and the balance, if any, from first to sixth defendants." It seems to us that this is a decree for money and that it does not lose this character, because the decree declares the mode and the order of the procedure by which it is to be realized.

The first paragraph of section 295 runs as follows:—"When- ever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons."

(1) I.L.R., 16 All., 418.

(2) I.L.R., 11 Cal., 718.

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It is under this paragraph that the plaintiff claims the right to a rateable share of the property. Formerly the creditor who first attached property had a prior claim to have his decree satisfied out of the sale-proceeds to the exclusion of other creditors, but now all judgment-creditors who apply to the Court, prior to realization, are entitled to share rateably, and under the penultimate paragraph of the section, if any of such assets be wrongly paid to any person, a judgment-creditor entitled to a rateable share may sue to recover the same from the person wrongly paid. It is under this paragraph that the plaintiff brings his suit. In the words of the Calcutta case already referred to "The object of the section appears to us to be to provide for the rateable distribution of the assets of a judgment-debtor among all persons who have obtained decrees ordering the payment of money to them from the judgment-debtor; and the fact that a person, who has obtained such a decree, also holds security or is entitled to any other relief under the decree is immaterial. There is, therefore, we think nothing in the section which takes away the right of a mortgagee, who has obtained a decree upon his mortgage, to proceed in the same suit against property of the mortgagor not subject to the mortgage when there are other creditors—nothing which shows that the only persons entitled to share rateably in the proceeds of sale of property sold in execution of a decree are those who have obtained decrees for money only. We think, therefore, that every decree, by virtue of which money is payable, is to that extent a 'decree for money' within the meaning of the section, even though other relief may be granted by the decree; and that the holder of such a decree is entitled to claim rateable distribution with holders of decrees for money only."

If it were held otherwise it would often result that the insufficiently secured creditor might find himself worse off than the wholly unsecured, but more prompt and pressing, creditor, and an inducement would exist for that scramble for first attachment which the recent alterations of the law were designed to remove. The unsecured creditor is not placed at an unfair disadvantage, since he advanced his money on the faith of the debtor's general credit apart from the property mortgaged, and it is always open to such a creditor to compel the sale of mortgaged property, if it is likely to yield any surplus over and above the mortgage money.

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It remains to consider the ground on which the District Munsif dismissed the suit, viz., that the plaintiff's decree was incapable of execution against anything save the mortgaged property, at the time when the first defendant attached the other property. It is true that at that time the plaintiff was not in a position to immediately execute his decree, but neither was the first defendant, for the decree in favour of the latter was subject to precisely the same limitation as the plaintiff's decree. The property ought not, therefore, to have been sold and the money paid to the first defendant until the mortgaged property had been sold and had been found to be insufficient to pay his debt. His title to receive payment out of the property sold, did not arise until the mortgaged property was found to be insufficient, and the plaintiff's title arose at precisely the same time. The payment of the whole of the sale-proceeds to the first defendant was, therefore, wrong, as the plaintiff was entitled to a rateable share.

In this view we must set aside the decrees of the Courts below, and give judgment for plaintiff as sued for with costs throughout.

APPELLATE CIVIL.

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

NALLA KARUPPA SETTIAR (PLAINTIFF), APPELLANT,

v.

MAHOMED IBURAM SAHEB (DEFENDANT), RESPONDENT.*

*Suit on a foreign judgment—Jurisdiction of foreign Court—Residence of defendant
—Constructive residence.*

The plaintiff having obtained against defendant a judgment in the District Court of Kandy now sued in British India to enforce it. It appeared that the defendant was domiciled and ordinarily resident in British India and that he had not appeared to defend the suit at Kandy and was not at the date of that suit or subsequently even temporarily resident in Ceylon: but he was a partner in a firm which carried on business at Kandy and he was interested in lands at that place which he had visited once or twice:

Held, that the Court at Kandy had no jurisdiction over the defendant.

SECOND APPEAL against the decree of E. J. Sewell, District Judge of Tanjore, in appeal suit No. 477 of 1893, reversing the decree of C. Venkobaachariar, Subordinate Judge of Tanjore, in original suit No. 5 of 1893.

The plaintiff sued to recover from the defendant certain sums due under decrees passed against the defendant by the District Court of Kandy in Ceylon.

The defendant pleaded, among other things, that the District Court of Kandy had no jurisdiction, as he was at the time the suits were brought and the decrees passed, permanently residing in British India, that he had no notice of the suits, and was not aware of their institution, and that the decrees were not properly passed against him.

The Subordinate Judge found that there was sufficient service of notice of the suits to make the defendant liable, and that the Court in Kandy had jurisdiction, and passed a decree as prayed.

The defendant appealed against this decision and the District Judge reversed the decree appealed against on the grounds which are stated in the judgment of the High Court.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar for appellant.

Pattahbirama Ayyar for respondent.

JUDGMENT.—The plaintiff sued in the Tanjore Subordinate Judge's Court in British India to recover certain sums under decrees passed in his favour by the District Court of Kandy in Ceylon. The defendant raised a number of pleas, but the Subordinate Judge found against him on all the issues and decreed the claim.

On appeal the District Judge tried three main questions, viz.—

(i) whether notice of the suit in the Kandy Court was so served on the defendant as to justify the British Indian Court in passing a decree on the judgment of the foreign (Kandy) Court:

(ii) whether the foreign Court had jurisdiction over the person of the defendant who was domiciled and resident in British India: and

(iii) whether the defendant was a minor when the judgment was given, and whether, in consequence, the judgment was one which could be made the basis of a suit in British India.

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On all these issues the District Judge decided in defendant's favour, and, therefore, dismissed the suit.

The plaintiff now appeals on all the issues decided against him.

We do not, however, think it necessary to discuss the first and the third of the above issues, as we are of opinion that the decision of the District Judge on the second issue is right, and that the plaintiff's suit must fail on that ground, whatever the decision on the other issues might be.

The defendant was the chief partner in the firm of Iburam Sahab and Company, which carried on business in Kandy under the terms of a deed of partnership (exhibit A). The plaintiff was domiciled and ordinarily resident in British India, but he visited Kandy once or twice and his family owned some immoveable property there in which he claimed to have an interest.

The plaintiff was not even temporarily resident in Ceylon when the suits were instituted in the Kandy Court or subsequently. The business was, under the terms of exhibit A, managed by one of the other partners who lived in Kandy. When the suits were filed, summonses on the partners, including the defendant, were served on the resident partners. It is not shown that they informed the defendant. He did not appear to defend the suits, and decrees *ex parte* were passed against him.

The question which we have to decide is this—

Assuming that service of notice of the suit on defendant's partner is sufficient service on defendant, and assuming that defendant is entitled to no protection on the score of minority, had the Kandy Court jurisdiction, in the above state of facts, to pass a decree against the defendant's person?

It is conceded that for the present purpose the Kandy Court must be considered to be a foreign Court. The Courts of British India will be guided in this matter by the same principles as are adopted by the Courts of England. The true principle on which the judgments of foreign Courts are enforced in England is that the judgment of a Court of competent jurisdiction over the defendant imposes a duty, or obligation, on the defendant to pay the sum decreed which the English Court is bound to enforce, and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

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Schibsby v. Westenholz(1). In the case of *Rousillon v. Rousillon*(2), Fry, L.J., referring to *Schibsby v. Westenholz*(1) and *Copin v. Adamson*(3), explained the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court. He said "the Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the *forum* in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the *forum* in which the judgment was obtained, and, possibly if *Beequet v. MacCarthy*(4) be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction."

If these tests are adopted in the present case, it will be seen that not one of them applies. It is, however, urged that the law as to the authority to be ascribed to foreign judgments is in course of development by means of judicial legislation, and we are asked, on the analogy of *Beequet v. MacCarthy*(4), to hold that the defendant by carrying on business through his partners at Kandy should be regarded as constructively resident there, and as having impliedly bound himself to submit to the jurisdiction of the Court under the protection of which his business was being carried on. We do not think that the current of decided cases will justify us in going so far. In *Beequet v. MacCarthy*(4) the defendant still held, at the time of the suit, a public office in the colony in which he was sued, and the cause of action arose out of or was connected with it. His duties required him to be present in the colony, and, therefore, amenable to the jurisdiction of its Courts. It was on this ground that he was held to be constructively present in the colony, though, in fact, temporarily absent. This case was stated in *Don v. Lippmann*(5) "to go to the verge of the law," and the Privy Council in the recent case of *Sirdar Gurdial Singh v. Rajah of Faridkote*(6) were of the same opinion, and stated that, if the case could not have been distinguished by the said special features

(1) L.R., 6 Q.B., 155, 159.

(3) L.R., 9 Ex., 345.

(5) 5-Cl. & F., 1.

(2) 14 Ch. D., 351, 370, 371.

(4) 2 B. & Ad., 951.

(6) L.R., 21 I.A., 171, 186.

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from the case of any absent foreigner who, at some previous time, might have served the Colonial Government, they would have regarded the case as wrongly decided. In the present case there was no obligation on the defendant to reside in Kandy, nor did he do so except for very short periods. The business was carried on by a resident partner who, by the fact of his residence, was liable to the colonial jurisdiction, but we are unable to find any ground for holding that the defendant was constructively resident, or at the time of the suit present within the jurisdiction of the Kandy Court. Nor does the possession by the defendant of some immoveable property in Kandy give that Court jurisdiction over him in matters of contract like the present, for in *Schibsy v. Westenholz*(1) it was observed: "We doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, while every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment." The general law is laid down very clearly by the Privy Council in the case of *Sirdar Gurdyal Singh v. Rajah of Faridkote*(2) in these words: "All jurisdiction is properly territorial and *extra territorium* *jus dicenti, impune non paretur*. Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (e.g., under the Roman Empire) the legislation of the Sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the power which so legislates.

(1) L.R., 6 Q.B., 155, 159.

(2) L.R., 21 I.A., 171, 186.

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"In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court to the jurisdiction of which the defendant has not in any way submitted himself is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the *forum* by which it was pronounced.

"These are doctrines laid down by all the leading authorities on international law; among others, by Story (*Conflict of Laws*, 2nd edition, ss. 546, 549, 553, 554, 556, 586), and by Chancellor Kent (*Commentaries*, vol. I, p. 284, note c, 10th edition), and no exception is made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the *locus solutionis*. In those cases, as well as all others when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to to do justice."

We do not think that there are any special circumstances in the present case to take it out of the general rule that the plaintiff must sue in the Court to which the defendant is subject at the time of the suit—a rule which is stated by Sir Robert Phillimore (*International Law*, vol. 4, s. 891), and by the Privy Council in the case already quoted "to lie at the root of all international and of most domestic jurisprudence on this matter." That was the course which the plaintiff in this case ought to have followed, if he desired a remedy against the defendant personally.

On the ground that the Kandy Court had no jurisdiction over the defendant, the Lower Appellate Court rightly dismissed the suit. We, therefore, confirm the decree of that Court and dismiss this second appeal with costs.

APPELLATE CIVIL—FULL BENCH.

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

KADAR HUSSAIN (PLAINTIFF), APPELLANT,

v.

HUSSAIN SAHEB AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1895.
November 5.
December 4.
1896.
October 2.

Limitation Act—Act XV of 1877, sched. II, art. 12 (a)—Dispossession.

Limitation Act, sched. II, art. 12 (a) is not applicable to a case in which dispossession is the cause of action and in which the plaintiff was not a party to, or bound by, the sale :

Held, accordingly, that a suit brought in 1892 to recover possession of the plaintiff's share of land sold by mistake in execution of a decree against his uncle in 1881, was not barred by limitation.

SECOND APPEAL against the decree of E. C. Rawson, Acting District Judge of Vizagapatam, in appeal suit No. 299 of 1893, reversing the decree of G. Jagannadha Rau, District Munsif of Razam, in original suit No. 4 of 1893.

The plaintiff sued to recover a moiety of certain land which had been sold in November 1881, in execution of a decree in original suit No. 290 of 1878, on the file of the District Munsif of Vizianagaram.

The District Munsif passed a decree for plaintiff, but his decree was reversed on appeal by the District Judge, who held that the suit was barred by limitation.

The plaintiff preferred this second appeal which came on for hearing before Collins, C.J., and Parker, J., who made the following order of reference to the Full Bench :—

ORDER OF THE REFERENCE TO FULL BENCH.—The following are the facts which give rise to this reference :—

Plaintiff's paternal uncle Dada Miyya owned half an Inam land, and plaintiff's father owned the other half. Dada Miyya mortgaged his half to defendant's father in 1870. Defendant's father obtained a decree upon this mortgage in suit No. 290 of 1878, and the property mortgaged was ordered to be sold. The sale took place in November 1881, but by some mistake the whole

land was sold instead of Dada Miyya's half share. Defendant's father purchased the land and was put in possession. Plaintiff brought this suit on November 25th, 1892, to recover possession of his half share.

The District Judge on the strength of the Ruling in *Suryanna v. Durgi*(1), held that the suit was governed by article 12 (a) of the Limitation Act and that the suit was barred.

There are however various decisions in which it has been held that article 12 of the Limitation Act does not apply to suits in which the plaintiff was not a party to, and not bound by, the sale sought to be set aside. See *Sadagopa v. Jamuna Bhai*(2), *Haji v. Atharaman*(3), (which was a decision by the same Bench); *Nilakandan v. Thandamma*(4), *Nathu v. Badri Das*(5), *Parekh Ranchor v. Bai Vakhat*(6) and *Vishnu Keshav v. Ramchandra Bhaskar*(7).

The ground of decision appears to be that article 12 is inapplicable to suits in which dispossession is the cause of action, since dispossession may not have taken place till some time after the confirmation of the sale.

The decision in *Suryanna v. Durgi*(1) has been recently doubted by a Bench of this Court in *Narasimha Naidu v. Ramasami*(8).

The question referred to the Full Bench is whether article 12 (a) of the second schedule of the Limitation Act is applicable to a case in which dispossession is the cause of action and in which plaintiff was not a party to, or bound by, the sale.

The reference came on for hearing before the Full Bench.

R. Subramania Ayyar for appellant, argued that *Suryanna v. Durgi*(1) was wrongly decided and referred to *Narasimha Naidu v. Ramasami*(8).

Ramachandra Rau Sahib for respondent, contended that when a man knows that his property was put up for sale and sold in execution of a decree of Court, he ought to object before the sale is confirmed, and accordingly that, in the absence of proof of fraud, whereby the confirmation of the sale was concealed from the

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(1) I.L.R., 7 Mad., 258.

(3) I.L.R., 7 Mad., 512.

(5) I.L.R., 5 All., 614.

(7) I.L.R., 11 Bom., 130.

(2) I.L.R., 5 Mad., 54.

(4) I.L.R., 9 Mad., 460.

(6) I.L.R., 11 Bom., 119.

(8) I.L.R., 18 Mad., 478.

* Second Appeal No. 62 of 1895.

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plaintiff as was found to be the case in *Parekh Ranchor v. Bai Vukhat*(1), the plaintiff was bound by the one year's rule.

The Full Bench (Collins, C.J., Shephard, Subramania Ayyar and Davies, JJ.) delivered the following judgment.

JUDGMENT.—In the circumstances stated we think there can be no doubt that article 12 (a) of the second schedule of the Limitation Act cannot properly be applied to the suit brought by the plaintiff.

Whatever was the intention of the parties who took part in the execution sale, that transaction could not affect the title of the plaintiff, and therefore it was not necessary for him to have the sale set aside.

We cannot agree with the decision in *Suryanna v. Durgi*(2) which was also a case of a sale in execution of a decree.

[After the delivery of the above judgment the decree of the District Court was set aside, and the appeal was remanded to be disposed of on the merits.]

APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice
Subramania Ayyar.*

RANGAYYA CHETTIAR (PLAINTIFF), APPELLANT,

v.

PARTHASARATHI NAICKAR AND OTHERS (DEFENDANTS
Nos. 1 to 7), RESPONDENTS.*

Mortgage—Decree on first mortgage, a puisne mortgagee not being joined—Purchase of mortgaged property by decree holder for inadequate price—Right of puisne mortgagee—Improvements—Interest.

A mortgaged land to B and then to C. B sued on his mortgage and obtained a decree for sale without joining as defendant C, of whose mortgage he had notice; D the son of the decree-holder became the purchaser in execution and improved the land at a considerable cost. C now sued the sons and representatives of A and B (both deceased), on his mortgage and sought a decree for sale:

Held, (1) that the plaintiff was entitled to a decree for sale subject to the right of the representatives of B, if the purchaser did not elect to redeem;

(1) I.L.R., 11 Bom., 119. (2) I.L.R., 7 Mad., 258. * Appeal No. 121 of 1895.

(2) that the purchaser was not entitled to allowances for improvements;
(3) that the plaintiff was entitled to interest at the agreed rate to the date of decree.

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APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Negapatam, in original suit No. 35 of 1893.

Suit to recover Rs. 7,992, being principal and interest due on a hypothecation bond, dated 7th December 1880, and executed by the father (deceased) of defendants Nos. 1 and 2 in favour of the plaintiff. The mortgagor had previously mortgaged the land to one Subbarayar the father (deceased) of defendants Nos. 3-6 to secure Rs. 12,000 under mortgage deed, dated 29th August 1878.

Original suit No. 21 of 1884 was brought on the mortgage of 1878, and a decree for Rs. 18,896-9-9 was obtained, in execution of which the land was brought to sale and it was purchased by defendant No. 3 for Rs. 1,300. The purchaser was placed in possession on 23rd January 1886.

Plaintiff's case was that Subbarayar who had notice of his mortgage from the date of its execution not having impleaded him as a party to original suit No. 21 of 1884, he was now entitled to enforce his charge against the property purchased by the third defendant in execution of the decree. He alleged that the property was sufficient for payment of both debts, and he now sought a decree for payment by the defendants of the debt due to him, or for the sale of the mortgaged property in satisfaction of it. The Subordinate Judge said:—"In the village No. 2, plaintiff claims the liability of 13 mahs and 36½ kulies as the remaining extent was sold away in court sale in satisfaction of a prior mortgage held by one Alamelu Ammal. The entire land in the village No. 3 and 1 mah and 84½, ½ kulies in the village No. 5 were sold for arrears of revenue. The whole extent in the village No. 6 was sold by the mortgagor for Rs. 3,000 which plaintiff received in part liquidation of his debt. These three items of land are not therefore sought to be held liable to plaintiff's claim."

It was contended by the third defendant that neither he nor his father had notice of the plaintiff's mortgage; that the property other than what was bought by him was sufficient to satisfy the plaintiff's claim; that at the sale held in execution of the decree in suit No. 21 of 1884, no one came forward to bid higher than Rs. 1,300 for which he purchased; and that a sum of Rs. 4,300

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was expended by him upon the improvement of the land after his purchase. The Subordinate Judge said:—"It is further contended that the land referred to in schedule No. 1 appended to the statement of the third defendant having been bought by him at a revenue sale, the same cannot be rendered liable to plaintiff's claim; that the land in the village No. 6 was worth Rs. 4,000, and the plaintiff was not justified in consenting to the sale of it for Rs. 3,000; that 1 mah and 80 kulies in the village No. 5 worth Rs. 75 has been purchased by the plaintiff for a small value; which was neither included in the plaint, nor its price deducted from the amount of the mortgage; and that he has also acted similarly in respect of the land in the village No. 3. It is added that third defendant has no objection to 4 velies, 8 mahs, 16 kulies and 8 cents in the village No. 1 being sold for plaintiff's mortgage debt."

It was found, *inter alia*, that the plaintiff in the suit of 1884 had notice of the plaintiff's mortgage: that the property purchased by defendant No. 3 was at the date of his purchase worth Rs. 35,000, and that the purchaser had improved it at a cost of Rs. 4,300. A decree was passed as follows:—

"This court doth order and decree that unless defendants 1 and 2 pay into court within six months from this date the sum sued for Rs. 7,992-1-0 and costs Rs. 588, the lands hypothecated to plaintiff and specified below with the exception of the land in the villages of Kothamangalam and Nanakadu Vada-pathi included in the third defendant's father's mortgage and in the purchase made by the third defendant in revenue sale, be sold first and the sale proceeds applied towards the decree amount, that then for the balance, if any, of the decree amount which may remain unpaid after the said sale, the property comprised in the third defendant's father's mortgage be sold unless the defendants 3 to 6 pay that balance into court within three months from the date of the first sale; that out of the sale proceeds defendants 3 to 6 be paid the amount decreed to them in original suit No. 21 of 1884 and costs and further interest as provided therein until January 1886 when they entered into possession of the land purchased by third defendant in execution together with costs of execution, all to be ascertained in the execution of this decree and Rs. 4,300 the cost of improvements made to the land by third defendant, that the balance, if

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"any, be taken in satisfaction of this decree, that at the latter sale, the property be not bid for more than the amount due to defendants 3 to 6 as stated above the sale shall be stopped and the defendants 3 to 6 should by virtue of auction purchase hold the property and plaintiff's claim against that property shall stand dismissed, and that further interest under the decree in original suit No. 21 of 1884 subsequent to January 1886, be disallowed as defendants 3 to 6 have enjoyed the land."

"This court doth further order and decree that plaintiff having obtained large amount for interest his claim for further interest be disallowed; that defendants do bear their own costs; and that no direction be given for taking an account of what is due to third defendant under the decree subsequent to January 1886, as the profits of the land after deducting the cultivation expenses and kist would, according to the evidence produced in this case, have been sufficient only to meet the third defendant's claim for further interest."

The plaintiff preferred this appeal.

Rajagopala Ayyar for appellant.

Sankaran Nayar for respondents.

JUDGMENT.—It is contended on the respondents' part that the suit ought to have been dismissed, the plaint not being properly framed. It is said that the plaintiff ought, as second mortgagee, to have sued to redeem, or at least prayed for a sale subject to the first mortgage. The first mortgagee having purchased the equity of redemption, it was open to the second mortgagee to ask for the sale of the property and so give the purchaser an opportunity of redeeming him. It is unnecessary that he should expressly ask for the sale to be made subject to the prior incumbrance. In the nature of things no other sale could be made. We think the decree, on the whole, gives full effect to the rights of the parties, inasmuch as it allows the first mortgagee who has purchased to redeem, if he wishes to do so. On the other hand, the decree makes the sale subject to the rights of the first mortgagee.

The claim for alleged improvements said to have been effected by the first mortgagee since his purchase cannot, we think, be allowed. In this respect he is in no better position than the mortgagor himself who may choose to spend money on his property. We cannot accede to the view that the improvements were made by the purchaser in the character of mortgagee, for in that

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capacity he is not shown to have been entitled to possession. The decree must be varied in that respect.

We can see no reason why the plaintiff should not be entitled to the interest payable under his mortgage. Interest at the contract rate must be allowed up to date of decree of the Subordinate Judge and from that date at six per cent. The decree must also be amended by directing that any surplus after paying both mortgages be paid to the defendants 3 to 6.

The memorandum of objections is disallowed with costs. Respondents must pay appellant's costs of appeal.

APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and
Mr. Justice Boddam.*

KRISHNA PATTAR (PETITIONER), APPELLANT,

v.

SRINIVASA PATTAR (COUNTER-PETITIONER), RESPONDENT.*

**Mortgage—Malabar kanom—Redemption—Improvements—Depreciation of,
between decree and date of redemption.*

A decree for the redemption of a kanom in Malabar was passed in December 1894, when there were on the land improvements in the form of trees, &c., to the value of Rs. 1,429. Within the six months limited by the decree for redemption the mortgagor applied for execution, and it appeared that the value of improvements had diminished by the loss of trees to the value of Rs. 157. The loss was the result of want of water and was not attributable to neglect on the part of the mortgagee:

Held, that the loss should fall on the mortgagee.

APPEAL against the order of the District Judge of South Malabar, in civil miscellaneous appeal No. 49 of 1895, reversing the order of A. Annasami Ayyar, District Munsif of Themmalapuram, in execution petition No. 211 of 1895.

This was an application in execution of a redemption decree. At the time of the decree on the 4th December 1894, improvements to the value of Rs. 1,429-11-3 were found payable to the mortgagee by the mortgagor, who was allowed six months within which to

redeem after paying for the improvements and the mortgage amount. The mortgagor applied for execution on 3rd April 1895 and stated that mortgagee had done damage to the improvements since the date of decree. It was found that trees to the value of Rs. 157-14-3 had withered since the date of decree owing to want of water. There was no proof that the mortgagee was responsible for the loss, and it was found by the Courts to have been caused by *vis major*. The question then was, as stated by the District Judge, who was to bear the loss, the mortgagee, as being still in possession because the mortgage money and compensation for improvements had not been paid or the mortgagor who had the right to possession under his decree for redemption but delayed to redeem.

The District Munsif held that the loss should fall on the mortgagee. The District Judge was of the contrary opinion and ordered that the mortgagor should pay the sum of Rs. 157-14-3.

The mortgagor preferred this appeal.

Sundara Ayyar for appellant.

Ryru Nambiar for respondent.

JUDGMENT.—On the 4th December 1894 a decree was passed in favour of the appellant enabling him to redeem certain lands mortgaged to the respondent by way of kanom. At the time of the decree improvements to the value of Rs. 1,429-11-3 were on the land. But when, on the 3rd of April 1895, *i.e.*, within the six months' time allowed by the decree for the redemption, the appellant applied for execution, it appeared that of the improvements which had existed at the date of the decree, trees to the value of Rs. 157-14-3 had withered owing to want of water.

The question is whether the appellant is bound to pay to the respondent the said sum of Rs. 157-14-3. It does not appear that the kanom instruments, on which the decree was obtained, contained any agreement as to compensation for improvements. The claim for it rests therefore upon the local custom, and the covenant implied according to that custom is to pay for all 'unexhausted improvements' (Wigram's *Malabar Law and Custom*, page 137). In other words, the basis on which the liability in question stands is, of course, that the mortgagor would, when he redeems, enjoy the benefit of the improvements effected by the mortgagee. Consequently when no such advantage accrued to the former, he cannot, on principle, be called upon to pay.

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Now, can the fact that a valuation of the improvements has been made and embodied in a decree alter the case? It is difficult to see how it can. According to the course of decisions here, it is established that, notwithstanding the passing of a decree for redemption, the relation of mortgagor and mortgagee fully subsists, if the decree be not executed and therefore the right to redeem can be again asserted and enforced, provided it had not been lost by lapse of time or otherwise. Suppose a mortgagor, having obtained a decree for redemption, does not execute it, but allows the property to remain in the hands of the mortgagee for a considerable time and the latter during that period makes more improvements. Surely, his right to the value of those cannot be denied, whether the question arises in execution proceedings or in a separate suit; nay, according to *Ramuni v. Shanku*(1) even in respect of improvements referred to in a decree which the mortgagor does execute, the mortgagee can, in such execution proceedings, claim a re-valuation if he can show that, since the passing of the decree, the value of the improvements has increased. How then can the mortgagor, with any justice, be held to be disentitled to obtain a reduction of the amount mentioned in the decree if he can prove that any part of the improvements assessed therein, has since ceased to exist? That the final adjustment of the amount of compensation must be made with reference to the state of things at the time of the actual redemption, is also shown by the practice followed by the Courts prior to July 1890 according to which the question used to be reserved for execution. The present system of holding an enquiry into the matter before decree, no doubt, originated with this Court's Circular order, dated the 14th July 1880 (Weir's Rules of Practice, page 197). But all that the circular lays down is that Courts should, before passing a decree, decide in respect of what improvements the party in possession is up to the date of the decree entitled to compensation; and the amount of compensation. The circular, therefore, does not and cannot affect the right of the mortgagor to ask for a revision of the amount awarded by the decree, if such revision is rendered necessary by events that have occurred since the decree. Accordingly, if, during execution, improvements as ascertained and awarded by a decree, be not found on the land or were destroyed

(1) I.L.R., 10 Mad., 367.

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by the tenant, the Courts have, in acting under section 244, Civil Procedure Code, been in the habit of ascertaining the amount of the loss and deducting it from the sum originally fixed.

The pleader for the respondent next urged that a loss like that under discussion, if it is not due to any act or default of the mortgagee, should fall on the mortgagor, as the property in the improvements was, at the time of the loss, in him. This assumption about the property being in the mortgagor even before compensation is paid by him, is not only not supported by any authority, but is directly contradicted by the Fifth Report where it is stated, "The buildings and plantations are in fact the property of the tenant; and he can mortgage or sell them, in the same manner, as the jenmkar mortgages or sells his own property in 'the land' (Higginbotham's edition, Vol. II, p. 82). Moreover, if the above contention were well founded, a person, who mortgages by way of *kanom*, would be liable for every improvement once effected, though it had disappeared before the decree. But no one has as yet ventured to put forward such a manifestly unreasonable claim. In support of the above contention on behalf of the respondent, it was urged that the holder of a *kanom* is, by the usage of the district, prohibited from cutting, without the mortgagor's consent, trees on the land, though they had been planted and grown by the mortgagee himself; and *Changaraan v. Chirutha*(1) was relied on. Without entering into the question whether the actual decision there is sound or not, which we are not called upon to consider, we may say that it is quite clear that the case cannot be treated as establishing the proposition for which it was cited. For, curiously enough, the District Munsif's judgment opened with the observation:—"It is now admitted that the trees 'belonged to the first defendant having been planted by him as 'kanom tenant of the plaintiff,' and referring to this observation, BEST, J., pointed out that the District Munsif's opinion that the *kanom* tenant was not entitled to cut the trees without the permission of the plaintiff—the landlord—was open to question.

In the present case no evidence was adduced as to the alleged custom prohibiting a *kanom* tenant from removing trees which had been planted by him. We cannot, therefore, express any opinion as to whether such a custom exists or not. But, assuming for

(1) Civil Revision Petition No. 445 of 1895 unreported.

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argument's sake that a usage of the kind does prevail, that does not necessarily prove that the property in improvements, not yet paid for, vests in the mortgagor. For the alleged usage would be perfectly consistent with the view that in such a case the property is in the mortgagee until the payment of compensation; the restriction on his power to remove such improvements as trees being explained as imposed on grounds of policy, similar to that which underlies the provision in section 63 of the Transfer of Property Act relating to an accession, made at the expense of the mortgagee to preserve the property from destruction, &c., but which accession is not capable of being separately possessed or enjoyed by the mortgagee. Considering that the mortgagor in cases like the present is bound to pay compensation for improvements even when the contract between the parties is silent on the point, the above view as to the relative rights of the parties would seem to be a more reasonable interpretation of the alleged local usage than that suggested on behalf of the respondent.

The conclusion, therefore, to be arrived at appears clearly to be that the appellant is bound to pay only for such improvements at the time of the redemption, are on the land in a reasonably good condition (compare *Gubbins v. Creed*(1), and therefore he is not liable for the amount in dispute. To hold otherwise would certainly tend to incline mortgagees to neglect between the date of the decree and that of its execution, the duty of properly looking after the improvements, compensation for which has been assessed, and in some cases even to destroy them to the injury of the mortgagors.

The order of the Lower Appellate Court must be reversed and that of the District Munsif restored.

The respondent will pay the appellant's costs in this and in Lower Appellate Court.

(1) 2 Sch. & Lef., 225.

APPELLATE CIVIL—FULL BENCH.

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

VASUDEVAN AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SANKARAN AND OTHERS (DEFENDANTS NOS. 1 TO 14
AND 17 AND 18), RESPONDENTS.*

Malabar law—Decree against karnavan binding on tarwad.

A decree in a suit in which the karnavan of a Nambudri illom or a Maru-makkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends is binding on the other members of the family not actually made parties.

SECOND APPEAL against the decree of R. S. Benson, District Judge of South Malabar, in appeal suit No. 343 of 1893, confirming the decree of A. N. Anantarama Ayyar, District Munsif of Angadipuram, in original suit No. 673 of 1892.

Suit to recover certain land of which defendant No. 18 was in possession. The land was formerly the property of a Nambudri illom which had become extinct. A conflict as to the right of succession to its property arose between the illom to which the plaintiffs belonged and of which defendants Nos. 15 and 16 were respectively, the karnavan and the senior anandravan on the one hand, and that of which defendant No. 17 was karnavan and defendants Nos. 1 to 14 were members on the other hand. In 1876 the karnavan of the plaintiffs' illom sued the karnavan and senior anandravan of the rival illom for partition of the properties in dispute, and in a subsequent suit of 1878 against the same parties he obtained a decree for possession of the land now in question. The junior members of the unsuccessful defendants' illom brought suit in 1877 against the decree-holder and his senior anandravan to recover the land now in question and for a declaration of their right of succession to the property of the extinct illom. In that suit the present sixteenth defendant was described as the karnavan and manager of the illom, and the present plaintiffs Nos. 1 and 2,

* Second Appeal No. 501 of 1895.

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who were then minors, were sued by him as their guardian *ad litem*. That suit was determined on second appeal in favour of the then plaintiffs. See *Shunkaran v. Kesavan*(1). The present plaintiffs now sued to recover the land, alleging that they were not parties to that suit and that the decree was not binding on them.

The District Munsif held that the question was *res judicata* and dismissed the suit, and his decree was affirmed on appeal by the District Judge.

The plaintiffs preferred this second appeal.

This second appeal having come on for hearing before Mr. Justice Shephard and Mr. Justice Subramania Ayyar, their Lordships made the following order of reference to Full Bench:—

ORDER OF REFERENCE TO FULL BENCH.—Vakils on both sides agreeing to this form of question, we refer it to a Full Bench having regard to the importance of the matter and the conflict of decisions: Whether the decree, made in a suit in which the karnavan of a Nambudri illom or a Marumakkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends, is binding on the other members of the family not actually made parties?

The case came on for hearing before the Full Bench consisting of COLLINS, C.J., SHEPHARD, SUBRAMANIA AYYAR and DAVIES, J.J.

Mr. J. Adam and Sankaran Nayar for appellants.

Krishnasami Ayyar for respondents.

Sankaran Nayar for appellants.

Ittiachan v. Veluppan(2) decides that a decree against a karnavan as such alone, is not binding on the tarwad see *Sri Devi v. Kelu Eradi*(3). *Subramanyan v. Gopala*(4). In *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*(5), Kernan, J., upholds the contention that the decree is binding. These decisions proceed on a consideration of Civil Procedure Code, section 13, explanation 5, relating to cases where a private right is claimed for the plaintiff in common with others. The position of a karnavan is defined in *Kombi v. Lakshmi*(6); see also

(1) I.L.R., 15 Mad., 6.

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

(5) I.L.R., 2 Mad., 328.

(2) I.L.R., 8 Mad., 484.

(4) I.L.R., 10 Mad., 223.

(6) I.L.R., 5 Mad., 201.

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Kalliyani v. Narayana(1). A karnavan cannot alienate land directly, and he cannot do it indirectly by suffering a decree to be passed against him. He is not the agent of the family to make alienations. In each case he must have actual authority. Supposing a suit is brought by a creditor against a karnavan for a debt alleged to be due by a tarwad and a decree is passed and tarwad property is attached, it is open to the Judge to go behind the decree and see if it is binding on the property. Where the debt is contracted for the benefit of the tarwad the consent of the anandravans is implied *Vasudeva v. Narayana*(2). In that case the decree was passed for land in possession of the karnavan, who alleged that it belonged to his tarwad. The tarwad having been dispossessed in execution the junior members were permitted to sue. In *Thenju v. Chimmu*(3) the karnavan offered to be bound by an oath as to whether or not the decree so obtained was binding on the tarwad. *Kombi v. Lakshmi*(4) was the case of a defendant. By analogy with the law relating to members of a numerous partnership, all the members of a tarwad should be served. The question referred should, on the principles now established, be answered in the negative.

Krishnasami Ayyar for respondent.

It is not open to the plaintiffs to re-open the suit. Assuming, of course, that the karnavan has been guilty of no fraud, the decree against him cannot be impeached. The claim in *Ittiachan v. Veluppan*(5) raised a question of the character of the debt, and the plaintiffs sought a declaration that it was not binding on them the decision in that case was followed in *Subramanyan v. Gopala*(6) and also in *Sri Devi v. Kelu Eradi*(7) where the limitations of the rule are explained. The result of the authorities is that where a suit is brought as here against a karnavan in his capacity as such the other members are bound by the decree is binding unless fraud is proved. Under Hindu Law one member of the family could only impugn the decree to the extent of his share. Here one member seeks to set aside the decree, not in part but in its entirety. The distinction between cases where the karnavan is plaintiff or defendant is pointed out in *Vasudeva v. Narayana*(2)

(1) I.L.R., 9 Mad., 266.

(3) I.L.R., 7 Mad., 413.

(5) I.L.R., 8 Mad., 484.

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

(2) I.L.R., 6 Mad., 121, 124.

(4) I.L.R., 5 Mad., 201.

(6) I.L.R., 10 Mad., 223.

se also *Cockburn v. Thompson*(1). Under Civil Procedure Code, section 13, persons who were represented by parties to the former action may be bound by the decree. A suit on behalf of a minor brought by his guardian is really a suit by a guardian representing the minor, but the adjudication is binding as against the minor. Compare *Jogendro Deb Roy Kut v. Funindro Deb Roy Kut*(2) which was a case of Hindu Law. The present case is stronger one, because the karnavan has larger powers than the managing member of a Hindu family, *Narayan Gop Habbu v. Pandurang Ganu*(3), *Gunsavant Bal Savant v. Narayan Dhond Savant*(4): see also *Harrison v. Steicardson*(5) 1 Daniell's Chancery Practice, chapter IV, section 1. Section 13, explanation 5, is not confined to cases under section 30. See *Madhavan v. Keshavan*(6), *Ohandu v. Kunhamed*(7), *Latchanna v. Saravayya*(8). Hukum Chand on *Res judicata*, paragraph 89. Where it is an indivisible right, one party represents the others. It is otherwise where the right is divisible. *Hazir Gazi v. Sonamonee Dassee*(9), *De Hart v. Stevenson*(10). If such a decree is not final, further suits will be instituted on the chance of a different conclusion being arrived at, *Dawan Singh v. Mahip Singh*(11).

Mr. J. Adam in reply.—

Moidin Kulti v. Krishnan(12) re-affirms *Ittiachan v. Velappan*(13) and to disturb the rule there laid down and to revert to what may have been the law before, would disturb many rights and give rise to much litigation. The possession for which the appellants contend involves no hardship, as persons desirous of binding a tarwad can always adopt the procedure provided by section 30, see *Komappan Nambiar v. Ukkaran Nambiar*(14).

COLLINS, C.J.—The question referred to the Full Bench is, whether the decree, made in a suit in which the karnavan of a Nambudri illom or a Marumakkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends, is binding on the other members of the family not actually made parties. I take it that the word 'honestly' means that the karnavan acted in good faith and in what he believed to

(1) 16 ves. 321.

(4) I.L.R., 7 Bom., 467.

(7) I.L.R., 14 Mad., 324.

(10) 1 Q.B.D., 313.

(13) I.L.R., 8 Mad., 484.

(2) 14 M.I.A., 36.

(5) 2 Hare., 530.

(8) I.L.R., 18 Mad., 164.

(11) I.L.R., 10 All., 441.

(14) I.L.R., 17 Mad., 214.

(3) I.L.R., 5 Bom., 685.

(6) I.L.R., 11 Mad., 191.

(9) I.L.R., 6 Calc., 31.

(12) I.L.R., 10 Mad., 322.

be the interest of the tarwad. The karnavan of a Malabar tarwad is, except under certain circumstances, the eldest male member of the tarwad; in him is vested actually all the property movable and immovable belonging to the tarwad; he manages the property of the tarwad and can invest the money of the tarwad either on loans or other security as he may think fit. He can also grant the land on kanom or on otti mortgage. No member of the tarwad can call for an account of the income, nor can a suit be maintained against him for an account of the tarwad property in the absence of fraud on his part. He can sue in his own name for the purpose of recovering or protecting the property of the tarwad, and none of his acts in relation to the above matters can be questioned, provided he has acted in good faith. He is restrained, it is true, from alienating the lands of the tarwad in his capacity as manager except in certain instances, *e.g.*, when a decree is in course of execution against the tarwad property and against the karnavan, and he alienates such property in good faith there being no other means available, and in the case where it is absolutely necessary to do so to pay arrears of revenue. The karnavan is not a mere trustee of the property of the tarwad; he is the natural guardian of every member within the family, and it was well said by Mr. Holloway in appeal suit No. 120 of 1862 (Malabar) "a Malabar family speaks through its head the karnavan, and in "Courts of Justice except in antagonism to that head can speak "in no other way." It appears that, during the time Holloway, J., was in the High Court, the proposition that the members of the tarwad were bound by the acts of the karnavan in cases in which he sued or was sued in his representative capacity was never seriously disputed, and the cases cited at the bar do not appear to me to overrule the proposition. I would adopt the view of the powers of the karnavan as laid down in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*(1), and there are many cases quoted by Mr. Wigram in his work on Malabar Law and Custom which support the proposition.

I would hold, therefore, that when a karnavan sues or is sued in his representative capacity and acts, in the terms of the order of reference, 'honestly,' the other members of the tarwad are bound

(1) I.L.R., 2 Mad., 328.

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by the decision. I answer, therefore, the order of reference to the Full Bench in the affirmative.

The sections of the Code of Civil Procedure cited in argument do not affect the matter one way or the other.

SHEPARD, J.—The question raised by the reference is one of considerable importance. Since 1880 it has constantly been discussed in this Court. Different views have been propounded, and it would not be easy to reconcile all the decisions. I propose first to examine these decisions and afterwards to consider the question from other aspects, and also with reference to the arguments which are urged against the admission of the principle that a karnavan can properly represent his tarwad in suits professedly brought by, or against, the tarwad.

In *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*(1), the senior member of an illom had been sued as such for the recovery of land alleged by him to belong to the illom. A decree having been passed against him, a junior member of the illom, alleging fraud, sued for a declaration with regard to the same land as against the plaintiff in the first suit. It was held that the junior was properly represented by his senior in the first suit, and that therefore having failed to prove fraud, he could not succeed in the second suit. In *Kombi v. Lakshmi*(2) a decree for money had been obtained against the karnavan and a suit was brought by the anandravan to set aside the sale in execution of the decree. It does not seem to have been proved that the karnavan was sued or sought to be made liable otherwise than in his personal capacity. The Court distinguished the case of a debt from the case of land such as was under consideration in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*(1). It held that the junior members were entitled to a decree on the creditor failing to prove that the debt was properly incurred for the purposes of the tarwad. It was in effect said that if the creditor intended to make the tarwad liable he ought to have made them parties or applied under section 30 of the Code.

In *Vasudeva v. Narayana*(3) Mr. Justice Innes, who was a party to the last decision, expresses the same view again. That was a case in which a member of an illom, apparently the eldest, was

(1) I.L.R., 2 Mad., 328.

(2) I.L.R., 5 Mad., 201.

(3) I.L.R., 6 Mad., 121.

defeated in a suit brought against him for redemption of certain land. In the second suit brought by his brother to recover the same land, it was held by Innes, J., that, although no fraud was alleged the brother was not bound by the former decree. Mr. Justice Kernan, who had taken part in the judgment in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*(1), considered that it was unnecessary to decide the question whether the case of a Malabar tarwad was an exception from the ordinary rule that all persons sought to be affected by a suit should be made parties to it. The learned Judges agreed that the case was distinguishable from that in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*(1). With all deference, I must say that, assuming that the elder brother in *Vasudeva v. Narayana*(2) was sued in his representative capacity, I can see no material distinction between the two cases. The circumstance that, in the earlier case, the plaintiff alleged fraud and left it to be assumed that otherwise he was bound by the decree is suggestive as indicating the opinion entertained by him and his advisers as to the position of the head of a Malabar family. But I do not understand why, because he failed to prove the alleged fraud, he should not have had relief on the simple ground that he was not duly represented in the former suit, if that ground was considered tenable. It appears to me that the judgment in *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*(1) was clearly intended to show that that ground was not tenable. In *Thenji v. Chimmu*(3) the two extreme views are stated: *First*, "a judgment is only binding *inter partes* and the judgment against the karnavan is in no case binding on the anandravans"; *Second*, "a karnavan is the head and representative of the family, and the judgment against him binds the anandravans unless he was guilty of fraud or collusion." It was not necessary in that case to attempt a reconciliation of the decisions.

In *Haji v. Atharaman*(4) it appears to have been assumed that a decree against the karnavan for a debt alleged to be the tarwad debt was binding on the tarwad. There was no actual decision. In *Ittiachan v. Velappan*(5) the question came before a Full Bench with reference to decrees for debt. The question stated in the

(1) I.L.R., 2 Mad., 328.

(2) I.L.R., 6 Mad., 121.

(3) I.L.R., 7 Mad., 413.

(4) I.L.R., 7 Mad., 512.

(5) I.L.R., 8 Mad., 434.

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judgment was as follows:—"Under what circumstances a decree passed against a karnavan of a Malabar tarwad will be binding on the other members of the tarwad who may not have been made parties to the suit, so that a sale in execution will convey the rights of the tarwad in the property sold in execution to a purchaser?" As might have been expected no definite answer was given to this question. The general effect of the observations made in the first part of the judgment seems to be that, in the opinion of the Court, the admitted practice of treating the karnavan as a sufficient representative of the tarwad was not strictly regular, but that notwithstanding it must be tolerated within certain bounds. In dealing with the particular cases under reference, the Court treated the circumstance that the karnavan had or had not been sued in his representative character as the cardinal point on which to decide whether or not the tarwad was bound by the decree. The next case *Sri Devi v. Keli Eradi*(1) is of importance because, in deciding it, the Court considered the Full Bench decision and acted upon their view of it. At the same time it must be said that, having regard to the facts found by the District Judge, the observations made on the general question of the force of decrees against a karnavan were not strictly necessary. The District Judge on appeal held that the karnavan had, in the first suit in which he was impleaded as defendant, fraudulently admitted the plaintiff's title. But the Court decided the case on the ground that apart from fraud the anandravans were entitled, notwithstanding the decree, to have the question of title examined and to show that the decree was erroneous in point of fact. They considered that they were precluded by the Full Bench decision from holding that the anandravans were bound by the decree against their karnavan unless they proved *mala fides* on his part.

The next case *Subramanyan v. Gopala*(2) was heard by a Court composed of the same Judges as those who took part in the last cited case. This case differs from the former cases in the circumstance that the manager of the family had figured as plaintiff in the former suit. It was found that she had sued not on her own account, but on behalf of the tarwad and that she had contested the suit honestly and with due diligence. On this finding returned in answer to questions sent down by the Court on the

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

(2) I.L.R., 10 Mad., 223.

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first hearing of the second appeal, the Court dismissed the suit brought by the junior members of the tarwad, founding their judgment on the fact that the manager had been the plaintiff in the first suit and thus distinguishing the case from *Sri Devi v. Keli Eradi*(1).

Some other cases were cited, but they have no immediate bearing on the point now under discussion. One negative proposition is clearly established by the cases to which I have referred—a decree made against a karnavan is clearly not binding on the tarwad, unless he sued or was sued in his representative character. It is also difficult to avoid the admission that the cases justify this further proposition that, in some cases, a decree against the karnavan may be binding on the tarwad and unimpeachable save on the ground of fraud. This limited proposition is admitted in *Subramanyan v. Gopala*(2). The distinction there insisted upon I fail to understand or appreciate. If the tarwad may be adequately represented by their karnavan in litigation promoted by him, I cannot see why this may not equally be represented by him in proceedings which are directed against the tarwad. The distinction between the case of the karnavan sued for debt and the karnavan sued for property is also, I think, one which cannot be maintained. It is suggested in the case in *Kombi v. Lakshmi*(3), but since then does not seem to have been insisted upon. I concede that distinctions founded on the nature of the right or the way in which it comes to be litigated may be material in considering whether the karnavan really did represent the tarwad and honestly represent it; but otherwise I fail to see how they can be material. There are, it appears to me, only two alternatives. We must either hold that the status of the karnavan has nothing in it to make a decree against him binding on the tarwad, or that, in all cases in which he is sued or sues in his representative character, the tarwad is bound, cases of fraud or collusion only being excepted. Having regard to the authorities already cited, I do not think we are precluded from affirming this latter proposition. The former proposition it would not be easy to reconcile with the Full Bench decision, which alone is binding on us.

(1) I.L.R., 10 Mad., 79. (2) I.L.R., 10 Mad., 223. (3) I.L.R., 5 Mad., 201.

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I will now consider the question apart from the recent cases and with reference to the position of karnavan as understood in Malabar. I believe there can be no doubt that, prior to 1880, the theory that the tarwad was fully represented by the karnavan was universally admitted (see *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*(1), *Kombi v. Lakshmi*(2), Wigram's Malabar Law). It is noteworthy that, as long as Mr. Justice Holloway, who was intimately acquainted with Malabar Law, was in this Court, the theory does not seem to have been questioned. In the Travancore State, I find from a recent judgment of the Court there that it is maintained to the present day (*Narayana v. Narayana*(3)). It is unnecessary to repeat at length what has been said in several cases as to the rights and duties of the karnavan. He is the manager of the tarwad property; he is entitled to possession of it even against the anandravans; he is authorized, subject to certain limitations, to alienate the family property and to pledge the credit of the family. He cannot be removed from office at the instance of the junior members and dispossessed of the family property except on proof of gross maladministration. Apart from this, the junior members have no other claim against him except for maintenance. No claim for division of the property is admissible (*Eravanni Revirvarman v. Ittapu Revirvarman*(4), *Varanakot Narayanan Namburi v. Varanakot Narayanan Namburi*(1), *Tod v. Kunhamod Hajee*(5), *Kannan v. Tenju*(6)). If the karnavan being so placed with regard to the tarwad, was, for many years prior to 1880, universally regarded as the person through whom the tarwad should speak in courts of law and was so treated by the courts, the remaining question is whether the Code of Civil Procedure forbids us to continue to treat him in the same way. This is a question which ought to be argued without reference to considerations of convenience or expediency, which, however, in my opinion, favour the maintenance of the old practice rather than its abolition. The argument used in several of the cases seems to have been that, because the Civil Procedure Code does not provide for the case of karnavans as it does, for instance, for the case of executors, and does contemplate the joinder of all parties interested in the sub-

(1) I.L.R., 2 Mad., 328. (2) I.L.R., 5 Mad., 201. (3) 11 Travancore, L.R., 112.
(4) I.L.R., 1 Mad., 153. (5) I.L.R., 3 Mad., 176. (6) I.L.R., 5 Mad., 1.

ject matter of the suit, the anandravans of a tarwad cannot be affected by a decree to which they are not parties either actually or constructively under the provisions of section 30. The general proposition that all persons intended to be prejudicially affected by a decree ought to be joined as parties to the suit cannot be denied; but there are exceptions from this rule, and the question whether one person represents another is rather a question of substantive law than of procedure. One of the classes of exception consists of the cases of which *Bissessur Lall Sahoo v. Maharajah Luchmessur Singh*(1) is an instance. Another consists of the cases in which the principle is admitted that the female heiress under Hindu Law represents the estate in such a manner that a decree against her in a suit properly framed may bind the reversioner. These exceptions have been allowed and maintained, notwithstanding the provisions of the Civil Procedure Code. The section of the code to which we are specially referred are the 30th and the 13th, explanation V. The 30th section is of a permissive character. So far as concerns the principle involved there was nothing new in the provision. It had been acted on before the code of 1877 came into force (*Srikhanti Narayanappa v. Indupuram Ramalingam*(2)). If it were shown to have been invoked, in the case of the karnavan and his tarwad, it might be said that a decree against a karnavan could, since the enactment of the Code, be no longer held binding on the tarwad, unless the procedure prescribed by the section were followed. But this is not so, and I do not think it can properly be said that a karnavan and his anandravans have 'the same interest' in a suit brought by, or against, the tarwad. The interest of the former, with his right of management and possession and his obligation to maintain the junior members, is surely not identical with the interest of a junior member, who has a claim for maintenance only. The whole contention in favour of the view that the karnavan represents the tarwad rests on the fact that he is in a position of authority having obligations and duties to perform, for discharge of which superior rights in the tarwad property are conferred upon him. With regard to section 13, explanation V, if it has any application to the case of a Malabar tarwad, it rather supports the view that the tarwad may be bound by a decree against the karnavan *bonâ fide*

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(1) L.R., 6 I.A., 233.

(2) 3 M.H.C.R., 226.

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litigating on its behalf. I am disposed to agree with Kernan, J., in thinking that the explanation refers alike to claims made by a defendant and claims by a plaintiff. The conclusion at which I arrive is that the Code of Civil Procedure does not prevent our giving effect to the theory of the karnavan's representative character. I cannot help thinking that learned Judges have been induced to discountenance the theory on the ground that the interests of the tarwads require that all their members should be joined in suits concerning their property or obligations. It was observed in some of the cases that to allow the karnavan to represent the tarwad in suits would practically amount to allowing him to alienate tarwad property indiscriminately. No doubt, the remedy by suit impeaching the decree against their karnavan on the ground of his fraud or collusion, would not afford the anandravans a complete indemnity against the possible misconduct of the karnavan. But the inconvenience resulting is, I think, more than counterbalanced by the evil consequences, which have resulted from the departure from the old practice. The result has been that, although a man may have obtained a decree for a debt or for property against the karnavan and some of his anandravans, he has been exposed to successive suits by the remaining members of the tarwad. It is always open to some unconsidered infant to re-open the litigation and insist on having the whole question re-tried. The rule of impartibility, which prevails according to Malabar Law, renders the consequences of an omission to join all the members of the tarwad, if they are to be deemed necessary parties, much more serious than it is in a similar case under the ordinary Hindu Law. Whereas, according to the latter, the creditor or the purchaser might, at least retain under his decree against the manager, the share of that manager in the family property, in Malabar he is deprived even of that consolation when the court holds that a junior member of the tarwad may re-open a litigation which has been fairly conducted by his karnavan and is persuaded to upset the former decree. In such a system it is not astonishing that a rule making the karnavan the exclusive representative of the tarwad should find a place.

For these reasons I am of opinion that the question must be answered in the affirmative.

SUBRAMANIA AIYAR, J.—I have also arrived at the same conclusion, and, in my opinion, that is the conclusion to which the

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principle governing the case leads, there being nothing in the Code of Civil Procedure to preclude effect being given to that principle.

The question here really turns upon the peculiar characteristics of a Malabar family and the unique position which its karnavan holds. The family property is not liable to partition, except with the consent of all; the right of the members other than the karnavan being practically limited to claim maintenance and to prevent the karnavan from wasting or improperly alienating the family property; and the title to hold possession of the estate and to receive and expend its income is vested in the karnavan, not by the sufferance of the other members, but of right, which is indefeasible so long as he exercises his functions without injury to the family. Therefore according to the substantive law to which he is subject, a karnavan is necessarily the natural representative of the family in all matters concerning it as between it on the one hand and outsiders on the other.

The question is whether in litigation also, when it concerns the family, a karnavan is not entitled to represent all the other members so as to bring cases like the present within the exception to the general rule requiring all persons materially interested in the subject of a suit to be made parties to it, viz., even those not actually before the court are bound by the judgment given in a suit, if their interest was sufficiently represented therein. Now it is conceded that, when a karnavan sues on behalf of the family, he fully represents all its other members and an adjudication therein, if there is no fraud or collusion, is binding on the whole family (*Subramanayan v. Gopala*(1)). It is obvious that in such cases it is not possible to maintain any other view. For the entire executive authority being exclusively vested in the karnavan, it is not open to the party sued by him to raise any objection to the action on the ground of the non-joinder of the other members, *Byathamma v. Avulla*(2). A defendant in that position cannot, in common fairness, be allowed to be sued again and again by each and every member of the family after a suit instituted by a karnavan had been properly tried and adjudicated upon. By parity of reasoning, then, it follows that a karnavan can be sued on behalf of the family. It is difficult to see how this conclusion can be avoided,

(1) I.L.R., 10 Mad., 223.

(2) I.L.R., 15 Mad., 119.

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unless the argument of the defendant based on the provisions of the Civil Procedure Code were correct.

The argument seems to be that, only when the special procedure prescribed by section 30 has been adopted, the members of a family not actually parties to the suit are bound by the decision pronounced in it, but not otherwise. Now, it must be remembered that section 30 provides only for that class of cases in which, owing to the circumstance that the persons interested are too numerous to be all conveniently brought before the court, and therefore the rigorous application of the general rule as to parties would work injustice, the rule has, as pointed out by the Lord Chancellor in *Mozley v. Alston*(1) see also *Richardson v. Hastings*(2), been relaxed in comparatively modern times. It has also to be remembered that the representative under that section is constituted and appointed by the court in the suit. But there are instances where, even though the difficulty with reference to the application of the general rule has nothing to do with the fact that the persons interested are numerous, yet the law does allow, apart from statute, certain persons to prosecute or defend suits in their representative capacity, e.g., Hindu widows with reference to reversioners; other persons having an estate, analogous to that of a Hindu widow with reference to those entitled to take after such qualified owners, and so on. In the cases last mentioned the limited owners possess the representative capacity to sue or defend by virtue of their position. This, as already shown, is eminently true in the case of a karnavan. Consequently he does not require the aid of section 30 to be a representative, but has the inherent right to act as such, provided, of course, there is in the particular case no conflict between his own interest and that of the family.

Nor does section 13, the only other provision relied upon, affect the validity of the conclusion arrived at. If the present case falls within explanation V, that explanation fully sustains the view taken, since, with all deference to the opinion of Innes, J., in *Vasudeva v. Narayana*(3), I think the explanation is certainly applicable to claims by a defendant as well as to those by a plaintiff. But if that explanation does not apply, the case is one not strictly covered by any other part of the section. And,

(1) I. Phillips' Reports, 798, 799. (2) L.J., 13 Ch., 142. (3) I.L.R., 6 Mad., 121.

as the section is not exhaustive as to *res judicata*, I think it does not affect the correctness of the view taken here. Therefore, unless there is shown in the words of Jessel, M.R., "fraud or collusion or anything of that sort or that the Court was cheated into believing that the case was fairly fought or fairly represented when in point of fact it was not" (*Commissioners of Sewers of the City of London v. Gellatly*(1)), a decision in a suit, defended by a karnavan in his representative capacity, must be held to be binding upon all those represented by him.

The rule governing the present case being thus clear, arguments against it founded on expediency have no force. If it be said that to recognise the right of a karnavan to represent his juniors in litigation would prove detrimental to the welfare of Malabar families, it must be admitted it would be equally so in cases in which a karnavan sues as when he defends. Yet, in the former case, the objection has not been considered good enough to hold that junior members are not bound by a decision obtained in the suit by the karnavan. How then can the argument prevail in the latter case? No doubt, in particular instances, it is possible and not improbable that junior members might find themselves unable to establish fraud, collusion or the like on the part of the karnavan. But I have no doubt that the hardship, likely to be so caused, will be small indeed when compared with that which would result from answering the question before us in the negative; since experience shows that, in the large majority of cases, the attempts made to re-open litigation once concluded after real and genuine contest are made by the same parties, the names of persons (possibly of those who had been fully cognizant of and who had acquiesced in the karnavan's management of the previous litigation) who unfortunately, for the successful party, had not been actually impleaded, being used for the promotion of such subsequent suits. No doubt representative litigation of the kind under notice is attended with some degree of difficulty. The difficulty however may, to some extent, be met by a judicious exercise of the discretion vested in the Courts in the matter of adding parties. But the difficulty cannot afford any justification for discarding the principle applicable to such cases. A departure from it, in some of the decisions of this court which have been fully considered

(1) L.R., 3 Ch.D., 616.

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by my learned colleague Shephard, J., and which I therefore refrain from discussing, has, I am afraid, tended to foster unjust and vexatious litigation which can, I think, be stopped to a considerable degree by again enforcing the principle accepted and uniformly acted upon up to 1880.

I concur therefore in answering the question referred in the affirmative.

DAVIES, J.—I was at first disposed to adopt the view that all members of the tarwad ought to be impleaded either individually when few in number, or under the provisions of section 30 of the Code of Civil Procedure when numerous, for the simple reason that this course would have the effect of preventing any further litigation in connexion with the same subject matter.

But now having regard to the representative character which the karnavan undoubtedly holds in all other affairs connected with the tarwad, it seems to me that if we overlooked that character in our courts of law we should be unjustly derogating from his status.

Moreover, the only litigation that would be possible upon the judicial recognition of his representative character would be confined to actions founded in fraud on his part. The inconvenience caused thereby would, in my opinion, be far less than what would follow from an inflexible rule requiring that in every case in which a tarwad was concerned all its members should be made parties, entailing in nine cases out of ten needless trouble and expense.

I therefore also concur in answering the question in the affirmative.

This second appeal coming on for final disposal, the Court (Shephard and Subramania Ayyar, JJ.) delivered the following judgment:—

JUDGMENT.—It is said on the appellants' behalf that there was a prior judgment in their favour, of which they might have availed themselves if they had known that the view of the law now taken would be maintained. But this prior judgment was not pleaded, though it was open to the appellants to put it forward.

On the facts as found by the District Judge, we must hold that he was right in dismissing the suit, and therefore the appeal is dismissed, but without costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

KUMARASAMI PILLAI (DEFENDANT), APPELLANT,

v.

ORR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Karnams in a permanently settled estate—Regulation XXV of 1802, ss. 8, 11—Regulation XXIX of 1802, s. 5—Right to dismiss a karnam—Delegation of such right to lessees of zamindari—Damages accrued by a karnam's neglect of a statutory duty.

The lessees of a zamindari are not entitled to sue for the removal of a karnam from office, though their lease contains a provision purporting to authorise them to appoint and remove karnams, but if they suffer any loss from the karnam's neglect of his statutory duty, they are entitled to bring an action for damages against him.

APPEAL against the order of W. Dumergue, District Judge of Madura, in appeal suit No. 594 of 1895, setting aside the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in original suit No. 22 of 1895 and remanding that suit for disposal on the merits.

The plaintiffs held from the Zamindar of Sivaganga a lease of his estate which, *inter alia*, authorised them to "proceed in their own names to exercise all the powers which would be exercised by the zamindar, including the appointment and removal of village karnams and other servants for the management and improvement of the said zamindari." The plaintiffs alleged that they had suffered loss by reason of the omission of the defendant, who was the karnam of a village in the zamindari, to render due accounts and to perform certain other duties, and they sued to have him removed from office and for damages.

The District Munsif held that the suit was not maintainable for the reason that the plaintiffs were not the proprietors of the zamindari and had not been registered as transferees under Regulation XXV of 1802, section 8. He referred to *Cherukomen v. Ismala*(1), *Rajah Vurmah Valia v. Ravi Vurmah Kunhi Kutty*(2),

* Appeal against Order No. 57 of 1896.

(1) 6 M.H.C.R., 145.

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

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Valamarama v. Virappa(1), *Ramachandra v. Appayya*(2), *Subramanya v. Somasundara*(3), and *Ayyappa v. Venkatakrishnamarazu*(4).

The District Judge held that the suit was maintainable and set aside the decree and remanded it to be disposed of on the merits. He distinguished the cases cited by the Subordinate Judge and supported his view by a reference to *Syed Ali Saib v. Zamindar of Sahur*(5), and *Vizianagaram Maharaja v. Suryanarayana*(6).

The defendant preferred this appeal.

Mr. R. F. Grant for appellant.

Mr. Norton and Mr. Ryan for respondent.

JUDGMENT.—If the plaintiffs have, in fact, suffered any damage from a neglect of a duty imposed by statute on the karnam, they are entitled to bring a suit to recover such damage.

Section 11 of Regulation XXV of 1802 does not restrict or take away this right. As regards that portion of the plaintiffs' action, which relates to their claim to remove the karnam from his office, the first question is whether the plaintiffs in their right as lessees (independently of the clause in their lease purporting to transfer to them the right to bring such a suit) can maintain that portion of their claim. Section 11 clearly gives this power to the zamindar or proprietor and to no one else. Inasmuch, therefore, as the plaintiffs' assignment does not make them proprietors or zamindars within the meaning of the Regulation, they cannot sue.

Section 5 of Regulation XXIX of 1802 cannot be read as conferring a general right to bring such an action on any person interested, but must be read in conjunction with section 11 of Regulation XXV already referred to.

The next point raised by plaintiffs' counsel was that the zamindar had, by a special provision in the plaintiffs' lease, assigned to the plaintiffs the right to bring a suit to remove karnams and therefore the plaintiffs were entitled to maintain this part of their claim.

Having regard to the nature of the power in question, we think it was not one which could be transferred. *Delegata potest as non potest delegari.*

(1) I.L.R., 5 Mad., 145.
(4) I.L.R., 15 Mad., 484.

(2) I.L.R., 7 Mad., 128.
(5) 3 M.H.C.B., 5.

(3) I.L.R., 15 Mad., 127.
(6) I.L.R., 9 Mad., 307.

We therefore think that plaintiffs cannot maintain so much of their action as relates to the removal of the defendant from his office. The order of the District Judge remanding the suit for trial, so far as the plaintiffs' right to claim for damages is concerned, is right. It must, however, be modified as to the remainder of the claim and the suit to this extent be dismissed.

Each party must bear their own costs of this appeal.

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APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

SUBRAMANIA AYYAR (DEFENDANT), APPELLANT, No. 2,

1896.
November 12

SITHA LAKSHMI (PLAINTIFF'S REPRESENTATIVE), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, s. 127—Onerous gift to an infant—Acceptance.

Land was given by the defendant to the wife of the plaintiff burdened with an obligation. She accepted the gift and died in infancy leaving the plaintiff her heir. The plaintiff now sued to make good his title to the land against the donor:

Held, that the gift was complete as against the donor and that the plaintiff was entitled to a decree.

SECOND APPEAL against the decree of T. Ramachandra Rau, Subordinate Judge of Trichinopoly, in appeal suit No. 154 of 1893, reversing the decree of G. Narasimhalu Naidu, District Munsif of Kulitalai, in original suit No. 363 of 1891.

The plaintiff sued as the heir of his wife who was the daughter of defendant No. 2, and died when an infant, to recover certain land which had been given to her by her father under a deed of gift which was in the following terms:—

“Deed of gift in respect of Manjakani (dowry), dated 1st February 1889, executed by Subramania Ayyar, son of Rangaier, Brahman, saivite, cultivator, residing at Mutharasanallur, Trichinopoly Taluk, to Venkatasubbammal, wife of Somarasam-pettah Gopalaier, and my eldest daughter, Brahman, saivite and housewife residing at the said Mutharasanallur, is as follows:—

* Second Appeal No. 981 of 1895.

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"As I have, with perfect willingness, made a free gift to you on this date for Manjakani (dowry), nanjah, survey No. 591, letter A, Nanjanthirathu Kattalai, decimal 86,—said No. letter B, decimal 32—No. 592, nanjahs classed as punjah, decimal 7 or total acre 1, decimal 25, together with all the samuthayams appertaining thereto, you will not only yourself enjoy the said lands as long as the sun and the moon last, but also, your issue will hold and enjoy them with absolute rights. Out of the debt I have now borrowed from Matharuboothamier of Kottaimal Agraharam, on the security of the said land, the balance still due, after deducting Rs. 200 which I have, on this date, asked my brother-in-law Natasaiyer to pay, after executing in his favour documents with certain particulars, is Rs. 255, including the principal and interest. This sum of two hundred and fifty-five rupees, you will, yourself, pay out of the income of the aforesaid land, and you will yourself enjoy the said lands with absolute rights and live in happiness. The former enjoyment of the said lands was mine, and the present enjoyment is yours. There is no other prior encumbrance in respect of the said land. To this effect, I executed a deed of gift in respect of Manjakani (dowry) in favour of Venkatasubbammal with my consent. The said lands are worth Rs. 800."

The land had since been leased by the plaintiff to defendant No. 1 who did not defend the suit. Defendant No. 2 with whom he was stated to be acting in collusion pleaded that the gift was not binding on him for the reasons that it was not accepted by the donee, and was burdened with an obligation which she being an infant could not elect to undertake.

The District Munsif upheld the first plea and dismissed the suit.

The Subordinate Judge on appeal reversed his decree.

Defendant No. 2 preferred this second appeal.

Kothandarama Ayyar for appellant.

Seshagiri Ayyar for respondent.

JUDGMENT.—The Subordinate Judge has found as a fact that the property given was delivered to and accepted by the deceased minor, wife of the plaintiff, who now sues for the property given. It is contended before us that inasmuch as the deed of gift imposed an obligation on the donee and the donee died a minor, there is no complete gift which binds the donor.

We think the gift is complete. Section 127 of the Transfer of Property Act only gives the minor the right to repudiate on attaining majority, such repudiation became impossible in the present case.

The decision of the Subordinate Judge is right.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

PEDDA SUBBARAYA CHETTI AND OTHERS (PLAINTIFFS),
APPELLANTS,

GANGA RAZULUNGARU AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Mortgage—Covenant to pay interest—Interest post diem.

In a suit on a mortgage, it appeared that the instrument sued on was executed to secure a sum of money arrived at by calculating interest on sums previously due by the mortgagors, and it was expressed to be for securing the payment of that principal together with interest as it might accrue annually. There was also a provision for compound interest. The principal was payable on 14th July 1886, and there was no express stipulation to pay interest after that date:

Held, that the mortgagees were entitled to interest for the subsequent period.

APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in original suit No. 33 of 1893.

The plaintiff sued upon a mortgage document, dated 19th December 1882, to recover principal and interest amounting together to Rs. 10,878-10-0. This sum comprised interest computed for the period subsequent to 14th July 1886, and it was argued that interest should cease from that date.

The mortgage document omitting formal parts was as follows:—

"On looking into the account up to date in the presence of our gumasta Kamaraju Narayaniah, the amount, including the principal and the interest in respect of the bond executed on the

* Appeal No. 113 of 1895.

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"14th November 1879 to you and to your brother Chengalroya Chetti, is Rs. 7,106-9-0, excluding the amount of Rs. 3,553-4-6 contained in the bond executed by us to-day to your brother Chengalroya Chetti, we are indebted to you Rs. 3,553-4-6, which is to be given to you, Rs. 1,219-6-0 being the amount, interest included, for the cloths and other things given by you from the first of Tai in Pramadi year up to this date and Rs. 25 the cost of the stamp; in all, Rs. 4,797-10-6. Therefore, for the payment of the principal and the accrued interest at the rate of $\frac{1}{4}$ rupee for Rs. 100 per mensem, we have hypothecated to you also the village of Arungolam No. 193, including the hamlet of Vemulnayudi Khandrika situated in Nemali Division, Chirutani Taluk, Chirutani Sub-District, Carvetinagaram Samstanam, North Arcot District, which is the minor's ancestral property, our inamti enjoyed by our forefathers and afterwards by ourselves, and which is in our possession and enjoyment; the tanks, channels and fountains related thereto; all the profits and rights enjoyed by us: this village is hypothecated on 29th June this year to Pedda Munusami Naidu (son of Bollini Appasami Naidu) and others residing in Velanjeri village, Chirutani Taluk; it is hypothecated to your brother Chengalroya Chetti this day. Hence the particulars of arrangements made for the payment of the said debt. From this date forward, we will continue to pay the interest due on the 30th of Panguni of each year. If we fail to pay the interest according to the date fixed, we will continue to give interest on that interest amount. We will pay the principal amount of rupees by the end of Ani of the Parthiva year; and we will take back this bond paying off on the one occasion principal and the interest that may then become due exclusive of the payments made."

The District Judge referred to *Mansab Ali v. Gulab Chand*(1), and held that interest was not payable as such after the due date and it could not be awarded as damages by reason of the operation of Limitation Act, schedule II, articles 115 and 116, and he passed a decree in accordance with this ruling.

The plaintiff preferred this appeal.

Mr. Subramaniam for appellants.

Sadagopachariar and Seshagiri Ayyar for respondents.

(1) I.L.R., 10 All., 85.

The Judgment of the High Court on the question of interest was as follows:—

JUDGMENT.—Two points are raised in this appeal. The first relates to the claim for interest accruing after the due date fixed for the payment of the principal in the mortgage instrument of the 19th December 1882. The District Judge considers that the instrument contains no stipulation, express or implied, to pay interest after the 14th July 1886, by which day the mortgagor undertakes to pay the principal. He refers to one of the numerous cases dealing with the question of interest payable under a mortgage. It is not necessary to discuss those cases, *firstly*, because the question is entirely one of construction to be answered with reference to the language of the particular instrument, and *secondly*, because we have a recent ruling of the Judicial Committee by which we must be guided in construing that instrument. (*Mathura Das v. Raja Narindar Bahadur*(1)).

In this case, after stating how the sum of Rs. 4,797-10-6 has come to be due, the instrument goes on to say that "for the payment of the principal and interest which may accrue at the rate of $\frac{1}{4}$ rupee per cent. per mensem we have hypothecated, &c." Then the property is described and the instrument proceeds to state how the money shall be paid. The interest is to be paid on the 30th Panguni of each year, and in case of default compound interest. The principal is to be paid by the end of Ani of the Parthiva year.

Now, it is true that there is not in terms a stipulation to pay interest after the end of Ani in the year Parthiva, and hence it is argued that the parties did not intend such payment to be made. But we have to look at other parts of the instrument besides the covenant to pay the principal on a fixed date. The amount found to be due and secured as principal is arrived at by calculating interest on sums originally due by the mortgagors, and the hypothecation is expressed to be for the payment of that principal and interest as it may accrue. That seems to show that interest was to be paid in the future as well as in the past. Then there is the clause providing for compound interest which certainly points to a liability for interest accruing after the due date. These provisions are more consistent than otherwise with an intention which in itself is the most probable one, when, to use the language of

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(1) I.L.R., 19 All., 39.

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the Judicial Committee, regard is had to "the ordinary expectations of persons entering into a mortgage transaction." We should only be defeating those expectations if we held with the District Judge that the mortgage document carried no interest after the due date. We are, therefore, of opinion that according to the right construction of the instrument the mortgagor incurred the obligation to pay interest on the principal amount remaining unpaid on the 14th July 1886.

APPELLATE CIVIL.

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

1896.
August 5, 25.

SANKARAN (RESPONDENT), APPELLANT,

v.

RAMAN KUTTI AND OTHERS (APPELLANTS), RESPONDENTS.*

*Letters Patent, s. 15—Appeal under Letters Patent—Civil Procedure Code, s. 588
—Powers of Appellate Court under s. 588.*

A Judge of the High Court when hearing an appeal under Civil Procedure Code, section 588, against an erroneous order of remand under section 562 may, if he thinks fit, pass a final decree in the suit instead of merely remanding the suit to the Lower Appellate Court. No appeal lies against such decree under Letters Patent, section 15.

APPEAL under Letters Patent, section 15, against the judgment of Mr. Justice Parker, in appeal against order No. 18 of 1894, setting aside the decree of E. K. Krishnan, Subordinate Judge of South Malabar, and restoring the decree of T. A. Ramakrishna Ayyar, District Munsif of Choughaut, in original suit No. 404 of 1892.

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

This appeal under the Letters Patent was preferred by the plaintiff.

Sankaran Nayar for appellant.

Sundara Ayyar for respondents.

* Letters Patent Appeal No. 16 of 1895.

JUDGMENT.—Plaintiff and defendants Nos. 1 and 2 are brothers. Third defendant is their father. All four form an undivided family of Tiyaṅs following the Makkattayam rule of inheritance. A kanom was granted by a land-owner in the name of the first defendant. On redeeming the kanom, the landlord paid into Court the amount of the kanom, together with compensation for trees and a house on the land redeemed. The decree in the suit (original suit No. 29 of 1892) directed that all the money should be paid to first defendant, as the kanom was in his name, 'unless defendants Nos. 2, 3 and 5' (the present second and third defendants and plaintiff) 'sue to establish their right to it.'

The plaintiff alleged that the kanom and the trees, for which compensation was paid, were joint family property, but that the house was his own sole property, having been built solely with his own funds. He sued for a declaration of his right to recover his one-fourth share of the money deposited for the kanom and as compensation for the trees, and for a declaration of his right to the whole of the money deposited as compensation for the house.

The third defendant supported the plaintiff's claim. The first defendant claimed the whole of the money as his own on the ground that the kanom was not joint family property, but his own acquisition. The second defendant alleged that all the property was joint family property. The District Munsif found that the suit for a bare declaration was not sustainable with reference to section 42 of the Specific Relief Act, and also that plaintiff without suing for partition could not sue for a declaration of his right to a share of the joint family property, nor for a declaration of his sole right to the compensation for the house since the latter had become merged in the family property. He therefore dismissed the suit. The Subordinate Judge reversed this decree and remanded the suit for trial on the merits, holding that the plaintiff could maintain the suit as framed. Against this order of remand the first defendant appealed to the High Court and the appeal was heard by Mr. Justice Parker sitting alone. He held that the passing of the decree in original suit No. 29 of 1892 gave the plaintiff no cause of action for a declaratory suit, though it was open to plaintiff to sue first defendant for the value of the house, if the latter belonged to the plaintiff, and also that plaintiff could sue for his share of the family property, but not for his share of

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a particular part of it. He, therefore, set aside the order of the Subordinate Judge and restored that of the District Munsif.

Against this order the plaintiff now appeals under section 15 of the Letters Patent.

A preliminary objection is raised that, as Mr. Justice Parker's order was passed under section 588, Civil Procedure Code, such order is final under the last clause of that section, and is not open to appeal.

We have no doubt but that the objection is valid. Section 588, Civil Procedure Code, is by section 632 of the same Code declared to be applicable to the High Court, and the right of appeal given by section 15 of the Letters Patent against an order of a single Judge of the High Court is subject to the limitations prescribed by the Code of Civil Procedure, *Achaya v. Ratnavelu*(1).

It is however contended that section 588 only empowered Mr. Justice Parker to determine whether the order of the Subordinate Judge in remanding the suit was right or wrong, but did not give him jurisdiction to go further and pass a decree in the suit, as he did when he restored the District Munsif's decree dismissing the suit, and in support of this contention it is pointed out that had Mr. Justice Parker merely decided that the Subordinate Judge's remand was wrong, and remanded the suit to him for disposal according to law, instead of himself restoring the District Munsif's decree, then the plaintiff would have been entitled to a second appeal to a Division Bench of two Judges of this Court in the event of the Subordinate Judge dismissing his appeal; whereas by the procedure adopted by Mr. Justice Parker, the plaintiff is obliged to abide finally by the opinion of a single Judge of this Court on a point of law instead of being entitled to have the point decided by a Bench of at least two Judges. Such a result may be to some extent anomalous; but the existence of an anomaly does not justify us in overruling the provisions of the law. That the Court when hearing an appeal under section 588, Civil Procedure Code, against an order of remand under section 562, Civil Procedure Code, may deal with the correctness of the Lower Court's decisions on the preliminary point, and may, if it sees fit, pass a final decree in the suit, instead of merely remanding the suit to the Lower Appellate Court, has been decided by the High Courts of Calcutta and

(1) I.L.R., 9 Mad., 253.

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Allahabad in *Loki Mahto v. Aghoree Ajail Lal*(1) and *Hasan Ali v. Siraj Husain*(2), respectively, and this appears to be also the view taken by the Full Bench of the Bombay High Court in *Bhau Bala v. Bapuji Bapuji*(3), and by the Full Bench of the Allahabad High Court in *Badam v. Imrat*(4), Spankie, J., dissenting. It has also been so decided by a Bench of this Court in *Kothandaramasami Naidu v. Krishnasami Naicken*(5). We see no sufficient reason for dissenting from these authorities.

The result is that the order now appealed against must be regarded as having been legally passed under section 588, Civil Procedure Code. Such an order is not open to appeal under the Letters Patent. We must, therefore, dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

TIRUPATI RAJU (DEFENDANT No. 3), PETITIONER,

v.

VISSAM RAJU AND ANOTHER (DEFENDANTS Nos. 1 AND 2),
RESPONDENTS. *

1896.
November 30.
December 1.

Civil Procedure Code—Act XIV of 1882, s. 470—Inter-pleader suit—Act IX of 1889—Provincial Small Cause Courts Act, sched. II, arts. 11 and 14—Claim for compensation awarded under Land Acquisition Act.

Land having been compulsorily acquired under Land Acquisition Act for the purpose of the East Coast Railway, the compensation was fixed at Rs. 468. A conflict having arisen as to the right to receive the compensation and the District Court having declined to determine it under Land Acquisition Act, section 15, an inter-pleader suit was instituted on behalf of the Secretary of State in the Court of the District Munsif. The decision of the District Munsif having been confirmed on appeal, the unsuccessful claimant preferred a petition to the High Court under section 622, Civil Procedure Code:

Held, that the inter-pleader suit was not within the jurisdiction of a Provincial Small Cause Court and was rightly brought on the ordinary side of the District Munsif's Court and consequently where the petitioner's remedy was by way of second appeal the petition for revision was not admissible.

(1) I.L.R., 5 Cal., 144.

(2) I.L.R., 16 All., 252.

(3) I.L.R., 14 Bom., 14.

(4) I.L.R., 3 All., 675.

(5) Letters Patent Appeal No. 35 of 1894 unreported.

* Civil Revision Petition No. 201 of 1896.

TIRUPATI RAJU
v.
VISSAM RAJU. PETITION under Civil Procedure Code, section 622, praying the High Court to revise the decree of H. R. Farmer, District Judge of Vizagapatam, in appeal suit No. 396 of 1894, affirming the decree of Y. Janakiramayya, District Munsif of Vizagapatam, in Original Suit No. 265 of 1893.

This was an inter-pleader suit instituted on behalf of the Secretary of State under the following circumstances:—

Certain mirasi land was compulsorily acquired for the East Coast Railway and a sum of Rs. 468-12-0 was fixed as the compensation for it. Defendants Nos. 1 and 2 were in possession of the land and claimed it as their property, although it was once admittedly the karnam's service inam. The third defendant was the working karnam and he claimed to be entitled to the land as such and consequently entitled to the money. The matter had been referred by the Collector to the District Court under Act X of 1870, section 15, clause 5; but the court declined to interfere on the ground of want of jurisdiction and neither of the defendants had since made good his claim to receive the compensation money. The District Munsif decided in favour of defendants Nos. 1 and 2 and his decision was confirmed by the District Judge.

Defendant No. 3 preferred this petition.

Mr. Satya Nadar for petitioner.

Pattabhirama Ayyar for respondents.

JUDGMENT.—The Collector having done all that he could do under the Land Acquisition Act was not, in our opinion, precluded from bringing this suit in an ordinary Civil Court, there being no prohibition by any enactment against his doing so. The next question is whether the suit should have been brought in a Small Cause Court, assuming that there was one having jurisdiction up to Rs. 500, which appears not to have been the case. Having regard to article 14 of the second schedule of the Provincial Small Cause Courts Act, which excludes suits for the recovery of compensation paid under the Land Acquisition Act from the Small Cause jurisdiction, we think the present, which is a substantially similar suit, did not lie in the Small Cause Court, as it involved, not incidentally but necessarily, the determination of a title to land; and would consequently fall under article 11. In this view, a second appeal lay, and a petition for revision is not admissible. It is accordingly dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

PUTHIANDI MAMMED (PLAINTIFF), PETITIONER,

v.

AVALIL MOIDIN (DEFENDANT), COUNTER-PETITIONER.*

1896.
November 18.

Transfer of decree—Subsequent attachment in execution against transferor.

A transferred a decree to B who recovered part of the amount due under it and was prevented from recovering the rest by an attachment of the decree in execution proceedings against A:

Held, that A was liable to pay compensation to B.

PETITION under Small Cause Courts Act, section 25, praying the High Court to revise the proceedings of S. Subbayyar, Subordinate Judge of North Malabar, in Small Cause suit No. 417 of 1895.

Suit to recover Rs. 100 and interest. The decree in Small Cause suit No. 1300 of 1890, which was passed in favour of present defendant, was assigned by him to the plaintiff. The plaintiff recovered a portion of the decree amount, but failed to recover the rest because the decree, of which the assignment had not been completed by the recognition of the court, was attached in execution of a decree against the defendant. The plaintiff sued to recover the amount which he had failed to realise.

The Subordinate Judge was of opinion that the plaintiff's failure to recover the rest of the money payable under the decree was the result of his own laches in failing to adopt the procedure described by Civil Procedure Code, section 232, and that the defendant accordingly was not liable to pay damages. He distinguished *Krishnan v. Sankara Varma*(1) and dismissed the suit.

The plaintiff preferred this petition.

Mr. Krishnan for petitioner.

Ryru Nambiar for counter-petitioner.

JUDGMENT.—All that the plaintiff got in law for the money he paid to the defendant for the transfer of his decree was an agreement to transfer it, not a complete transfer until recognised by the court. The completion of the transfer in this case was

* Civil Revision Petition No. 851 of 1895.

(1) I.L.R., 9 Mad., 441.

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MOIDIN.

prevented by the attachment of the decree for the defendant's debts, and it was the defendant's duty to do all that was necessary to complete the transfer by removing the obstacle, the attachment. This he did not do and made it impossible for the transfer to the plaintiff to be completed by the recognition of the court.

In these circumstances the plaintiff was entitled to succeed in his action. We must set aside the decree of the Subordinate Judge and decree the claim with costs and interest at 6 per cent. thereon from the date of plaint till date of payment.

The petitioner is entitled to his costs in this court.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

1896.
December 1.

MUTHU AYYAR (PURCHASER), PETITIONER,

v.

RAMASAMI SASTRIAL AND ANOTHER, COUNTER-PETITIONERS.*

Civil Procedure Code—Act XIV of 1882, s. 310-A (a)—Application to set aside sale—Deposit by judgment-debtor of the amount of debt—Poundage money.

A judgment-debtor, whose land had been sold in execution, is entitled to have the sale set aside under Civil Procedure Code, section 310-A (a), if he deposits 5 per cent. of the purchase money including that deducted by the court for poundage and fulfils the requirements of clause (b) even though something more on account of the poundage was recoverable from him under the head of costs.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the proceedings of N. Sambasiva Ayyar, District Munsif of Tiruvadi, on miscellaneous petition No. 840 of 1895.

The petitioner, who was the judgment-debtor in original suit No. 164 of 1893, preferred the above application under section 310-A (a) of the Civil Procedure Code applying that the sale of certain immovable property which had taken place in execution of that decree be set aside, on his depositing the amount specified in the proclamation of sale together with 5 per cent. on the purchase money. The purchaser objected saying, as was stated in the

* Civil Revision Petition No. 190 of 1896.

judgment, that he lost $1\frac{1}{4}$ per cent., as a poundage of $6\frac{1}{4}$ per cent. was deducted from the purchase money he had deposited.

The District Munsif held that the requirements of the section had been satisfied and accordingly he set aside the sale.

The purchaser preferred this petition.

S. Subramania Ayyar for petitioner.

Counter-petitioners were not represented.

JUDGMENT.—Admittedly the judgment-debtor paid the 5 per cent. required under clause (a) of section 310-A of the Code of Civil Procedure, upon the whole amount of the purchase money including that deducted by the court for poundage. Under that clause he is not required to do any more. Having also fulfilled the requirement of clause (b) he was entitled to have the sale set aside, even though something more on account of the poundage was recoverable from him under the head of costs provided for in the last clause of the section 310-A. The petitioner was therefore wrong in opposing the setting aside of the sale. His course was to have applied to the court for the recovery of what he was entitled to under sections 315 and 310-A.

The petition is accordingly dismissed.

APPELLATE CIVIL.

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

VENKATASUBBARAYA CHETTI AND ANOTHER (COUNTER-
PETITIONERS), APPELLANTS,

v.

ZAMINDAR OF KARVETINAGAR (PETITIONER),
RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 291, 311—Material irregularity—Substantial loss.

Where a material irregularity is proved to have occurred in the conduct of a court sale, and it is shown that the price realised is much below the true value, it may ordinarily be inferred that the low price was a consequence of the

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AYYAR
v.
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SASTRIAL.

1896.
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18.

* Appeal against Order No. 3 of 1896.

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OF KARVETI-
NAGAR.

irregularity even though the manner in which the irregularity produced the low price be not definitely made out.

When a sale is adjourned under section 291, the provisions of that section must be followed with exactitude.

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, passed on execution petition No. 48 of 1889, which was an application in Original Suit No. 3 of 1884.

Certain land having been brought to sale in execution of the above-mentioned decree, the judgment-debtor preferred the above petition under Civil Procedure Code, section 311, praying that the sale be set aside on the ground of material irregularity in conducting it, which, as it was averred, had caused substantial loss to him.

The District Judge found that the land had been sold for much below its value and he said,—

“If, therefore, any material irregularity in publishing the sale can be proved, the substantial injury to the zamindar cannot be disputed.

“It is admitted that petitioner got the proclamation of sale issued in August 1891 for sale in September 1891; but, by agreement with petitioner, got the sale postponed five times to take place without any fresh proclamation until it was eventually held on 29th October 1891.

“The Ameen, who conducted the sale, deposes that all sales are published by beat of drum; but that, on October 29th, this was not done as he could not find the monigar to get the publication so ordered.

“The result was that there was practically no notice at all of the sale. The amount of notice given by the proclamation had been waived (petitioner, no doubt, being a consenting party to this). But, in the absence of such proclamation and the usual notice by tom-tom, there was really no publicity whatever given to the sale.

“I think this was a material irregularity. In the second place, the counter-petitioner concealed the existence of any prior incumbrance. The counter-petitioner examined, admits that he had notice of Kristnama Charlu's mortgage from the Sub-Registrar's certificate which mentioned it. His only explanation is that, as the date of the mortgage was 1873, he concluded that, in 1888, it was barred by limitation, and so he stated in

“his execution application that the property was to be sold free of incumbrances.

“But he admits that he had made no inquiries of Kristnama Charlu as to whether there had been any payments or written acknowledgment to keep alive the mortgage. As a matter of fact, the mortgagee had actually sued out a decree. The mortgage, as the certificate showed, was for a very large sum, so that the counter-petitioner could not really have supposed that it had been allowed to lapse. I do not believe his statement that he said the property was free of incumbrances because he believed Kristnama Charlu's mortgage was barred. I believe his object was to keep Kristnama Charlu in ignorance of his attachment and sale.

“The fact, that the sale was held free of incumbrances upon a false statement to that effect in the application, is, I think, a material irregularity.”

In the result the District Judge refused to confirm the sale and directed a fresh sale to be held after due notice.

The decree-holders preferred this appeal.

Ramachandra Rau Sahib and *Kuppusami Ayyar* for appellants.

Mr. Subramaniam for respondent.

JUDGMENT.—Though such irregularities as have occurred are mainly due to the zamindar's repeated applications for adjournment, yet, on considering all the facts of the case, we are not prepared to hold that the District Judge was wrong in regarding the irregularities, especially the omission to have the sale tom-tomed, as material and we think that where a material irregularity is proved and it is also proved that the price realized is much below the true value, then it may ordinarily be inferred that the low price was a consequence of the irregularity, even though the manner in which the irregularity produced the low price be not definitely made out. We therefore dismiss this appeal but without costs.

We observe that the orders of the District Judge adjourning the sale did not comply with the provisions of section 291, Civil Procedure Code, which require that adjournments shall be to a specified day and hour. It is of the utmost importance that in these matters the exact provisions of the Code should be followed.

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PRIVY COUNCIL.

P.C. •
1897.
March 18.

SRIMANT RAJAH YARLAGADDA MALLIKARJUNA PRA-
SADA NAYUDU BAHADUR GARU, APPELLANT,

AND

MAKERLA SRIDEVAMMA AND OTHERS, RESPONDENTS.

[On appeal from the High Court at Madras.]

Collection of debt on succession—Certificate of heirship—Acts XXVII of 1860 and VII of 1889—Right of succeeding trustee to collect.

In a suit brought by a widow who had succeeded her husband as trustee of an endowment for a debt due thereto:

Held, that she was not suing as being entitled to the effects of her deceased husband, or for payment of a debt due to the estate which had been his, but that she was suing as representing the endowment in the capacity of a trustee of its money. Accordingly, neither Act XXVII of 1860 (collection of debts on succession), section 2, nor Act VII of 1889 (the Succession Certificate Act), section 4, was applicable to her claim, and her not having obtained a certificate of heirship to her husband's estate did not disentitle her to a decree.

APPEAL from a decree (27th April 1891) of the High Court, affirming a decree (20th December 1889) of the District Judge of Kistna.

The suit out of which this appeal arose was brought on the 27th March 1889 by Makerla Sridevamma, first respondent on this appeal, styling herself Manager and Dharmakarta of the Annapurna Choultry. She was the widow of Makerla Ragunatha Nayudu, son of Venkataswami Nayudu. Both the father, who founded, endowed and managed the choultry, and the son, who succeeded him in the management, died in 1879. On the death of her husband Sridevamma became manager.

The first defendant, who was now appellant, was the zamindar who, as holding an impartible estate, defended the partition suit relating to Devarakota in *Mallikarjuna v. Durga* (1).

On the 30th January 1876 he gave the following: Promissory note, dated the 30th January 1876, executed by Sriment Rajah Yarlagadda Mallikarjuna Prasada Nayudu Bahadur, Zamindar Garu, in favour of Makerla Raghunatha Rao Nayudu Garu:—

* Present: Lords WATSON, HORHOUSE and DAVY, and Sir R. CECIL.
(1) I.L.R., 13 Mad., 406.

"As I have this day borrowed from you Rs. 12,000 in cash, out of the funds settled by you and your father for the upkeep of the Annapurna Choultry caused to be built by your father in Bandar for the purpose of paying off the *peishkush* and other Government dues payable in respect of my estate, I promise to pay you every month only the interest thereon at half a rupee per cent. per mensem, but retain the principal amount with me alone for twelve years from this date, and pay you the same as soon as the said twelve years expire, and get back this promissory note.

"Promissory note executed and given to this effect with my consent."

On the 15th January 1877, Venkataswami Nayudu made a will appointing his son Ragunatha heir to his estate, describing it as having been acquired by himself. In this will he stated that Rs. 12,000 had been invested with the Rajah as an endowment for the choultry. On the 2nd March 1879, he confirmed this and then died. Ragunatha took the estate, and on the 24th September in that year died, leaving, by his will, the immediate possession of it to Sridevamma, his second wife, whom he directed to adopt a son to him. This was done.

On the 11th December 1884, Makerla Venkataswami Nayudu, a minor, sued Sridevamma for a declaration that he had been adopted by her to her husband on the 6th September 1880, and demanded possession of certain property, one of the items of which was described as "Funds remaining in the hands of the Chella-palli Zamindar, on account of Annapurna Choultry, Rs. 12,000." As to the adoption and for possession he obtained a decree on the 15th March 1887; but the above item was excepted. Sridevamma in the present suit claimed the money due on the promissory note of the 30th January 1876 against the appellant and the Collector of the district, who had been appointed receiver of the Rajah's estate. She alleged that since her husband's death she had been managing the choultry and that payments of interest had been made upon the note by the first defendant to her husband and to herself. No reference was made in the plaint to the adoption.

The first defendant admitted that he had made the note, but said that the amount was a charge on the estate in the hands of the receiver; also, that the right to receive payment was in the adopted son, the widow having no certificate of heirship. The other defendants, the younger brothers of the first, they having

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been joined at their own request, denied their liability. The receiver was willing to abide by the decision of the Court, and took no further part in the proceedings.

At the hearing in the Court of First Instance were cited *Re Bhyrub Bharuttee Mohunt*(1) and *Dukharam Bharti v. Luchmun Bharti*(2). The decision was that the plaintiff, being in possession of the office of trustee of the choultry, might, in that character, collect and give a valid receipt for a debt due to that institution. The claim was accordingly decreed. The first defendant appealed to the High Court on the ground that no certificate had been granted to the plaintiff to collect the debt due to her deceased husband, whom the Rajah had promised to pay. Also that the adopted son was the heir and representative.

On the 5th December 1890 the High Court (Collins, C.J., and Shephard, J.) made the following order:—

"The plaintiff does not, as far as we at present see, appear to be the proper heir of the payee of the note, and the adopted son, who is apparently the proper person to give a discharge, is not on the record. We must adjourn the case for two months in order that the adopted son may be made a party, and a guardian appointed: when that is done we shall be in a position to dispose of the appeal."

The adopted son having been made a respondent on the appeal, the High Court gave the following judgment:—

"It now appears that the minor adopted son has been joined as a party. As far as the plaintiff is concerned the appeal is therefore dismissed with costs."

"As against the third and fourth defendants it is contended that the first defendant (appellant) ought not to be made to pay their costs as directed by the District Judge. On examining the record we find that the third and fourth defendants became parties on their own motion and that being so we think they ought to pay their own costs."

"The decree of the District Judge must be modified accordingly. And the third and fourth defendants must pay the costs of this appeal so far as it has reference to them."

From this decree the Rajah now appealed.

Mr. J. D. Mayne for the appellant.

(1) 21 W.R., 340.

(2) I.L.R., 4 Cal., 954.

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It was clear that no right to claim the money secured by the document of 1876 passed to Ragunatha personally by his father's will or to Sridevamma by her husband's will. The beneficial title to the money remained vested in the Annapurna Choultry. The right to sue for it might have vested in an executor of the will of Venkataswami, the original manager and trustee; but no such executor had been appointed. Then, again, the right to sue would have vested in such person as might have been appointed trustee under the Religious Endowment Act, 1863. There was, however, no evidence on the record showing that the plaintiff was appointed by proper authority to be the trustee or manager of this choultry. Suing as the representative of her late husband's estate, the widow could not obtain a decree for the sum which she claimed without having obtained a certificate under Act XXVII of 1860. The Act VII of 1889 made it the duty of the Court to see that a certificate had been obtained by the plaintiff. The latter Act came into operation on the 1st May 1889, the plaint having been filed on the 27th March in the same year. Thus the plaintiff had not fulfilled a condition precedent to her acquiring a right to sue, the getting a certificate of heirship. Her position had not been improved by the adopted son being made a party to the appeal; for, if he had had a title to sue for this debt, his title would have displaced the plaintiff's. The decree, however, obtained by him on the 15th March 1887, had expressly excepted the right to sue for this debt from the declaration of his title to the rest of his adoptive father's estate. The plaintiff could only claim through her husband, in right of her being his heir and representative, and for this purpose a certificate was necessary.

The respondents did not appear. Their Lordships' judgment was delivered by

LORD HOBHOUSE.—In this case the first defendant, who is the principal defendant, and appellant borrowed a sum of Rs. 12,000 out of the funds of a charitable endowment called a choultry, and he gave a promissory note to the founder of the endowment, who was then its manager.

The founder died, and he left the bulk of his estate to his son and heir, but taking notice that the son and heir should have nothing to do with the Rs. 12,000, which were the endowment of the choultry. No doubt his son succeeded him in the management. He died within six months of his father, and his heir was

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his widow. Then the widow succeeded in the management, and received interest on the Rs. 12,000. She, under a power given her by her husband, adopted a son in the year 1884, but that son was an infant, and the widow remained until after the institution of this suit in the management of the choultry.

The infant brought a suit against his adoptive mother and against his guardian for an account of his adoptive father's estate and for possession, and he got a decree, but in making that decree the Court expressly excepted the funds of the choultry. It seems that up to the commencement of this suit in the year 1889 the widow had received interest on the promissory note from the defendant, and either she or her husband received Rs. 1,000 in payment of principal. In 1889 the widow sued to recover the sum due upon the note, and she was met by two pleas: one was that she could not sue because she had adopted a son, and that son is the heir of his father and entitled to his father's estate. The answer to that plea is that she did not sue in respect of her husband's estate, but as trustee and manager of the choultry.

The second plea was that she had not got such a certificate as is required by law. The Act that is relied upon as necessitating the production of a certificate runs in these terms: "No debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person except on the production of a certificate." (1) That is the Act XXVII of the year 1860. There is a subsequent Act, which Mr. Mayne says applies to the case, Act VII of 1889, but that uses exactly the same expressions so far as regards the person suing: "No Court shall pass a decree against a debtor of a deceased person for payment of his debt without a certificate." (2)

Now the question is whether the widow here is suing as entitled to the effects of her deceased husband, or is suing for the payment of the debt of her deceased husband. She is doing neither one nor the other, she represents the endowment, and on that ground the District Judge declared that she was the trustee of this endowment, and that she was entitled to receive the debts, and he gave her a decree. The defendant appealed to the High Court, and the High Court took the precaution of suspending proceedings

(1) Act XXVII of 1860, sec. 2. (2) The Succession Certificate Act, 1889, sec. 4.

until the adopted son, who, if anybody could dispute the widow's title to receive the debt, would be the person to dispute it, was made a party to the suit. Then in his presence they dismissed the appeal and affirmed the decree of the District Judge with some variation as to costs, as to which there is no question now.

It seems to their Lordships that that is perfectly right. The High Court has taken every precaution to protect the defendant in his payment of the money, and it is absolutely impossible that after that decree anybody can demand the money of him again.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The respondent does not appear, and there will be no order as to costs.

Appeal dismissed.

Mr. R. T. Tasker, solicitor for the appellant.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

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APPELLANTS,

v.

VENKATA SURYA MAHIPATI RAMAKRISHNA RAO
(PLAINTIFF), RESPONDENT.*

*Hindu Law—Impartible estate—Power of testamentary disposition—Will,
construction of—Misdescription of legatee.*

The holder of an impartible estate may alienate it by will to the same extent that he may alienate it by gift *inter vivos*.

A testator made a bequest to "A B my avurasa son," knowing that A B was not his avurasa son:

Held, that the misdescription was immaterial and that A B took the bequest.

APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Godavari, in original suit No. 6 of 1891.

The suit was brought by the adopted son of the late Rajah of Pittapur to recover the Zemindari of Pittapur and other property belonging to the late Rajah from the second defendant who

* Appeal No. 33 of 1895.

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claimed to be the natural born legitimate son of the late Rajah and from the Court of Wards (the first defendant), who, on the death of the late Rajah, had taken possession of the property in question on behalf of the second defendant.

The facts of the case were as follows :—

The Zemindari of Pittapur was granted to the ancestors of the late Rajah in 1647 in the days of the Muhammadan kings of Golconda. The late Rajah was born in 1844, and in 1854 succeeded his brother in the estate. He married his first wife in 1861, but had no issue by her till October 1885, when, as the defendants Nos. 1 and 2 alleged, she gave birth to the second defendant. On various dates the late Rajah married five other wives, but none of them bore any children until after the birth of the second defendant, when one of them was said to have given birth to a daughter.

On the 28th of September 1873, the late Rajah adopted the plaintiff. On the 1st of October following the late Rajah executed in favour of the plaintiff's natural father a document (Exhibit DC.) in the following terms :—

"Whereas we had no issue of any kind and whereas we, on the 28th ultimo, corresponding to Sunday, the 7th of this Sudaha, adopted, in accordance with the Hindu law, your second son named Sri Rajah Ramakrishna Dasa Uachendrule Varu, who is a gnati of our family and who was born on Saturday the 7th of Kartika Bahula of the year Kalayukti (27th Saturday 1858), and whereas we have given the son so adopted the name of Sri Rajah Venkata Surya Mahipati Ramakrishna Rao Bahadur and constituted him heir to our Zemindari of Pittapur, &c., to all other properties movable and immovable, we agree in compliance with your request, to your retaining with my adopted son the thirty servants you have been retaining and changing from time to time and not to permit you or any one of your family to see him whenever you or they may come to see him, and we have accordingly executed this agreement.

In or about 1881, differences and disputes arose between the plaintiff and the late Rajah, and the plaintiff in consequence left Pittapur and continued to live apart from the late Rajah till the latter's death. The late Rajah died on the 22nd July 1890. Before his death he executed three testamentary documents (Exhibits CXCIX, CCI, CCII) which were executed, respectively,

on the 16th February 1889, on the 7th September 1889, and on the 17th of March 1890.

Exhibit CXCIX, so far as material to this report, was in the following terms :—

"I write this will this 16th day of February 1889, as I am now suffering from dropsy which seems to be difficult to cure.

"Though it is not necessary for a Hindu to execute a will to bequeath his property to his legitimate (avurasa) son as Hindu law provides his rights; yet to prevent further confusion I write this will to make the public understand that I have determined to bequeath my property to my avurasa son according to Hindu law. My avurasa son Kumara Mahipati Venkata Surya Rao should succeed to my property. My adopted son Venkata Mahipati Surya Ramakrishna Rao, the second son of the Rajah of Venkatagiri, has already been provided by me a money allowance of Rs. 24,000 one year according to their request and have also given him vast movable property and spent much money for his marriage and other ceremonies by which I fell in debt to the Rajah of Venkatagiri. This debt is to be liquidated according to the instalments stated in the bond by the income of the estate and not from the property given to the adopted son nor from his usual money allowance. My adopted son should, as usual, receive his monthly allowance of Rs. 2,000, including annual payment of Rs. 6,000, but my avurasa son will, by any reason or other, be unwilling to give this allowance in cash he may allot any portion of my self-acquired proprietary estates to him which fetches an equal income of Rs. 24,000 a year, but should not in any circumstance go to disputes with each other, the one to get more and the other to lessen it."

Exhibit CCI was as follows :—

"I have hitherto executed a will on 16th February 1889, placed it in a sealed cover (portion torn), and deposited the same in the office of the Registrar. As it has been my intention to give all my movable and immovable property to my avurasa son Kumara Mahipati Venkata Surya Rao, as mentioned above, the said will was written in that manner. As it struck me that by the wording of that will it might be construed that I got the will written in such terms because I thought that my whole property would be obtained by my avurasa son according to the Hindu law alone, and in order to make my intentions clear

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"leaving no room for entertaining doubts, I have executed this will to form part of my former will.

"It is my intention that my avurasa son alone should obtain not only the impartible ancient Pittapur Zamindari estate, but also the following properties which form my self-acquisition. . . . The villages in the Thotapalli estate, the Veeravaram estate in Dandangi Mutah and the Ananthavaram village and other immovable properties as well as the Palivela estate, which I got in pursuance of the will of my paternal aunt Raja Vellanki Lakshmi Venkaiyamma Row Garu. These properties should, therefore, rest in him accordingly. The whole of my immovable property including my jewelry, &c., should be obtained by my avurasa son alone."

Exhibit CCII, so far as it is material for the purposes of this report, was in the following terms:—

"It is just under the Hindu law that the avurasa son should succeed to all the properties. It is my intention also that he should so succeed. Some immovable properties, such as proprietary estates, and most part of the movable properties form my self-acquisition. Although they are not of the impartible nature as the ancient Zemindari of Pittapur, those properties, as well as my other movable and immovable properties of all kinds, should be obtained by my avurasa son Chiranjeevi Raja Kumara Venkata Mahipati Surya Rao.

"It is also my intention that Chiranjeevi Raja Venkata Surya Mahipati Ramakrishna Rao, the second son of the Venkatagiri Raja, whom I had hitherto adopted should be receiving cash payment which he had been receiving hitherto according to the settlement made before at their request. As the settlement formerly made is also to the effect that he should continue to receive such payment in future also, that should take place accordingly. A good deal of movable property was already given to the said adopted son, and his marriage, &c., were performed at a great cost and trouble; owing to this, I had to contract a loan from Venkatagiri people. The balance of the debt due to them should be discharged by instalments from the taluk (estate), but neither the property given to the adopted son, nor the money allowance he should be getting, should be made answerable for the said debt. In case my avurasa son is unwilling to continue payment of the money allowance to the

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"adopted son, my avurasa son may give to the adopted son, in lieu of the money allowance, so much of the estate out of the proprietary estates which form my self-acquisition as will fetch a net income equivalent to the money allowance which the adopted son has been receiving. But they both should not enter into any disputes saying that the allowance already fixed for the adopted son is excessive or low."

On the death of the late Rajah the Collector as Agent of the Court of Wards took possession on behalf of the second defendant of the estate belonging to the late Rajah. The plaintiff then brought this suit, claiming to be entitled to all the property left by the latter. He denied that the second defendant was the son of the late Rajah. He further contended that, even if the second defendant were the son of the late Rajah, he was entitled by right of primogeniture to succeed exclusively to such of the property of the late Rajah as might be found to be impartible, and was entitled as eldest surviving member of the late Rajah's family to the possession of such of the property as might be found to be partible.

The second defendant asserted that he was the son of the late Rajah and that he, as the natural born son of the late Rajah, was entitled to such of the property as might be found to be impartible to the exclusion of the plaintiff, who was only an adopted son, and that in such property as might be found to be partible the plaintiff as adopted could have no more than one-fourth the share of a natural born son.

The second defendant also laid claim to the properties of the late Rajah under the testamentary documents of the 16th February 1889, the 7th September 1889, and the 17th March 1890. He contended that the late Rajah had power to dispose of all the properties dealt with by the testamentary documents inasmuch as these properties were partly self-acquired and partly ancestral impartible property.

The plaintiff denied the validity of the testamentary documents executed by the late Rajah on the following grounds:—

- (1) That the provisions of these documents were based on the assumption that the second defendant was the natural born son of the late Rajah, whereas as a fact he was not.
- (2) That the provisions of these documents contravened the agreement of 1st October 1873. (Exhibit DC.)

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- (3) That the will was wholly void under the Mitakshara law and by family custom.
(4) That inasmuch as no portion of the property was the self-acquisition of the late Rajah, the properties were inalienable by will.

The issues specifically referred to in the judgment are as follows:—

- (iv) If the second defendant be found to be not in fact the son of the late Rajah, whether he is precluded from claiming under the said testamentary disposition.
(v) Whether the said testamentary disposition contravenes the provisions of the instrument of 1st October 1873 executed by the testator, and if so, whether such disposition is invalid by reason thereof
(vi) Whether the properties specified in schedules 1 and 2 of the second defendant's written statement are impartible.
(viii) Whether the aforesaid testamentary disposition in so far as it relates to properties, if any, found to be impartible is invalid under either Hindu law or family custom or by reason of the tenure on which the suit estate is held.

The District Judge found that the second defendant was not the son of the late Rajah and that certain of the properties of the late Rajah were ancestral impartible property and the rest were the self-acquisition of the late Rajah. With regard to the alienability of the properties, he said: "it appears to me that the decision of the Privy Council in *Sartaj Kuari v. Deoraj Kuari*(1), which runs counter to the whole previous current of Madras decisions, must not be stretched too far. That decision is that the holder of an impartible zemindari may alienate a portion of the estate, unless there is some custom or something in the tenure by which the estate is held, which forbids such alienation. It is a very long stride from a decision which allowed the alienation of a parcel of land or permitted a mining lease to a decision which permits a zemindar to bequeath his estate to any beggar he picks up out of the streets. I cannot think that the Privy Council in the decision in *Sartaj Kuari v. Deoraj Kuari*(1) contemplated

(1) I.L.R., 10 All., 272.

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"any such results of their decision. I am of opinion that as the zemindari was in its origin a military or feudal estate and that as the grant of a sannad in 1802 did not change the previous tenure, there is certainly something in the tenure of this estate that prevents the holder from bequeathing it *en bloc* to a stranger." And with regard to the validity of the testamentary disposition under which the second defendant claimed, he said: "The fourth and fifth issues raise the question whether second defendant, although found in fact to be not the son of the late Rajah, can inherit under these wills. Upon this question Mr. Bashyam Aiyangar pointed out that second defendant, the legatee, is an innocent person. He is no party to the fraud. Also plaintiff's case is that the late Rajah was a party to the fraud. Therefore the testator was not deceived and knew what he was doing when he made this bequest.

"Upon this point, I think, that there is much force in the contention of Mr. Bashyam Aiyangar that second defendant is an innocent person, that the testator knew what he was doing and that the second defendant ought to get at least the self-acquired property of the late Rajah. For some time I was disposed so to decide the matter. It may be that the Rajah intended second defendant, even if dispossessed of the zemindari, to get something as a recompense for the cruel position in which he has been placed. But upon further consideration I am of opinion that the adoption of plaintiff on 28th September 1873, and the subsequent agreement of October 1st 1873 preclude the Rajah from bequeathing his property to a stranger. It is true the agreement of October 1st 1873, is not a settlement of property, but it is evidence to show that the Rajah of Venkatagiri gave plaintiff in adoption to the Rajah of Pittapur with an implicit understanding between them that plaintiff should inherit in the event of there being no begotten son. That event has now happened, and I think that this implicit agreement upon which the adoption took place is sufficient to hinder the Rajah of Pittapur from bequeathing even his self-acquired property away from plaintiff."

In the result he gave a decree in favour of the plaintiff directing the first and second defendants to deliver up to him the properties movable and immovable left by the late Rajah.

The first and second defendants appealed.

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Bashyam Aiyangar with him *Ramasubba Ayyar*, *Subba Row* and *Subramania Ayyar* for appellants.

The appellant not only claims as the son of the late Rajah, but he claims also under the will of the latter: viz., under the three documents executed by the late Rajah on the 16th February 1889, on the 7th September 1889 and on the 17th March 1890. Under these documents the appellant would get all that he wants, and if the issues relating to them are decided in his favour, the consideration of the other issues becomes unnecessary.

In deciding whether the appellant takes under the will, the first question raised is, whether the properties dealt with by it are alienable by will. Some of these properties are found by the Judge to be the self-acquired properties of the late Rajah. As to these, the question does not arise; they are clearly alienable by will. The question concerns only those properties which we assert, and which the Judge finds, to be impartible. That they are impartible is shown by overwhelming evidence. Being impartible they are alienable. In *Sartaj Kuari v. Deoraj Kuari*(1) (followed in *Beresford v. RamaSubba*(2) and *SivaSubramania Naicker v. Krishnammal*(3)), it was held that the holder of impartible property might dispose of it by gift, unless there was anything in the tenure on which it was held restraining alienation, or unless there was a custom against alienation. The District Judge finds that the zemindari was in its origin a military or feudal estate, and that consequently there is "something in the tenure of the estate, that prevents the holder from bequeathing it *en bloc* to a stranger." The finding that the estate was in its origin military or feudal is not supported by the evidence. But even if the Judge is right in fact, that does not render the estate inalienable now, since it is held under a sanad granted under Madras Regulation XXV of 1802. If the tenure imposes a restraint upon alienation, that restraint must be imposed for the benefit of the grantor of the tenure, who, in the case of a military or feudal tenure, would be the Government. But the Regulation, by section 8 allows an estate held under a sanad to be alienated, at least as against the Government. As to a custom restraining alienation, if the respondent relies upon such a custom, it is for him to prove it. *Sartaj Kuari v. Deoraj Kuari*(1) *SivaSubramania Naicker v.*

(1) I.L.R., 10 All., 272. (2) I.L.R., 13 Mad., 197. (3) I.L.R., 18 Mad., 287.

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Krishnammal(1). But he has failed to do so. The impartible properties therefore come within the rule laid down by the Privy Council in *Sartaj Kuari v. Deoraj Kuari*(2) and are alienable. But it was attempted to distinguish this case on the ground that it referred only to an alienation *inter vivos*; and it is said that it does not follow that, because an estate is alienable *inter vivos*, it is alienable by will. *Sartaj Kuari v. Deoraj Kuari*(2) was however a case of gift *inter vivos*, and it is contended that the power of bequest is co-extensive with the power of gift *inter vivos*. In *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*(3). Willes, J., in delivering the judgment of the Privy Council, said: "The law of wills has, however, grown up, so to speak, naturally from a law that furnishes no analogy, but that of gifts; and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred." This principle was applied in *Vallinayagam Pillai v. Pacheche*(4) and *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*(5) and *Venkata Rama Rau v. Venkata Suriya Rau*(6). No doubt this impartible property is ancestral, but that does not prevent it being disposed of by will, if the owner is a sole owner. What prevents ancestral estate or a share in ancestral estate being disposed of by will is the existing rights of other members of the coparcenary. *Vitla Batten v. Yamenamma*(7), *Lakshman Dada Naik v. Ramchandra Dada Naik*(8), *Rathnam v. Sivasubramania*(9). Therefore, when, as in this case, there are no rights in the property belonging to any other members of the coparcenary, there is no restraint on alienation by will. Under the ruling of the Privy Council in *Sartaj Kuari v. Deoraj Kuari*(2), the holder of impartible property is exactly in the position of a sole owner of ancestral property; and

(1) I.L.R., 18 Mad., 287. (2) I.L.R., 10 All., 272. (3) 9 B.L.R., 377.

(4) 1 M.H.C.R., 326. (5) 12 M.L.A., 1.

(6) I.L.R., 1 Mad., 281; s.c. in P.C., I.L.R., 2 Mad., 333.

(7) 8 M.H.C.R., 6. (8) I.L.R., 5 Bom., 48. (9) I.L.R., 16 Mad., 353.

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his sons having no right in the property cannot veto any disposition by will. They may have rights to maintenance, but this does not give them a right to object to a bequest of the property. A widow has a right to maintenance out of ancestral property, but she has not, on that account, a right to veto an alienation of it by will. *Vallinayagam Pillai v. Pachche*(1).

The District Judge has held that the late Rajah was precluded by the document of October 1873 from alienating the estate as against the Respondent. But this is not so. *Rungama v. Atchama*(2). *Mussumat Bhoobum Moyce Debia v. Ram Kishore Acharj Chowdhry*(3).

The property being alienable by will and the late Rajah not being precluded from alienating it by the document of the 1st of October 1873, the next question raised is whether the appellant, assuming him not to be the avurasa son of the late Rajah, is precluded from taking under the will. On this point the District Judge has not found against the appellant, and it is only necessary to point out that the respondent's case is that the late Rajah knew that the appellant was not his son.

The Advocate-General (Hon'ble Mr. Spring Branson) with him Mr. Wedderburn, Rama Rau, Ananthacharlu, Gopalasami Ayyangar and Grant for respondent.

We can hardly contend that the properties found by the District Judge to be impartible are not so. But we say that they are inalienable by reason of the tenure on which they are held and by custom. The evidence shows that the estate at its origin was held on military tenure. And if it was so at its origin, it must be so still. The grant of a sanad under Madras Regulation XXV of 1802 does not alter the tenure under which the estate was originally granted. A sanad granted under that Regulation fixes the pesheush, but does not alter any of the incidents attaching to the estate. *Muttayan Chetti v. Sivagiri Zemindar*(4). If the estate is held on military tenure a custom of inalienability must follow.

Assuming, however, that the estate is not inalienable by tenure or by custom, we contend that the late Rajah could not dispose of it by will. *Sartaj Kuari v. Deoraj Kuari*(5) shows that he could

(1) 1 M.H.C.R., 326.

(4) I.L.R., 3 Mad., 370.

(2) 4 M.I.A., 1.

(5) I.L.R., 10 All., 272.

(3) 10 M.I.A., 279.

have disposed of it in his life time by gift, but it does not therefore follow that he could dispose of it by will. No doubt, as was said by the Privy Council in *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*(1), there is an analogy between the power of disposition by gift *inter vivos* and the power of disposition by will. But the power of testamentary disposition by a Hindu is an anomaly, and therefore ought not to be pressed too far *per* Holloway, J., in *Gooroova Batten v. Narrainsawmy Batten*(2) see too the judgment of the Privy Council in *Lakshman Dada Naik v. Ramchandra Dada Naik*(3). The argument of the appellant is that a man may by will dispose of whatever he may give away in his life time. But this is not so. This doctrine is questioned by Markby, J., in *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*(4) and in the judgment in *Tara Chand v. Reeb Ram*(5), and it is expressly denied by Holloway, J., in *Gooroova Batten v. Narrainsawmy Batten*(2), see too *Jarman on Wills*(6). As an instance where the power of bequest falls short of the power of gift *inter vivos* the case of an alienation by a widow may be referred to *Jushada Raur v. Juggernaut Tagore*(7) and *Gurivi Reddi v. Chinamma*(8). The question whether a Hindu may dispose of property by will depends upon whether he is a joint or separate owner of that property. In the cases where an alienation by will has been upheld, it has been on the ground that the testator was the separate owner of the property. In *Nagalutchmee Ummal v. Gopoo Nadaraja Chetty*(9) the testator was the separate owner of the ancestral property. In *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*(10) the decision was based on the ground that the property was the separate self-acquired property of the testator. In *Vallinayagam Pillai v. Pachche*(11), the property was ancestral, but the testator was the separate owner of it. Now in this case the testator was not the separate owner of the impartible property: that property was joint property, for impartibility does not render the ownership separate. In *Naraganti Achammagaru v. Venkatachalapati Nayanivaru*(12) it was laid down that the ownership of a

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(1) 9 B.L.R., 377.

(3) I.L.R., 5 Bom., 48, at p. 62.

(5) 3 M.H.C.R. 50, at p. 55.

(7) 2 Morley's Digest, 67.

(9) 6 M.I.A., 309.

(11) 1 M.H.C.R., 326.

(2) 8 M.H.C.R., 13.

(4) 2 B.L.R., O.C.J., 11, at p. 41.

(6) Vol. I, p. 48, fifth edition.

(8) I.L.R., 7 Mad., 93.

(10) 12 M.I.A., 1.

(12) I.L.R., 4 Mad., 250.

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a coparcener in sole possession of an impartible estate is not separate ownership. And this was followed in *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*(1). In *Neel Kisto Deb Burmono v. Beer Chunder Thakoor*(2) it is said that there can be no community of interest in an impartible estate. But this rule does not apply to Madras *Naraganti Achammagaru v. Venkatachellapati Nayanivaru*(3). As to impartible property being also joint property see also *Katama Natchier v. The Rajah of Shivagunga*(4), *Maharani Hivanath Koer v. Baboo Ram Narayan Sing*(5), *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondoru*(6), *Sivagnana Tevar v. Periasami*(7), *Jogendra Bhupati v. Nityanand Man Sing*(8).

Moreover, on the death of the Rajah the estate passed by survivorship to the respondent. *Jogendra Bhupati v. Nityanand Man Sing*(8), *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai*(1). And this right of survivorship defeats any testamentary disposition of the Rajah, *Vitla Butten v. Yamenanna*(9), *Jarman on Wills*(10) see also *Alami v. Komu*(11). Assuming, however, that the properties were such as were alienable by will, the agreement of October 1st, 1873, precluded the Rajah from alienating them as against the respondent.

But even if the Rajah was at liberty to dispose of the properties, the question arises whether under the will the appellant can take. We contend that on a true construction of the will the Rajah intended the appellant to take only in the character of his avurasa son, and therefore as the appellant is not his avurasa son the bequest fails, *Fanindra Deb Raikat v. Rajeswar Das*(12), *Doorga Sundari Dossee v. Surendra Kishav Rai*(13), *Karsandas Natha v. Ladkavahu*(14), *Nidhoomoni Debya v. Saroda Pershad Mookerjee*(15). Whether the Rajah knew the appellant not to be his son is immaterial so long as the appellant was not his son *Godfrey v. Davis*(16).

Bashyam Ayyangar in reply —

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| (1) I.L.R., 17 Mad., 316. | (2) 12 M.I.A., 523. | (3) I.L.R., 4 Mad., 250. |
| (4) 9 M.I.A., 543. | (5) 9 B.L.R., 274. | (6) 13 M.I.A., 333. |
| (7) I.L.R., 1 Mad., 312; s.c. sub. nom. <i>Periasami v. Periasami</i> , L.R., 5 I.A., 61. | (8) 8 M.H.C.R., 6. | (9) Vol. I, p. 48, fifth edition. |
| (10) I.L.R., 12 Mad., 126. | (11) I.L.R., 11 Calo., 463. | (12) I.L.R., 12 Calo., 686. |
| (13) I.L.R., 12 Bom., 185. | (14) L.R., 3 I.A., 253. | (15) 6 Ves., 43. |

On the last question, if the Rajah knew that the appellant was not his avurasa son, the misdescription goes for nothing *Pratt v. Mathew*(1), *Schloss v. Stiebel*(2), *Doed. Gains v. Rouse*(3). To disentitle the legatee to take under the will, he must have fraudulently induced the testator to believe that he bore the character which the testator attributed to him *Rishton v. Cobb*(4). *In re Petts*(5), *In re Boddington*(6), *Jivani Bhai v. Jivu Bhai*(7). Further, the evidence shows that the testator called the appellant his avurasa son and treated him as such: see *Pratt v. Mathew*(1) and *Laker v. Hordern*(8).

The *Advocate-General*, in replying on the fresh authorities cited, referred to *Hill v. Crook*(9), *Albu v. Kupppammal*(10). *In re Hall*(11).

JUDGMENT.—This is an appeal against the decision of the District Judge who has decreed in favour of the plaintiff's right to succeed to the ancient Zemindari of Pittapur in the Godavari District. The plaintiff claims as the adopted son of the late Rajah of Pittapur. As such he claims to recover the estate and effects of his adoptive father. The appellant alleges himself to be the natural-born son of the late Raja, it being said that his birth took place in the month of October 1885—some twelve years after the date of the plaintiff's adoption. The adoption of the plaintiff in 1873 is admitted. The defence is rested on two independent grounds: *Firstly*, it is said that the appellant is entitled to succeed in virtue of his being the natural-born and legitimate son of the deceased Raja by his first wife Mangayamma, and *secondly*, it is said that the late Raja left a will bequeathing to the appellant practically his whole property, making some provisions for the adopted son and other members of the family.

The District Judge has found in favour of the plaintiff with regard to both these points. He has found that the appellant is not the son of the late Raja nor of the Raja's wife. He has also found that, although the late Raja did make three wills, all being to the same effect, so far as the question in this case goes, those wills are not valid and operative as against the plaintiff. Mr. Bashyam Aiyangar, who argued the case on behalf of the

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| (1) 22 Beav., 328 at p. 334. | (2) 6 Sim., 1. | (3) 5 C.B., 422. |
| (4) 5 My & C., 145. | (5) 27 Beav., 576. | (6) L.R., 22 Ch.D., 597. |
| (7) 2 M.H.C.R., 462. | (8) L.R., 1 Ch.D., 644. | (9) L.R., 6 H.L., 265. |
| (10) I.L.R., 16 Mad., 355. | (11) L.R., 35 Ch.D., 551. | |

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appellant, was prepared to impugn both these findings. But, as he was satisfied with the disposition of property made in the Raja's wills, he was content with a decision on the question of their validity if that question was decided in his favour. His position was that, whether his client was the son of the late Raja or not, he was entitled to the Raja's property as bequeathed under the wills. We proceed then to consider whether these wills of the Raja are valid against the plaintiff. That the three wills were duly executed by the late Raja on the 16th February 1889, 7th September 1889, and 17th March 1890, respectively, is a fact found by the District Judge and not disputed. It may be a question whether the last of these three wills supersedes the other two. The third issue relates to this question, and it is one which may have to be decided in some future suit, inasmuch as there is a variance between the gifts made in the first two papers and those made in the last. For the purpose of the present case it appears to us unnecessary to decide the question, inasmuch as there is a complete disposition of the property in favour of the appellant as well under the last will as under the first two. The plaintiff, the present respondent, impugns these wills on several grounds in order to avoid the application of the principle laid down by the Judicial Committee in *Sartaj Kuari v. Deoraj Kuari*(1). It has been alleged on behalf of the respondent that the Zemindari of Pittapur is not an impartible zemindari, and further, that, if it be an impartible zemindari, it is a zemindari which, according to the custom or in virtue of the tenure upon which it is held, is inalienable. The sixth and eighth issues were framed with reference to these contentions. With regard to the question of impartibility (the sixth issue), the finding of the District Judge is in the appellant's favour. He finds that the property comprised in schedules I and II, that is, the zemindari and the accretions thereto, are impartible. We were referred by Mr. Bashyam Aiyangar to numerous documents, proving, in our opinion, beyond all doubt that the estate has always been regarded as impartible. In family arrangements made in 1845 and 1869 (Exhibits CCIX and CCCVII) it was so treated. In the course of the descent which is traced back for several generations to the original holder (Exhibit CCCXXI) there are several instances in which, on the

(1) I.L.R., 10 All., 272.

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death of the holder of the zemindari, there was a plurality of legal heirs, and yet only one succeeded to the estate. The zemindari was treated as admittedly impartible in the litigation to which the present plaintiff was a party (Exhibits CCLXXXIV and XII). It is not necessary, however, to elaborate this point, because the Advocate-General who appeared for the respondent practically abandoned it.

Upon the contention raised by the eighth issue that the zemindari is by custom or in virtue of its tenure inalienable, the District Judge finds that the zemindari was in its origin a military or feudal estate. The only evidence in support of this finding to which we were referred consists of statements by the late Raja that he placed at the disposal of the Government in 1879-1880 some armed men on account of the disturbance in Rumpa. There is no evidence as to the circumstances under which this was done. It is suggested by the Advocate-General that there may be more evidence as to the nature of the tenure in the possession of the Court of Wards, and that they ought to have disclosed it to the Court. The answer to this is that the burden of proving that the estate was held by military or *quasi* feudal tenure lay upon the plaintiff, and that it was competent to his advisers to elicit from the Court of Wards any information with regard to the history of the zemindari which might be in their possession. Apart from the suggestion that the zemindari was held on military tenure, it is not contended that there was any evidence to prove that the zemindari was by custom inalienable. On the other hand, Mr. Bashyam Aiyangar refers to numerous instances in which grants in perpetuity of portions of the zemindari have, from time to time, been made (Exhibit CCLXXIX and DQ series). The exhibits marked CCLXXIX relate to such alienations prior to the permanent settlement; the others are subsequent thereto. As, in our opinion, there is no evidence that the estate was ever held on military tenure, it is not necessary to consider whether the nature of the tenure—if it had been military in its origin—would have been affected by the permanent settlement of the estate under Regulation XXV of 1802. For these reasons we have come to the conclusion that the District Judge was wrong in his finding of fact upon the eighth issue.

The question now follows whether the estate being without doubt impartible and not shown to be inalienable either by custom

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or otherwise, the principle laid down in the case above cited is applicable. It was decided in that case that the property in the paternal or ancestral estate acquired by birth under the Mitakshara law is so connected with the right to a partition that it does not exist where there is no right to a partition. In the absence of co-ownership their Lordships held that there was no restraint upon the father's power of alienation. The case has been considered more than once by a Division Bench of this Court, and there can be no doubt that we are bound to act upon the doctrine explicitly laid down by the Judicial Committee (See *Beresford v. Ramasubba*(1) and *Sivasubramania Naicker v. Krishnammal*(2)). There are, it is true, cases prior to 1888 in which expressions were used which point to another view of the law: *Katama Natchiar v. The Rajah of Shivagunga*(3), *Neelkisto Deb Burmono v. Beerchunder Thakoor*(4), *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora*(5), *Maharani Hiranath Koer v. Baboo Ram Narayan Sing*(6), *Sicagnana Tevar v. Periasami*(7). But we must now take it that in those cases as well as in the later case of *Jogendra Bhupati v. Nityanand Man Sing*(8), a distinction is to be made between a matter of succession by inheritance and a question of alienability. This distinction is clearly marked by the Judicial Committee itself in *Sartaj Kuari's* case(9). The decision is a clear authority to the effect that the Raja could legally have alienated the whole or any part of the estate by gift or otherwise during his life time. It is contended, however, that what a Hindu can alienate by gift *inter vivos* he cannot always alienate by a testamentary disposition. The Advocate-General combated the proposition that a Hindu can alienate by will all that he can dispose of by gift *inter vivos*. There is a strong body of authority in support of the proposition that the two powers are co-extensive *Vallinayagam Pillai v. Pachche*(10), *Ganendra Mohan Tagore v. Upendra Mchan Tagore*(11), *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*(12), *Nagalutchmee Ummal v. Gopoo Nadaraja Chetty*(13), *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*(14). Cases were cited

(1) I.L.R., 13 Mad., 197.

(2) I.L.R., 18 Mad., 287.

(3) 9 M.I.A., 543.

(4) 12 M.I.A., 523.

(5) 13 M.I.A., 333.

(6) 9 B.L.R., 274.

(7) I.L.R., 1 Mad., 312; s.c. sub. nom. *Periasami v. Periasami*, L.R., 5 I.A., 61.

(8) I.L.R., 18 Cal., 151.

(9) I.L.R., 10 All., 272.

(10) 1 M.H.C.R., 326.

(11) 4 B.L.R., O.C.J., 103.

(12) 9 B.L.R., 377.

(13) 6 M.I.A., 309.

(14) 12 M.I.A., 1.

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in which learned Judges have thrown doubt upon the universality of this proposition *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb*(1), *Krishnamamani Dasi v. Ananda Krishna Bose*(2), *Tara Chand v. Reeb Ram*(3), *Goorooa Butten v. Narrainsawmy Butten*(4). The weight of authority is, however, strongly in favour of the proposition above mentioned. In *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*(5), the Judicial Committee say as follows:—"Decided cases too numerous to be now questioned have determined that a testamentary power exists and may be exercised at least within the limits which the law prescribes to alienations by gift *inter vivos*." An attempt was made to show that there were cases in which a Hindu could not bequeath by will what he could give away *inter vivos*, and the case of a Hindu widow disposing of her savings was cited as an instance. It is answered that the question of a widow's right to dispose of her property by will depends upon the nature of the property—whether it is such that she could give it away by gift *inter vivos*. No case has been cited in which a widow has been held incapable of bequeathing by will property which she could otherwise legally dispose of. No principle is suggested on which a distinction can be rested between the extent of the power of giving by will and of giving *inter vivos*.

The cases relating to the disposition by will of an undivided share of a coparcenary property, really support the proposition that the powers of giving and bequeathing are co-extensive. In *Villa Butten v. Yamenamma*(6), it was held that a Hindu could not alienate by will his undivided share of coparcenary property, and thus defeat his son's coparcenary right. When that case was decided the view, since overruled (*Baba v. Timma*(7)), was entertained that a Hindu, under like circumstances, could make a gift *inter vivos* of his undivided share of family property. Dealing with these decisions the Judicial Committee in *Lakshman Dada Naik v. Ramchandra Dada Naik*(8) use the following language: "The reasons for making this distinction between a gift and a devise are, that the coparcener's power of alienation is founded on his right to a partition; that that right dies with him; and, that, the title of his co-sharers by survivorship vesting in them at the

(1) 2 B.L.R., O.C.J., 11.

(2) 4 B.L.R., O.C.J., 231.

(3) 3 M.H.C.R., 50.

(4) 8 M.H.C.R., 13.

(5) 12 M.I.A., 1.

(6) 8 M.H.C.R., 6.

(7) I.L.R., 7 Mad., 357.

(8) I.L.R., 5 Bom., 43.

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"moment of his death, there remains nothing upon which the will "can operate." In Bombay it should be mentioned, a different view as to a coparcener's power of disposition had been taken. The High Court there had held that a coparcener could not either give or devise his share without the consent of his co-sharers. Referring to this the Judicial Committee go on to observe "Their Lordships do not think it necessary to decide between the conflicting authorities of the Bombay and the Madras High Courts in respect of alienations by gift, because they are of opinion that the principles upon which the Madras Court has decided against the power of alienation by will are sound, and sufficient to support that decision." The doctrine here approved, that it is the right to a partition which puts a restraint on the coparcener's power of alienation, is the very doctrine enunciated in *Sartaj Kuari v. Deoraj Kuari*(1). The case of *Lakshman Dada Naik v. Ramchandra Dada Naik*(2) decides that, where there is a right to a partition subsisting in one coparcener, the power to bequeath his share cannot be exercised by another coparcener. In *Sartaj Kuari v. Deoraj Kuari*(1) the negative proposition is asserted that, where the right to a partition is wanting, there is no restraint on the power of alienation. Seeing that in their judgment in the same case (*Sartaj Kuari v. Deoraj Kuari*(1)) the Judicial Committee cited the *Hansapur* case(3) in which the disposition was a testamentary one, we cannot suppose that they intended to restrict their decision to the case of gifts *inter vivos*. The conclusion at which we arrive is that, as the late Raja was capable of disposing of his estate by gift to a stranger, notwithstanding the existence of a son, so there is nothing to prevent his dealing with it by way of testamentary disposition.

We come now to consider the question raised by the fifth issue. This issue appears to have been framed with respect to an allegation made in the fifth paragraph of the plaint. Reference is there made to an adoption deed, dated the 1st October 1873. In point of fact there is no such deed, and it is not alleged in the plaint that, apart from the document bearing date the 1st October 1873, there was any contract between the plaintiff's natural father and the late Raja on the occasion of the plaintiff being given in adop-

(1) I.L.R., 10 All., 272.

(2) I.L.R., 5 Bom., 48.

(3) *Baboo Beer Pertab Sahee v. Maharaja Rajender Pertab Sahee*, 12 M.I.A., 1.

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tion to the late Raja. The document of the 1st October 1873 (Exhibit D E) was executed some few days after the ceremony of adoption took place. This document evidences nothing more than a concession made by the late Raja with regard to the retinue of his adopted son and to the access to him of the members of his natural family. It is true that, by way of recital, it is stated in the document that the boy has been adopted and constituted the heir to the zemindari and its appurtenances. These words state nothing more than the legal consequences of the plaintiff's adoption. It cannot be pretended that they in any way restrain the adoptive father in the exercise of his powers of alienation. It might as well be said that the Raja had precluded himself from prejudicing the rights of his adopted son by begetting a natural son. Language far stronger was used by the adoptive father in the case of *Rungama v. Atchama*(1) and yet it was held that he had not disabled himself from disposing of the property without the consent of his adopted son. There being no evidence and, as we have said, no allegation even of anything in the nature of a contract or a settlement, we must hold that there was nothing in the provisions of the document of the 1st of October 1873 to preclude the Raja from disposing of his property as he pleased, so long as he did not evade the obligation to maintain the appellant. That obligation is recognised in the wills.

It remains to deal with the contention which is raised under the fourth issue. The issue is not happily worded, but we are told that it is meant to raise the question whether, by reason of the mere fact that the appellant is not the son of the testator, he is precluded from taking the estate under the will. For the purposes of this issue we are assuming that the appellant is, as found by the District Judge, not the son of the late Raja. It is contended that the Raja's expressed intention was to give the estate to his begotten son, and that the gift must fail if, in point of fact, the appellant does not answer to that description. In the plaint the allegation in respect of this matter is that the Raja, in or about October 1885, announced that his wife had been delivered of a son, namely, the appellant, and that this assertion on his part was false and fraudulent and set up to deprive the plaintiff of his rights as an adopted son. From this allegation in the third

(1) 4 M.I.A., 1.

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paragraph of the plaint and the plaintiff's own evidence as also from the opening of the plaintiff's vakil in the Court below and from the conduct of the case in that Court, it is abundantly clear that the plaintiff's case was that the Raja was himself a party to the conspiracy by which the appellant was introduced into the family as his son, he being in fact a stranger. There is nothing to indicate that the Raja was under any mistake about the matter, and still less that he himself was the victim of the alleged fraud. The Judge apparently accepts this view of the case in paragraph 128 of his judgment. These being the circumstances, the cases cited to us, in which the testator was either under a misapprehension or was deceived, are wholly inapplicable. In the class of cases to which *Fanindra Deb Raikat v. Rajeswar Das*(1) belongs, the testator made a gift to a certain person under the belief that he filled a certain character, and the language of his will showed that his intention was that the person named should take the gift only in that character. In such cases it has been held that, when the testator turns out to have been mistaken, the gift must fail, because the presupposed condition does not exist. It was argued that, notwithstanding the fact that the testator, the Raja, was under no mistake, the will still showed that his intention was that the appellant, as his begotten son, and only as begotten son, should take under it. It is contended that, by his reference to the Hindu law and by his constant repetition of the word *avurasa* son, the Raja evinced his clear determination to make his will in harmony with Hindu opinion, which might be scandalized if he had given away his property to a stranger. Having regard to the admitted fact that the Raja knew that the legitimacy of his putative son was disputed, we are asked to say that he intended the appellant to take only in the event of his claim as son being established by a Court of law. A somewhat similar argument was used by Sir George Jessel as Counsel for the appellant in *Hill v. Crook*(1). There the testator bequeathed certain property on trust for his "daughter Mary, the wife of the said John Crook" for her life, John Crook in the former part of the will having been described as the testator's son-in-law, and after the decease of his said daughter, Mary Crook, he directed that his property should remain upon trust for the benefit of the children of

(1) I.L.R., 11 Cal., 463.

(2) L.R., 6 H.L., 265.

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his said daughter Mary Crook. It appeared that John Crook had first married another daughter of the testator and that, upon her death, he had gone through a form of marriage with the testator's daughter Mary. This daughter Mary was, therefore, not the legal wife of John Crook, and her children were not her legitimate children. There was in fact a double misdescription, for *primâ facie* according to English law 'children' imports legitimate children. The children of Mary Crook were reputed and known as her children. So, in the present case, we have been referred to evidence showing that the appellant was introduced to the Raja's friends as his child and that the usual ceremonies for a child were performed by the Raja. It was held in *Hill v. Crook*(1) that the children of Mary Crook were as clearly pointed to by that description as if they had been mentioned by name. There can be still less doubt where, as in the present will, the actual name of the donee is also given. All that can be said with regard to this will is that, if the appellant is not the son of the late Raja, there has been a misdescription of him in the will. It cannot be said that there is any possible doubt as to the identity of the person intended by the testator. We may refer to the case of *Schloss v. Stiebel*(2) cited in the argument, where the testator who was betrothed to a lady and intended to marry her in a few days, made a codicil in her favour describing her as his wife. Although he died before marrying her, it was held that the lady was entitled to the legacy. That case, like the present, illustrates the general doctrine that a false description does not by itself vitiate the legacy. In *Kennell v. Abbott*(3) the Master of the Rolls, citing the passage from the Digest [Book XXXV, t. I., l. 72, s. 6], says that the meaning of it is "that a false reason given for 'the legacy is not of itself sufficient to destroy it.'" If there is an adequate description of the person intended to take, the erroneous addition of words of description is immaterial. This is the case even where the error is unintentional, the true fact being unknown to the testator. *A fortiori* it must be so where the testator, for some reason of his own, uses words which he knows to be inapplicable. His description of the appellant as his *avurasa* son, which we are assuming to have been intentionally erroneous, we are disposed to attribute to a desire on his part to

(1) L.R., 6 H.L., 265.

(2) 6 Sim., 1.

(3) 4 Ves., 802.

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strengthen the position of his intended beneficiary, who, we must repeat, had after all been treated by him as his son. The frequency of the use of the term 'arurasa' is, in our opinion, fully accounted for by the need of distinguishing the *arurasa* from the *dattaka* or adopted son. It may be noticed that in each of the wills the full name of the adopted son and of the *arurasa* son is given only once and in other places the descriptions *arurasa* and *dattaka* are used in juxta-position.

On this part of the case we find that the testator's intention was undoubtedly to give the estate to the appellant irrespective of his claim to the title of son. No fraud or deception was practised upon the testator. He was under no misapprehension as to the facts. He used language which can apply to no one but the appellant, and therefore his gift must take effect.

To recapitulate, our findings are (i) that the zamindari of Pittapur is an impartible estate; (ii) that there is no proof that it is inalienable either by custom or by reason of the tenure; (iii) that the estate thus being alienable *inter vivos* according to the decision in *Sartaj Kuari v. Deoraj Kuari*(1) it was equally alienable by will; (iv) that the late raja's will is not void as being in conflict with any contract or settlement made by him in the plaintiff's favour; and (v) that the appellant, whether or not he was the son of the testator, is the *persona designata*.

Having come to these conclusions in favour of the appellant, we deem it unnecessary to proceed further with the appeal. The inquiry into the matter of the legitimacy of the appellant would entail a mere waste of the time of the Court for a great number of days, besides causing needless expense to the parties, for in the result their position with regard to the property would not, in the view we have taken of the validity of the will, be altered by the decision at which we might arrive on the other question.

We must allow the appeal and reverse the decree of the District Court and dismiss the suit.

We have considered the question of costs. We think that, as the plaintiff has provoked an enquiry into the legitimacy of the appellant which, unless he succeeded in impeaching the Raja's wills, was vain, he ought to pay the ordinary costs of the litigation. By ordinary costs we mean the costs incurred under the

Court Fees' Act for stamp duties, and under the Legal Practitioners' Act for pleader's fees, and the printing and translation charges in this Court. Other costs incurred by the parties themselves, such as the costs of the Commissions for the examination of witnesses and of printing papers done outside the Court, must be borne by the party who incurred them.

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MAHIPATI
RAMA-
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RAO.

APPELLATE CRIMINAL—FULL BENCH.

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

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v.

ARUMUGAM AND OTHERS.*

1896.
September
17.
October 7.
1897.
February 23.
April 30.

Occurrence Reports—Charge sheets—Right of an accused to copies of, before trial—Criminal Procedure Code, ss. 157, 168, 173—Public documents—Indian Evidence Act, s. 74—Right to inspect and have copies—Indian Evidence Act, s. 76.

Held by the Full Bench (SUBRAMANIA AYYAR, J., dissentiente).—Reports made by a Police officer in compliance with sections 157 and 168 of the Criminal Procedure Code are not public documents within the meaning of section 74 of the Indian Evidence Act, and consequently an accused person is not entitled, before trial, to have copies of such reports.

Held by COLLINS, C. J., and BENSON, J.—The same rule applies to reports made by a Police officer in compliance with section 173 of the Criminal Procedure Code.

Held by SHEPHARD and SUBRAMANIA AYYAR, JJ.—Reports made by a Police officer in compliance with section 173 of the Criminal Procedure Code are public documents within the meaning of section 74 of the Indian Evidence Act, and consequently an accused person, being a person interested in such documents, is entitled by virtue of section 76 of the Indian Evidence Act to have copies of such reports before trial.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by G. T. Mackenzie, Acting Sessions Judge of Coimbatore.

The case was stated as follows:—

"The accused in the case applied for copies of the Village Magistrate's report, complaint, police occurrences and charge

(1) I.L.R., 10 All., 272.

* Criminal Revision Case No. 323 of 1896.

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"sheet, medical certificates and statements of complainant, in order
"that they might know the nature of the case against them and
"also to enable them to cross-examine the witnesses for the prosecution.

"The Magistrate passed the following order:—

"Grant copy of complaint, medical certificates and statements
"only.' From this it appears that copies of occurrence reports
"and charge sheets were refused.

"The accused then moved the Sessions Court in Criminal
"Revision Petition No. 9 of 1896, on which Mr. Desikachariar,
"High Court Vakil, was heard. He asked this Court to order
"the Magistrate to grant these copies.

"My attention was drawn to a memorandum which the
"District Magistrate of Coimbatore published in the District
"Gazette of March 7th.

"The attention of all magistrates is drawn to the High Court
"Ruling in *Queen-Empress v. Venkataratnam Pantulu*(1), copies
"of charge sheets and occurrence reports should not be granted to
"the accused prior to the completion of the trial of a case.'

"I held that I have no power to interfere with the magis-
"tracy in this matter, and that if I had the power to interfere,
"Queen-Empress v. Venkataratnam Pantulu(1) would prevent me.
"Mr. Desikachariar then asked me to refer the order under section
"458.

"My own opinion is that every thing which is before the
"Magistrate or Judge ought to be known to the accused. The
"special privilege which section 172 gives to diaries may have a
"reason inasmuch as diaries may refer to other cases also. But
"I read with the utmost astonishment the remark of the Chief
"Presidency Magistrate in *Queen-Empress v. Venkataratnam*
"*Pantulu*(1), that charge sheets contain good deal of information
"for use of the Magistrate which the defence is not allowed to see.

"Also I am unable to understand the exact force of the
"words 'at the present stage' in the decision of the High Court.
"The Chief Presidency Magistrate refused copies 'before the
"trial,' so the High Court may mean that copies must be given
"when the trial has commenced or when a charge has been

(1) I.L.R., 19 Mad., 14.

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"framed. But the District Magistrate of Coimbatore under-
"stands the High Court to mean that copies need not be given
"until the trial is over, by which time it will be too late for
"accused to make any use of them. It is to be observed that
"the code says nothing about different stages of the proceedings
"in this connection, and it seems to me that if an accused is
"entitled to a copy at last he is entitled to it at first.

"The point is of general importance. There is hardly a
"case at sessions in which the defence does not scrutinize the first
"report from the Village Magistrate, the first occurrence report
"sent in by the Station-house officer, and the charge sheet."

The Public Prosecutor (Mr. Powell) for the Crown.

Krishnasami Ayyar for the accused.

This reference was heard before SUBRAMANIA AYYAR and
DAVIES, JJ., who made the following

Order of reference to the Full Bench.—The question raised in
this case is whether the accused was, at the time he applied for
copies of certain police reports including a charge sheet submitted
to the Magistrate before whom he stood charged, entitled to
obtain the copies for defending himself in respect of the offence of
which he was accused.

Now there can be no doubt that the papers in question are
public documents within the meaning of section 74 of the Indian
Evidence Act, since they are records of the acts of public officers
submitted by them as required by law (sections 157, 168 and 173,
Code of Criminal Procedure), or in the discharge of their official
duty, and it is equally undoubted that, under section 76 of the
Evidence Act, the accused would be entitled to the copies, if the
documents are such as the accused has a right to inspect.

Though there appear to be no express legislative provisions
with reference to the question under consideration, yet it is per-
fectly clear that, in the eye of the law, every person has a right to
inspect public documents, subject to certain exceptions, provided
he shows he is individually interested in them (Taylor on Evidence,
9th Edition, section 1492, Vol. II, page 992). In *Mutter v.*
The Eastern and Midlands Railway Company(1), Lindley, L. J.,
with the concurrence of the Lords Justices Cotton and Bowen, laid
down the rule thus:—"When the right to inspect and take a

(1) L.R., 38 Ch. D., 92, 106.

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copy is expressly conferred by statute, the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle as is shown by the judgment in *Rex v. Justices of Staffordshire*(1). In the case mentioned by the Lord Justice, Lord Denman, Chief Justice, observed that for the persons interested "Every officer appointed by law to keep records ought to deem himself for that purpose" (for the production of documents) "a trustee."

Such being the law on the point and the applicant being unquestionably interested in documents like the present as the person accused of the charge, to the investigation of which they relate, it must be held he is entitled to inspect them and, therefore, to copies thereof under the section of the Evidence Act referred to above. In support of this view, it may also be pointed out that, as it cannot be denied that the accused might at his trial summon the police officer as a witness and call for and use the report in question with reference to the examination of such a witness, it stands to reason that he should be permitted to ascertain their contents in order that he may act with an accurate knowledge of all available information which may prove useful in defending himself. (See *Fox v. Jones*(2).) The above conclusion, arrived at on general principles, appears to receive some confirmation from the provisions of section 172 of the Criminal Procedure Code which exempts "police diaries" from being called for or seen on behalf of the accused; thus implying that reports, like those in question or other proceedings of the police, may be inspected at the instance of a person possessing the requisite interest.

We should here observe that, apart from general principles, if in any case an order has been made on a police occurrence report or charge sheet affecting the person accused, such as an order for his arrest or for his remand to custody, he is *ipso facto* entitled to a copy of that document under the express terms of section 548 of the Code of Criminal Procedure.

(1) 6 A. & E., 84, 100.

(2) 7 B. & C., 732, 734.

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In our view, no weight should be given to the suggestion of the Public Prosecutor that to allow the accused access to documents like the present would enable them to tamper with prosecution witnesses and thus hinder the course of justice. On the contrary, it is impossible not to feel the force of the observation of Trevelyan, J., that he did not know of anything more disastrous to the administration of criminal law than that the accused should be debarred from having access to information to which he has a right and to which he is not absolutely debarred from having access by some express provision of the legislature (*Sheru Sha v. The Queen Empress*(1)).

It was next argued that at all events the accused ought not to be furnished with the copies until the time of the trial. But it is difficult to see how, in the absence of any distinct authority so restricting the exercise of the right in question, it can be contended that the accused can be refused inspection and copy until the stage of trial is reached. If the right exists at all, the party, entitled thereto, must be held to be at liberty to claim it at any time he considers fit to do so, since obviously he is the best judge of when the right is to be exercised. Certainly it is but natural that accused persons should desire to have and apply for copies of papers, in which they are interested, even before the trial commences and the judgment of Lord Ellenbrough, C.J., in *The King v. Tower*(2) shows that applications, like the present, are not premature and ought to be complied with.

The recent case of *Empress v. Venkataratnam Pantulu*(3) relied on by the Public Prosecutor, while seeming to recognize the right of the accused to obtain copies, would, however, seem to deny the exercise of such right at the beginning of a trial. This is not in accordance with the view taken by us. We must, therefore, refer for the decision of a Full Bench the question whether the accused had, from the moment of his accusation, a right to inspect and obtain copies of the documents in question for the purpose of his defence.

This case coming on for hearing before the Full Bench, (COLLINS, C.J., SHEPHARD, SUBRAMANIA AYYAR and BENSON, JJ.), the Court delivered the following judgments:—

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

(2) 4 M. & S., 162.

(3) I.L.R., 19 Mad., 14.

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COLLINS, C.J.—In answering this reference to the Full Bench, I intend to follow the exact words of the reference. The question is whether the accused had, from the *moment of his accusation*, a right to inspect and obtain copies of the documents in question for the purpose of his defence. These documents are certain police reports including a charge sheet. The reference assumes that the documents are records of the acts of public officers submitted by them as required by law—see sections 157, 168 and 173, Code of Criminal Procedure—and that they are public documents within the meaning of section 74 of the Indian Evidence Act, and that any person interested in the subject-matter of a public document has a right to inspect it and under section 76, Evidence Act, has also the right to have a copy of such document supplied to him; but that is really the point the Full Bench has to decide. There appears no doubt that a person accused is a person interested in the documents referred to in sections 157, 168 and 173 of the Code of Criminal Procedure, if the reports relate to the accusation against him; and if such reports are public documents he would be entitled to inspect and have copies of such documents. I would remark that the accused person would thus be in a position to know before any evidence is given against him all the information the police have collected relating to the offence and their reasons for suspecting the accused. The accused would, if he had the above information, have every opportunity of making a successful defence—even if he was guilty—in fact he has a copy of the brief for the prosecution.

The question to be decided is, are these reports made under section 157—the occurrence report—and section 168—the report made by a subordinate police officer to the station-house officer—public documents, and further is the charge sheet drawn up under section 173 a public document?

The definition of a public document is (so far as it relates to the question before me) a document forming the acts or records of the acts of a public officer. It must be conceded that a policeman is a public officer.

Section 157 enacts that if, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered to investigate, he shall forthwith *send a report of the same* to a Magistrate empowered to take cognizance of such offence upon a police report

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and shall proceed in person or shall depute one of his subordinate officers to proceed to the spot and investigate the facts. . . .

Now can it be said that this report is a document forming the acts or records of the acts of a public officer? I am of opinion that it is not. It is the reasons the officer in charge of the police station has for suspecting the commission of an offence.

Section 168 directs that a subordinate police officer who has made any investigation shall report the *result* of such investigation to the officer in charge of the police station. I am of opinion that reporting the result of an investigation cannot be said to be the act or record of an act of a public officer.

Section 173 directs that, after the investigation under this chapter shall be completed, the officer in charge of the police station shall forward to a Magistrate . . . a report in a prescribed form setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and shall also state whether the accused person is in custody or released on his bond with or without sureties. This information, usually called the charge sheet, stands in a somewhat different position from the reports under sections 157 and 168, and it is possible to argue that the latter portion does relate to the act or record of the act of a public officer,—viz., keeping the accused in custody or releasing him on bail; but as that information would not be of the slightest use to the accused, and as in my opinion, the other information does not contain either an act or record of an act by a public officer, I hold that it is not a public document as defined by section 74 of the Evidence Act.

The acts and record of the acts of the public officer, while the investigation against the accused is carried on, are contained in the police diary, but by section 172, Criminal Procedure Code, the accused is not entitled to call for such diary. I give no opinion whether the accused can call for the reports and charge sheet during the progress of the trial, but I answer in the negative the question referred to the Full Bench.

I may add that I have not considered the English Criminal Procedure in relation to this case. The powers and duties of Magistrates and police are so different in India to the powers and duties of the same officials in England that I consider any reference to English Criminal Procedure unnecessary.

SHEPARD, J.—Neither in the Criminal Procedure Code nor in the Evidence Act is there any provision declaring or limiting the right of private persons interested in criminal proceedings to inspect documents in the hands of third parties. A right to inspect public documents is, however, assumed in section 76 of the Evidence Act; and, having regard to the authorities cited in the order of reference, I think it may be inferred that the Legislature intended to recognize the right generally for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given. Within that limit the right appears to be recognized according to the English authorities. In the present case there can be no question as to the interest of the party who claims inspection. It is plain that a person charged with an offence is legitimately interested in knowing beforehand the particulars of the charge made against him, and the names of the witnesses who are going to support it. His interest is none the less a legitimate one, because some persons might make improper use of the information so obtained. If, therefore, the documents sought to be inspected are public documents, and if they are unprotected by special privilege, it follows that the claim to inspection must be allowed. If any of the documents is not a public document, the claim must clearly be disallowed. Documents of three sorts are mentioned in the order of reference. There is the report which the officer in charge of a police station is bound, under the provisions of section 157 of the code, to send to the Magistrate. There is the report which a subordinate officer is under section 168 bound to send to the officer in charge of the station, and there is the final report which under section 173 the officer in charge of the station has, on completing his investigation, to send to the Magistrate. Section 74 of the Evidence Act defines public documents, and if any of these reports is a public document, it must be because it forms the act or the record of the act of a public officer. Now, taking the first of them commonly called the occurrence report and applying the language of the Evidence Act, I cannot see how it can possibly be called a public document. In obeying the provisions of section 157 of the Criminal Procedure Code, the police officer, as far as regards the Magistrate, does no act except the act of writing and despatching a report founded on information received by him. It is clear that this report does not form an act of the station-house officer within

the meaning of the section, and it cannot be the record of an act, because there has been no act on his part to record. In popular language any report which a subordinate officer is bound to send in to his superior officer and which is not confidential may be called a public document; but the Evidence Act lends no support to this view.

It is necessary to examine the language of the 74th section more closely in considering the report which the subordinate police officer is, under section 168 of the code, directed to send to station-house officer. It is a report of the result of the investigation held under the provisions of the chapter XIV of the code. No doubt there may, in this instance, be said to be a record of acts done by a public officer. Nevertheless, I do not think the report is a public document within the meaning of section 74. In construing that section, I think it may fairly be supposed that the word 'acts' in the phrase "documents forming the acts or records of the acts" is used in one and the same sense. The act of which the record made is a public document must be similar in kind to the act which takes shape and form in a public document. The kind of acts which section 74 has in view is indicated by section 78 of the same Act. The acts there mentioned are all final completed acts as distinguished from acts of a preparatory or tentative character. The inquiries which a public officer may make, whether under the Criminal Procedure Code or otherwise, may or may not result in action. There may be no publicity about them. There is a substantial distinction between such measures and the specific act in which they may result. It is to the latter only, in my opinion, that section 74 was intended to refer. Unless this line of distinction is drawn, I do not see where the right of discovery is to stop. If the report which a subordinate police officer sends to the station-house officer may be inspected before the trial, what is there to prevent inspection of the report which any other officer furnishes for the information of the Public Prosecutor? It is true that the police officer acts in performance of a statutory duty, but section 74 makes no distinction between such acts and other official acts. If an investigation amounts to an act of a public officer within the meaning of that section, and the report of it is, in consequence, a public document, it practically follows that the accused is at liberty to look into the brief of the counsel for the prosecution.

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The charge sheet which is prepared under section 173 of the code stands on a different footing. When the charge sheet is sent to the Magistrate, the preliminary stage of investigation and preparation is over. Upon the receipt of it the Magistrate may, under section 191, take cognizance of any offence that has been charged. The transmission of the charge sheet with a view to that result, accompanied by a statement as to the accused person whether he is forwarded in custody or not, may therefore properly be called an act of a public officer, and the charge sheet itself may properly be said to form a record of that act. It is only reasonable that an accused person should, when once the Magistrate is seized of the case, have access to the report stating the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case. On the other hand, there are good and obvious reasons why, in the case of communications prior to that stage between police officers themselves, or between such officers and the Magistracy—communications which may or may not result in a charge and may relate to third parties and extraneous matters, discovery should not be allowed.

The conclusion at which I arrive is that an accused person is entitled to inspect, and, therefore, to have a copy of the charge sheet before the trial, but that he is not entitled to inspect the other documents. Whether he is entitled to call for them at the trial is a different question with which we are not now concerned. It was on that question that the cases in *Sheru Sha v. Queen Empress*(1), *Bikao Khan v. Queen Empress*(2) turned.

SUBRAMANIA AIYAR, J.—The further consideration, which I have bestowed on the question referred for decision, has not led me to think that the view, expressed in the order of reference, is erroneous. But some arguments, not urged before Davies, J., and myself prior to the date of the reference, have been advanced since and the most important of them call for some notice.

One of the arguments is that a right, similar to that put forward now on behalf of the accused, does not exist in England. But this ignores an essential difference which exists between the circumstances of the police in England and of the police in this country. There the law does not sanction an investigation by the

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

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

police as is allowed by the Code of Criminal Procedure here. This is pointed out by Sir James Stephen in the History of Criminal Law where he observes: "The second way in which proceedings may begin is by a police investigation. This process (sections 154-172, Criminal Procedure Code) is unknown in England. It is not altogether unlike part of the French procedure, but it is still more like what would exist in England if the course usually taken in fact by the police were to be taken under a legal sanction, the police being invested by law with special powers to take evidence for their own information and guidance" (Vol. 3, page 332). Owing to this difference between the two systems official documents corresponding to "charge sheets" and "occurrence report" under our code are unknown to the law in England, and consequently no question as to inspection of such document, has or could have arisen there.

The next argument appears to be that as in England a person accused of an offence falling under the description 'felony' is not entitled to a copy even of the indictment, it ought not to be held that an accused person in this country is entitled to copies of such documents as the charge sheet, &c. With reference to this argument, the first observation to be made is that the sole point for our determination being whether the documents in question are public documents within the meaning of section 74 of the Evidence Act, one is unable to see any connection between that question and the fact that in England persons accused of a particular class of offence are disentitled to a copy of the indictment. In the next place, supposing the doctrine of English law as to copies of indictment in cases of felony is somehow germane to the present discussion, it is clear even in England that doctrine is much disapproved of, if it has not already ceased to be law (*vide* Greave's Note (o) at page 463, Russell on Crimes, 6th edition). But granting that it is well recognized in English Criminal Procedure, can it be defended as a just and sound rule whilst admittedly a man accused of a misdemeanour is under the same law treated better? The characteristics of reasonableness and of good sense, which alone would justify our adopting a rule of English common law, being wanting in the particular instance relied on, a reference to it would seem scarcely calculated to throw true light on the question at issue.

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Another argument was urged with reference to the law as to grant of copies of depositions in England. In arguing thus by analogy, the peculiar nature of the theory which prevailed in England (before salutary changes were introduced by 6 and 7 Will. IV., cap. 114), as to a prisoner's position with reference to everything done in connection with the charge against him *prior to the trial*, must not be lost sight of. That theory was that, in enquiring into and committing a person charged with an offence, a Magistrate was acting *inquisitorially*, that his enquiries should be conducted in private and behind the back of the prisoner if that is considered necessary and that the prosecutor or his solicitor alone might have access to the depositions taken by the Magistrate, but not the party accused, who, strangely enough it was thought, should not before the actual trial be enabled to know what the evidence to be adduced against him was (*vide* the procedure adopted by the Magistrate in *Thurtell's case*(1) and the observations of Justice J. A. Park in the same case). Referring to the working of a practice of this extraordinary description, Sir James Stephen justly observes: "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which Justices of the Peace acting frequently the part of detective officers took their examinations and committed them for trial." (*Ib.*, p. 225.) No doubt all this is now happily changed. But that such was the law and procedure even in the early part of this century ought to make one hesitate to look for light to the English practice under the common law in a matter like this. If we turn to the English statute law on the point, it cannot be denied that, so far as it goes, it affords reasonable facilities to the accused. The substance of it is this: a person under trial is entitled, subject to payment of certain fees, to copies of depositions, provided he applies for the same *before the day appointed for the commencement of the Assize or Sessions* at which he is to be tried. If, however, he is not diligent in the matter and applies later, he can get them only if the Judge considers that the copies may be made and delivered without delay and inconvenience to such trial. Nor are persons under trial who have not taken the precaution of securing copies of depositions thereby precluded from ascertaining before their trial the nature of the evidence

(1) 1 Step. H. Criml. Law, 227.

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recorded against them by the Magistrate, for they possess the right of *inspecting without fee or reward* all depositions or copies thereof which have been taken against them and returned into the Court before they are tried (3. Russel on Crimes and Misdemeanours, 6th edition, pages 404 to 466, and especially note V at page 466). What is there in these provisions to suggest anything against the granting of copies of the papers in question?

Turning now to the provisions of the Criminal Procedure Code relating to those papers, it is necessary in order to understand their real import and nature to see why such provisions came to be enacted. Prior to the passing of the first Criminal Procedure Code, viz., that of 1861, the powers of the police were different from those now exercised by them. Complaints in cases of the more serious offences were usually laid before them. They were authorized to examine the complainant, to issue process of arrest, to summon witnesses, to examine the accused and to forward the case to the Magistrate or submit a report of the proceedings according as the evidence may, in their judgment, warrant the one or the other course. These large powers were grievously abused for purposes of extortion and oppression, and it was a question for the determination of Her Majesty's Commissioners appointed to consider the reform of the judicial establishments, procedure and laws in 1856, whether the powers should not be greatly abridged. The Commissioners, however, came to the conclusion that considering the extensive jurisdiction of the Magistrates in this country, the facilities which exist for the escape of parties concerned in serious crimes and the necessity for the immediate adoption in many cases of the most prompt and energetic measures, it was requisite to arm the police with some such powers as they then possessed. (See page 181 of the Selections from the Records of Government: Papers relating to the Reform of the Police of India, 1861.) The original draft of the Criminal Procedure Code, therefore, sought to give effect to the above conclusion. But when the matter came before the Legislative Council much difference of opinion prevailed among the members of the Council in respect of some of the provisions inserted to carry out the view of Her Majesty's Commissioners. On the one side, it was contended that to allow the police to record statements of parties and witnesses and to place them before the Magistrate would be productive of much mischief. On the other side, it was urged that in the interest, not

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only of the prosecution, but also of the defence, it was necessary that such statements should be immediately recorded and laid before the Magistrate at once. (See Proceedings of the Legislative Council, Vol. V, pages 515 to 545 and 570 to 574.) The substance of the existing provisions of the law respecting the submission of reports by the police seems to have been devised to avoid the evils apprehended by one set of the members and to secure in a measure some of the advantages to which the other members attached so much importance.

Now, first, the general report directed to be sent is the daily report called the diary. This the law prescribes should be forwarded to the officers of the department itself, in accordance with the principle insisted upon at the reorganization of the police which took place about the same time as the passing of the Criminal Procedure Code, viz., that dual control should be avoided and policemen should be directly dependent on, and be responsible only to, their own officers (page 250 of the selections already cited). And this diary, which must contain everything material heard or done by a policeman in the course of the day with reference to his work, was, for obvious reasons, declared not to be subject to inspection by the parties. Next, special reports bearing upon particular cases coming up for investigation were directed to be submitted to the Magistrate. One of the objects, which the legislature had in view in requiring the submission of these reports to the Magistrates, was manifestly to provide a record with reference to which the action of police officers engaged in making an investigation may be scrutinized during the later stages of the case. Now, who is more interested in exercising this scrutiny than the accused implicated in the particular case to which the investigation relates? It is impossible to believe that the legislature intended that persons, so deeply interested in bringing to light any misconduct in connection with the investigation, should not have access to the records in question. If such were really the intention, why, whilst expressly laying down that the general report or diary cannot be called for by the parties, the legislature singularly enough refrained from declaring that these special reports also are confidential? Why did it not in terms extend the protection accorded to the diaries to the other reports prescribed? It is scarcely necessary to add that to withhold from the accused access to the reports in question would certainly be to deprive those

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persons of one reliable means of ascertaining the development of the case during the investigation and to disable them from exposing, at the preliminary enquiry to trial, the attempts, if any, made by the police or other persons connected with the case, to get up false evidence, or other circumstances appearing in the reports and revealing flaws in the case for the prosecution.

As to section 125 of the Evidence Act, that only provides against a police officer being *compelled* as a witness to say whence he got any information as to an offence. The section has clearly no reference to the present case.

Lastly, that the documents in question fall strictly within the language of section 74 of the Evidence Act seems to my mind to admit of no doubt. First as to the charge sheet, is it not a 'record' of at least *some* of the investigating officer's acts? Again, suppose it is not, is it not unquestionably *itself* a document forming an 'act' of *his*, he being enjoined to act in a particular way, that is, submit such a report. The same remark applies to the report under section 157. Nor is it right to suppose there is no other "occurrence report" sent by the police to a Magistrate in the course of an investigation. For, according to the rules of the department, a policeman making a search has to send one in respect of it to the Magistrate (Orders of the Madras: Police Order 140 (4), page 80), and there is the inquest report prescribed by section 174 of the code. Copies of these are not unimportant to accused persons, and it cannot be doubted that these reports are records of a public servant's acts within the meaning of section 74.

For all the above reasons, I would answer the question submitted in the affirmative.

BENSON, J.—The question for our decision is, as I understand it, whether a person who is named as accused of an offence in a charge sheet forwarded by the police to a Magistrate is entitled before his trial to inspect and obtain copies of certain reports made by the police in connection with the case, viz.:—(1) the occurrence report made under section 157, Criminal Procedure Code; (2) the report made under section 168, Criminal Procedure Code, by a subordinate police officer to the station-house officer; and (3) the charge sheet drawn up under section 173, Criminal Procedure Code.

It was, I understand, conceded that a copy of the station-house officer's report made under section 167, Criminal Procedure

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Code, could not be demanded, inasmuch as it is an extract from the police diary, which is specially protected by section 172, Criminal Procedure Code.

I am of opinion that the reference must be answered in the negative.

It is admitted that the right is nowhere given by any express legislative enactment; but it is argued that the reports in question are public documents within the meaning of section 74 of the Indian Evidence Act; that every person interested in the subject-matter of a public document has an inherent right to inspect it, and that, under section 76 of the Indian Evidence Act, every person entitled to inspect a public document is also entitled to obtain a copy of it. It will be seen that the whole question depends on whether the documents in question are public documents within the meaning of section 74 of the Indian Evidence Act. I do not think that they are. The only class of documents specified in that section within which they could fall is "documents forming the acts or records of the acts of public executive officers." The police officers who send in these reports are, no doubt, public executive officers, but I do not think that these reports can, with any propriety, be regarded either as forming their acts or as the records of their acts. The diary of a police officer, which is kept under section 172, Criminal Procedure Code, is the record of his acts, in the popular sense of the word, in making an investigation under the Criminal Procedure Code. It sets forth his proceedings day by day in making the investigation and *inter alia* it must record "the time at which information reached him, the time at which he began and closed his investigation, the place or places visited by him and a statement of the circumstances ascertained through his investigation," but this diary is by section 172 expressly protected from inspection by the accused and his agents. It may, I think, well be doubted whether the word 'acts' in section 74 is used in its ordinary and popular sense, and not rather in the restricted and technical sense in which it is used in section 78 of the Act, but in either case, I think that the reports in question are not, in any sense, records of the acts of the police officer. This will be clear if their contents, as prescribed by law, are considered. The occurrence report (section 157) is a report sent to the Magistrate stating that the officer of police suspects, on information or otherwise, that a cognizable offence has been

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committed in his jurisdiction, and if the police officer considers it unnecessary to investigate the case, it must state the reasons for such conclusion. It is not a record of his acts, but a report of information given to him. The report under section 168 is merely a report by a subordinate police officer to the station-house officer of the "result of his investigation" into an alleged or suspected cognizable case. It is not the record of any act of the investigating officer. The charge sheet is the report sent to the Magistrate under section 173 when an investigation has been completed. It must contain "the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case," and must state "whether the accused person has been forwarded in custody or has been released" on bail. This report is not the record of the acts of the police officer. It no doubt reports one act of the police officer, viz., whether he forwarded the accused in custody, or has released him on bail, but it is not the official record of that act. The record of the act is the proceedings in granting or refusing bail, not the report of those proceedings to the Magistrate. I conclude, then, that none of the reports in question are the acts or the records of the acts of the police officers within the meaning of section 74 of the Indian Evidence Act. They are not, therefore, public documents, and the accused has no right to inspect them or to obtain copies of them.

So far I have referred to the reports as if they contained only the information which they are required by the code to contain. As a fact, however, they have been enlarged so as to contain much more than the code requires. For example, in both the occurrence report and the charge sheet there is a column in which is set forth the name of the person by whom the information was given. Section 125 of the Indian Evidence Act expressly provides that no Magistrate or police officer shall be obliged to state whence he received the information of any offence. In any view, therefore, an accused person could have no right to inspect or obtain a copy of that entry. So also in the occurrence report the names of persons suspected are entered, and in the charge sheet the houses searched and other particulars which may not concern the accused person at all are stated. It is obvious that he could have no right to obtain copies of such entries regarding third persons. If, however, the accused person was entitled to obtain a copy of the

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reports so far as they concerned himself, I do not think that his right could be taken away by the insertion in them of particulars regarding third parties or matters not required by law to be mentioned in the reports. The Magistrate might, however, grant an extract of so much only as concerned the applicant and was not protected by law from disclosure.

It is argued that, if an order has been made on an occurrence report or charge sheet affecting an accused person, he is, *ipso facto*, entitled to a copy of the document under section 548, Criminal Procedure Code. This will be so only if the Magistrate making the order is at the time a 'Criminal Court.' It may, I think, be doubted whether a Magistrate (even when he has jurisdiction to try the offence) can be regarded as a 'Court' before the trial commences. He is certainly not a 'Court' when enquiring into offences which he is not empowered to try, *e.g.*, into sessions cases (section 19, illustration (d) and section 20, Indian Penal Code). In this large and important class of cases, therefore, section 548 has no application. This, however, is not the question before us, and I need not pursue it further.

I am not aware of any statute or practice which enables an accused person in England to obtain, before his trial, copies of reports made by the police in the course of their investigations. No doubt the relations of the police to the Magistracy in the two countries stand on a different footing, but it seems improbable that if the Indian Legislature intended to give an accused person access, before his trial, to the police reports connected with his case, this would not have been clearly laid down by law.

In my opinion the alleged right is nowhere expressly conferred by law, nor can it be deduced from sections 74 and 76 of the Indian Evidence Act.

I would, therefore, answer the reference in the negative.

APPELLATE CIVIL.

Before Mr. Justice Subramania Aiyar and Mr. Justice Benson.

SRI RAJA CHELIKANI VENKATARAMANAYAMMA GARU
(PLAINTIFF IN O.S. No. 8 AND DEFENDANT IN O.S. No. 12 OF
1893), APPELLANT IN BOTH,

1897.
January 8,
11, 14, 15, 18,
19 and 20.
February 25.

v.

APPA RAU BAHADUR GARU AND ANOTHER (DEFENDANTS IN
O.S. No. 8 OF 1893), RESPONDENTS,*

AND

APPA RAU BAHADUR GARU (PLAINTIFF IN O.S. No. 12
OF 1893), RESPONDENT.*

*Hindu law—Obstructed inheritance—Inheritance passing to daughter's son—
Survivorship—Presumption of joint property.*

The daughter's sons of a deceased Hindu take the property of their maternal grandfather as an inheritance liable to obstruction and consequently take it without rights of survivorship *inter se*:

Where property enjoyed in common by persons capable of forming a Joint Hindu family was in its origin separate property, there is no presumption that such property has subsequently become joint property.

Muttayan Chetti v. Sivagiri Zamindar (1) and *Sivaganga Zamindar v. Lakshmana* (2) doubted.

APPEALS against the decrees of G. T. Mackenzie, District Judge of Gódvári, in original suits Nos. 8 and 12 of 1893.

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

Bhashyam Ayyangar, Pattabhirama Ayyar, Venkatarama Sarma, Seshachariar, Aiya and Subramania Ayyar for appellant in No. 164.

Mr. Wedderburn, Ramachandra Rau Saheb, Subba Rau, Sundara Ayyar, Seshagiri Rau and Kuppusami Ayyar for respondents.

The Advocate-General (Hon'ble Mr. Spring Branson), *Venkatarama Sarma and Aiya* for appellant in No. 165.

Mr. Wedderburn, Ramachandra Rau Saheb, Subba Rau, Sundara Ayyar and Seshagiri Rau for respondent.

* Appeals Nos. 164 and 165 of 1895.

(1) I.L.R., 3 Mad., 370.

(2) I.L.R., 9 Mad., 188.

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JUDGMENT.—The permanently-settled estates of Jaggampeta, Dontalooru and Rayavaram, the most important of the properties in litigation, belonged originally to Venkata Rao who died in July 1869. He left surviving him his widow, Venkayamma, his daughter, Chelikani Venkataramanayamma, and the latter's eldest son Niladri. Venkayamma, claiming to be the heir, took possession of the whole of his estate, movable and immovable, and held the same till her demise in July 1875. Then Venkataramanayamma succeeded to the property and died in July 1884, leaving behind her her husband Sami Rao, Niladri, already referred to, and her second son, Appa Rao, as well as three daughters; the last four having been born subsequent to the death of Venkata Rao. At the time of their mother's death, Appa Rao was aged 13 years and Niladri was aged 19 years. He was, therefore, no longer a minor. He was, however, still treated as a minor, and Sami Rao, who had been managing the property ever since the death of Venkata Rao, continued to do so on behalf of both his sons. How long his management lasted does not clearly appear. The evidence, however, shows that sometime before 1889 Niladri had assumed the management, and had been carrying it on, on account of himself as well as of Appa Rao. But from 1889, when Appa Rao attained majority, both the brothers jointly looked after the property and continued to do so until September 1892, when Niladri died without male issue, leaving a widow Venkataramanayamma, and two daughters. The widow alleges that Niladri on his death-bed executed a will (exhibit K), but this is now denied by Appa Rao. Sami Rao died on 28th November 1892. Until the death of Sami Rao, the widow and Appa Rao were on amicable terms, and the former's claim to a moiety of the whole property was admitted by the latter and both remained in joint possession of the estate. But in consequence of disputes having arisen, she was ousted from possession of the property soon after Sami Rao's death. Thereupon the two suits, from which these appeals are brought, were instituted.

In one of these, original suit No. 12 of 1893 (appeal suit No. 165 of 1895), Appa Rao sued to set aside the alleged will (exhibit K) of his brother, Niladri, and in the other, original suit No. 8 of 1893 (appeal suit No. 164 of 1895), the widow sued for possession of the whole of Niladri's property. The District Judge decided against the widow in both suits, and

against both decrees she now appeals, Appa Rao being the first respondent. In original suit No. 8 of 1893 the appellant (Venkataramanayamma), based her case upon the will of Venkata Rao (exhibit A), dated the 6th September 1866, which was, soon after its execution, deposited under a sealed cover in the District Registrar's office, and which has ever since remained there, and upon exhibit K the alleged will of Niladri, dated the 2nd September 1892. In her plaint she also prayed, in the alternative, that if her claim to the whole estate should be held to be unsustainable, such share as she might be found entitled to, should be decreed to her.

The principal defence of the first respondent as to exhibit A was that it was revoked; as to exhibit K that it was not genuine or valid. It will be convenient to defer the discussion of matters connected with exhibit K until appeal suit No. 165 (original suit No. 12 of 1893) is taken up for consideration.

The first question, therefore, for determination is whether exhibit A was revoked. The Hindu Wills' Act does not apply to the case, and no special mode of revocation being prescribed, revocation, like any other question of fact, may be proved by apt evidence, though no doubt mere oral evidence in a matter like this should be received with great caution. What amounts to revocation in common law was clearly pointed out in *Doe dem. Reed against Harris*(1) cited for the first respondent. There Lord Denman, C. J., in the course of his judgment observed, "some doubt has been entertained whether any declaration could be sufficient without the word 'revoke' but, upon full consideration, we think it impossible so to limit the testator's power of revocation, and that any equivalent word or words and expressions would be sufficient for that purpose.

"But, further, we are now required to consider whether, without any language at all, a testator may revoke a will by the conduct he exhibits. And this appears to be tantamount to an enquiry whether conduct can give a positive declaration of intent. If it can, there can be no more necessity for words than for the use of a particular expression. Now, nothing is easier than to imagine such gestures and proceedings, connected with the will, as must fully convince every rational mind that

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(1) 8 A. & E., 11.

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"the testator intended to revoke his will, and thought he had done so by the means he took for that purpose. But if he who has power to revoke by declaring a present resolution then to do so does in fact make that resolution manifest, it seems clear that the act of revocation is complete in every essential part."

Such being the rule on the point, does the evidence here establish the first respondent's contention that, though exhibit A has all along remained in the Registrar's office, yet it was in reality revoked? The evidence in support of it consists chiefly of the testimony of the seventh and the eighth witnesses called for the first respondent and certain circumstances connected with the enjoyment and devolution of the bulk of the property referred to in the will. Exhibit XXXIII, copy of the vakalat spoken to by the said seventh witness, the reception of which in evidence was rightly objected to on behalf of the appellant, both in the lower Court and here, on the ground that the original was not accounted for as required by law, must be excluded from consideration.

Now as to the evidence of the two witnesses relied on: Gourayya, the seventh witness, is a pleader whom Venkata Rao had employed to transact his legal business from March 1866, that is, for some six months previously to the execution of the will. The material portion of his evidence may be given in his own words:—"I heard that Venkata Rao executed a will. He spoke to me about a will. He told me he had cancelled the will and the pattas, and he said that he would empower me to get back the will from the Registrar's office. He said that he had taken back the pattas. He said that he would give me a vakalat. He got that vakalat registered. I did not get back the will from the Registrar's office. I was not able at once to go to the Registrar's office as I fell ill. The Vakalat was executed at Jaggampeta and I took it to Peddapur. Nilachalam asked me to return the vakalat as he heard that I was not well. He said that they would send somebody else. Nilachalam was the son of the kept woman of the Rajah and was looking after the estate under Venkata Rao. He was a confidential servant of Venkata Rao. I returned the vakalat to him. Nilachalam is dead." Virayya, the eighth witness and maternal uncle of Nilachalam referred to by the seventh witness, stated that he was a servant under Venkata Rao and that he (the witness) was present when Nilachalam informed Venkata Rao that he had brought the will, that thereupon Venkata

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Rao said "Tear it", and that Nilachalam tore the paper which he led Venkata Rao to believe was the will. Turning now to the weight due to the testimony of these witnesses, Gourayya appears to be unconnected with either of the parties in the litigation. He is apparently independent and his cross-examinations suggest no grounds for impugning his evidence, which is confirmed strongly by the fact that a vakalat to get back the will from the Registrar's office was executed by Venkata Rao on the 21st November 1867, presented for the registration on the 24th idem and subsequently duly registered (exhibits XL and XLa). The conversation, which the witness says took place between him and Venkata Rao, is therefore likely to have taken place. But the eighth witness's story is in itself so extraordinary that it cannot be depended upon in the absence of corroboration, and this is altogether wanting. Two matters are, indeed, relied on as corroboration. The first is that some of the papers connected with the cancellation of grants of land referred to in the will, one to Venkata Rao's sister and another to his illegitimate sons, made about the time of the execution of the will, had been fraudulently abstracted from the records of the Collector sometime before 1871 (exhibit XXXIX). The other is the fact that Venkayamma in that year complained (exhibit XXXVIII) that such clandestine removal of the papers had taken place at the instigation of Nilachalam and Venkata Rao's sister. We do not, however, think that these matters can be accepted as affording any material corroboration of the story. That story, if true, implies that Nilachalam perpetrated a gross fraud on his father with whom he was on confidential terms. What motive Nilachalam had for so deceiving Venkata Rao is not shown. The suggestion is that he acted in the way alleged in the hope of being able to rely on the will after the death of Venkata Rao in support of some claim he (Nilachalam) intended to make to the property, the grant whereof was recited in the will but the right to which he had relinquished, as was evidenced by the missing papers. The suggestion is a mere surmise and is too far-fetched to be safely acted upon. On the other hand, it is argued on behalf of the appellant that it was to the interest of Nilachalam that the will should have been destroyed; since in that event, it might have been open to him as an illegitimate son to claim by inheritance a share of Venkata Rao's estate along with the widow or with the daughter or with the latter's son. The argument has

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little force since it has not been shown that the connection between Nilachalam's mother and Venkata Rao had been of such a character as to give Nilachalam the status of an illegitimate son entitled to inherit under the Hindu law. Nor has it been shown that Nilachalam thought he had a right to set up such a claim. The evidence of the eighth witness being, in our opinion, incredible and uncorroborated, must be rejected, and the fact that exhibit A was not taken back from the Registrar's office and destroyed, must be treated as unexplained.

That fact, however, is not conclusive against the alleged revocation, and we must now see how far evidence connected with the enjoyment and devolution of the property proves the revocation. In the will reference is made to grants of property already made to certain relations and dependents of Venkata Rao; the rest of his estate being left to his wife Venkayamma, and after her to his daughter Venkataramanayamma and to his grandson Niladri. Of the grants *inter vivos*, the most important are those made respectively to the testator's sister, to his illegitimate sons including Nilachalam, and to the testator's daughter Venkataramanayamma. The sister got a village with a nett rental of about Rs. 4,000, the sons another with a rental of about Rs. 2,000 and the daughter two villages with a rental of about Rs. 6,000 per annum (exhibits XXXV, XXXIV and XXXVI). It appears from the statements in the will and in Venkata Rao's grant (exhibit XXXV) to his sister that what really prompted him to make the grants and to execute the will was his serious illness in 1866. However by October 1867, Venkata Rao had fully recovered and he then changed his mind about the grants and persuaded the grantees to relinquish their rights under the grants (exhibits XXXIVa and XXXVIII). This was in October 1867. The very next month Venkata Rao employed Gourayya to withdraw the will, executed a vakalat to him for the purpose and even took the precaution of registering the vakalat. Considering that the three grants and the will came into existence almost simultaneously, viz., between the 6th and 14th September, and that the cancellation of the former was shortly afterwards followed by steps to take back the will from the Registrar's office, the inference, it is argued, is that Venkata Rao wished to get the will back because it also had been cancelled. Now, though the facts on which the above argument rests are true yet the inference drawn therefrom

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is far from being conclusive. Nevertheless it would seem to be entitled to some weight when taken with the light thrown upon the matter by the conduct of Venkayamma, Venkataramanayamma, and Niladri, and by the views which they took of the titles under which they held the zemindari during the twenty-three years, which elapsed between the death of Venkata Rao and that of Niladri.

What then were the views taken by them? Three days after her husband's death Venkayamma wrote to the Collector of Gódvári a letter which runs thus: "My husband Sri Raja Rao Venkata Rao Bahadur Garu having been unwell, owing to the illness he had, died on the 22nd of this month; I have a daughter called Chelikani Venkataramanayamma, a grandson (by-daughter) called Chelikani Venkatasurya Niladri Rao of the age of four years and a grand-daughter (by-daughter) called Venkayamma aged one year. *I am the heir to the whole of my husband's property according to law.* I shall from this day forward manage the affairs. I therefore request you will be good enough to cause Jaggampeta, Dontalooru and Rayavaram mittas which are standing in my husband's name to be entered in my name and grant me a dhimat (a written authority for collecting revenue) Under the orders of the Board of Revenue, the estates were registered in the name of Venkayamma who was described in column 9 of the register exhibit IV bearing the heading "mode of transfer by sale, gift or otherwise," as having taken "by inheritance." After having held the property for about six years, Venkayamma became ill and wrote to the Sub-Collector of Gódvári on the 14th July 1875. "I am not therefore confident that I would live and consequently write to you in regard to the whole of my property. I have got a daughter by name Sri Raja Chelikani Venkataramanayamma. The said Venkataramanayamma is the chief heir to my zemindari consisting of Jaggampeta, Dontalooru and Rayavaram estates and to all other movable and immovable properties. I therefore request that the right to the zemindari consisting of the said estates may be registered in her name" On the 17th idem Venkataramanayamma herself communicated to the same officer her mother's death and after observing "I am the reversionary heir to all the estates forming the movable and immovable property of my mother" concluded with a prayer for the registry being transferred to her name as heir (exhibit V).

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Lastly on the 27th June 1884 Venkataramanayamma wrote to the Collector of the District informing him that she had fallen ill, that she did not expect to recover from that illness and that she had given to her two daughters some property and observed "after my death my two sons are the chief heirs to my estates" and to the whole of my movable and immovable property" (exhibit I). This view was endorsed, in equally distinct terms, by Niladri himself in his letter to the Collector, dated the 8th July 1884, intimating his mother's death and asking the estates to be registered in the names of *himself and the first respondent* which was accordingly done. Not only was no reliance placed on the will on these three important occasions, but it is not shown that it was relied on or even referred to on any other occasion until, at all events, a month before Niladri's death in 1892. Such conduct on the part of the three successive holders of the estate tells strongly against the case of the appellant, who has consequently attempted to explain it away by suggesting that Venkayamma, Venkataramanayamma and Niladri were all ignorant of the will and of its provisions. This suggestion is hardly consistent with the plaint which, while it asserts that Niladri was unaware of the arrangement made by Venkata Rao, refrains from saying that such ignorance was shared by Venkayamma and Venkataramanayamma; nor is there any evidence whatever on behalf of the appellant to prove the alleged ignorance. The probabilities are all the other way. It is difficult to see why Venkata Rao should have wished to keep the will a secret from his wife and his daughter who were living on affectionate terms with him at the time he made the will in their favour. On the contrary, if, as was said in one part of the argument on behalf of the appellant, one of Venkata Rao's objects in making the will was to prevent his illegitimate sons laying any claim by inheritance to a share of the zemindaries along with his widow, his daughter and his grandson by the daughter, surely he would have taken care to let these latter know what he had done to secure their rights against the possible claims of the illegitimate sons. Again, there was no secrecy whatever attending the execution of the will. It was written by Jagga Raja, one of Venkata Rao's gumastahs, and was attested by the Karnam and the Village Munsif of the place. Moreover, about twelve months after the will was deposited in the Registrar's office, the vakalat for its withdrawal was publicly

executed and registered, Vakil Gourayya having, as stated by him, paid a visit to the zemindar in connection with that vakalat and the then Sub-Magistrate, in his capacity as a registration officer, having attended at the zemindar's residence to accept the presentation of the vakalat for registration (exhibit XLa). That, notwithstanding all these circumstances, Venkayamma, Venkataramanayamma as well as the latter's husband Sami Rao who was residing with them all the time as a member of the family, somehow did not come to hear of the will in Venkata Rao's life time is hard to believe. It is harder still to suppose that even after Venkata Rao's death, no information reached his successors at any time before August 1892, and the more so as Jagga Raja, the writer of the will, was alive all the time. Then it is also suggested that the ladies probably thought the will amounted to nothing more than a mere statement of the rights they possessed under the Hindu law and so did not think it worth while or necessary to refer to, and rely upon, the will. This conjecture also—for it is nothing more—is a very unlikely one, for even if the ladies had supposed that the will amounted to nothing more than a declaration of their rights under the Hindu law, they would still almost certainly have alluded to it at all events as confirmatory evidence of their claim under the Hindu law. Another suggestion is that Venkataramanayamma did not wish Niladri alone to take the property to the exclusion of the first respondent and the omission to refer to the will was due to this cause. This ingenious argument, however, cannot account for Venkayamma's conduct in 1869, as the first respondent was not born till two or three years later. It is scarcely necessary to add that so far as Niladri was concerned, his admission that he and the first respondent were *co-heirs* cannot be explained except upon the hypothesis that he was absolutely unaware of the provision of the will in his own favour. But in support of such hypothesis nothing is to be found in the evidence, whereas it is clear, upon the testimony of plaintiff's own fourth witness, Jalandanki Venkayya, that Niladri was aware of the will and of its provisions. In these circumstances the conclusion that the will was never after November 1867 treated as a subsisting testamentary paper seems irresistible. And how strong was the conviction in the minds of the members of the family that the instrument was not a subsisting one may be gathered from the suggestive ambiguity to which the persons, who drew up the plaint

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in this case, found it necessary to have recourse in alleging Niladri's exclusive right to the property. For, though several authenticated copies of the will had been obtained from the Registrar's office by the appellant's agent a month or two before the plaint was filed, yet exhibit A is not referred to in the plaint, nor is it even alleged that "the arrangements" under which Niladri got the estate were made by any will of Venkata Rao. When this is contrasted with the explicit statement in the plaint as to exhibit K referred to therein by date and as the "will" of the Niladri, it is pretty plain that the appellant's advisers were then unwilling to tie her down to the case that the arrangement, which was set up as having constituted Niladri the sole heir, was the one made under the will in question. This remarkable unwillingness on their part even at that late hour, considering that there was no doubt either as to the genuineness or the validity of the instrument, can be attributed only to the grave distrust felt by those advisers as to the possibility of treating exhibit A as a disposition still in force.

Such are the chief considerations which favour the first respondent's contention. Against it, no doubt there is the fact that the document was not actually taken back from the Registrar's office. Why Venkata Rao failed to get it back (as we have seen he intended to do) has not been explained, but this fact ought not to be pressed too strongly against the first respondent, since owing to the lapse of time almost all the persons who would have been in a position to throw light on the matter were dead at the time of trial. In these circumstances Gourayya's evidence, coupled with the course of conduct referred to above, is entitled to great weight and the finding of the District Judge that the will was revoked must be held to be correct. On this finding it is unnecessary to go into the questions which would arise if the will were still in force.

Now Venkata Rao having died intestate it follows that, on Venkataramanayamma's death, the inheritance passed to Niladri and to the first respondent as his daughter's sons, and the question then arises whether at the time they succeeded to the estate, they took the property with the right of survivorship under the law, or separately without any such right.

Having regard to the well-known Mitakshara doctrine of right by birth giving rise to that form of joint property designated as

"unobstructed heritage," as opposed to "obstructed heritage," it is difficult to see how the present question can be answered except in the negative. According to that doctrine only the man's son, son's son, and son's son's son acquire a right by birth and thereby a community of interest in the property of the father, grandfather or great grandfather. Such community of interest, however, does not entitle any of the co-parceners to predicate, before a partition is effected, what the extent of his share in the joint property is, since the share is liable to diminution by the successive births of other co-owners. But that very circumstance renders it just and right that when any member of such a co-parcenary dies, his undefined interest should not vest in his own heirs, but should lapse to his survivors and go to augment their rights in the undivided family estate. Hence the rule of survivorship recognised under the Mitakshara system. When, however, under the same law, property passes by pure inheritance or obstructed heritage, it vests only in him who is the heir in existence at the time the inheritance opens (*Narasimha v. Veerabhadra*(1) and if there happen to be two or more co-heirs the share of each is not liable to variation by the subsequent birth of a person of the same class, but is fixed and definite. Consequently in such a case the reason for the rule of survivorship does not exist and the rule itself is totally inapplicable. This conclusion drawn from principle is well supported by authority also. In *Gopalasami v. Chinnasami*(2) Turner, C.J., and Brandt, J., expressed a strong inclination against the applicability of the doctrine of survivorship to a case like the present. And in *Jesoda Koer v. Sheo Pershad Singh*(3), Petheran, C.J., and Banerjee, J., after a critical examination of the chief passages relating to the question in the Mitakshara and other works, and after referring to the leading decisions that throw light on the subject, held that the principle of survivorship under the Mitakshara law is limited (1) to property which is taken as unobstructed heritage (including property thereby acquired) and (2) to the joint property of re-united co-parceners; but does not extend to property which is inherited by two brothers as heirs of their mother's father and which does not fall under either of those descriptions. This considered decision was referred to with

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(1) I.L.R., 17 Mad., 287.

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

(3) I.L.R., 17 Calc., 33.

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approval in the analogous case of *Saminadha Pillai v. Thangathanni*(1) where Shephard and Best, JJ., held that when a group of heirs took the estate of a deceased divided member after his mother, the rule of survivorship did not apply. The *ratio decidendi* of this decision and of the Calcutta ruling which in effect it followed is identical, viz., that survivorship does not exist in any case in which property passes as *obstructed heritage*. The heritage in the present case, being that of daughter's sons, is an obstructed heritage, and is, therefore, on the above principle, not subject to the incident of survivorship.

On the part of the first respondent, however, certain passages of the *Sarasvati Vilasa*, particularly paragraphs 632, 646, and 654, (Foulkes's translation, pp. 125, 128, 129), were relied on. The doctrine propounded in those passages is stated, in the very commencement of the disquisition, to be the teaching of Lakshmidhara. Dr. Jolly considers that, as it is not clear whether the author of the *Sarasvati Vilasa* meant to make the teaching his own, it does not possess more than a historical interest. (Hindu Law, p. 202.) The doctrine, in question, in the words of the same learned writer, is that "property devolving on a daughter who has a son, assumes the nature of unobstructed property and is passed on by the daughter's son to his own son, in case he was alive at the time of the devolution of the estate" (*Ib.*) According to this view, a daughter's son, in existence at his mother's succession, takes a *vested* right the moment the property devolves on his mother. But it is well settled that the right of such an heir, to inherit his grandfather's estate, is *contingent on his surviving his mother and her sisters, if any*. Moreover the assertion that, in the case supposed, the inheritance assumes the nature of unobstructed heritage, does not appear to be supported by any of the other treatises of the *Mitakshara* school, since none of them recognizes any exception to the fundamental theory that from the widow downwards the property devolves as obstructed heritage. This is necessarily implied in most of those treatises. In one of them at least, viz., the *Vyavahara Mayukha*, the author begins the discussion regarding the descent of a sonless separated man's property with words which have been translated, "order of succession to obstructed heritage" (*Mandlik*, p. 76)—words which, in the absence of subsequent

(1) I.L.R., 19 Mad., 70.

qualification, must be taken to include under "obstructed heritage" even the case spoken of by Lakshmidhara. It is clear, therefore, that Lakshmidhara's teaching cannot, as pointed out by Mr. Mayne, be now accepted as law. (Hindu Law, fifth edition, note *g* to section 519.)

Muttayan Chetti v. Sivagiri Zemindar(1) and *Sivaganga Zemindar v. Lakshmana*(2) were also referred to on behalf of the first respondent. But they clearly do not touch the present question. There, it was held that as between a man and his son the former's power of disposition over property, inherited by him from his maternal grandfather, is restricted as it is in the case of unobstructed property belonging to the man and his son. Whether this conclusion can be maintained after the decision of the Judicial Committee in *Sartaj Kuari v. Deoraj Kuari*(3) is open to doubt. Now the *ratio decidendi* of that case, in the concise words of Shephard and Davies, JJ., in the recent Pittapur case(4), is this—"Where the right to a partition is wanting there is no restraint on the power of alienation." See also *Sivasubramania Nayakar v. Krishnammal*(5). Such being the rule laid down by the Privy Council and it being unquestionable, as is admitted by the learned Judges, who decided the cases in *Muttayan Chetti v. Sivagiri Zemindar*(1) and *Sivaganga Zemindar v. Lakshmana*(2) that a partition of property inherited from a maternal grandfather cannot be claimed by a son of the man who thus inherited it, it would seem to follow that the view, taken in those two cases to the effect that, though a son cannot ask for a share of such property, he can nevertheless impeach his father's alienation thereof, is no longer sustainable. But supposing it to be otherwise, those cases are quite distinguishable from this. In them the question related to a man's power to restrain alienation of immovable property coming to his father as obstructed heritage. And in support of the view adopted there, *Mitakshara*, chapter I, section 27, may, perhaps, still be relied upon as an authoritative text, upon the exact weight due to which, no direct pronouncement has yet been made by their Lordships of the Judicial Committee. In the present case, however, the question is not between a father and his

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(1) I.L.R., 3 Mad., 370. (2) I.L.R., 9 Mad., 188. (3) I.L.R., 10 All., 272.
(4) I.L.R. (*The Court of Wards v. Venkata Surya Mahipati Ramakrishna Rao*),
20 Mad., 167. (5) I.L.R., 18 Mad., 289.

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son seeking to restrain his father's alienation, but between the representative of a sonless deceased co-owner and the surviving co-owner claiming by survivorship the share of that deceased co-owner in property in which the co-owners took *no right by birth*, and therefore neither the survivor nor the representative of the deceased ought to be affected by any of the peculiar consequences flowing from such right.

The finding upon this question of law must, therefore, be against the first respondent.

The next question to be considered is whether, though the brothers took originally as tenants in common, the first respondent is entitled to Niladri's moiety by survivorship in consequence of the mode in which the property was dealt with by them between 1884 and 1892. It was urged on behalf of the first respondent that, in cases like the present, unless the contrary is shown, it should, as a matter of law, be taken that the rule of survivorship prevails. We do not find any ground for this contention. No doubt, when two persons capable of forming a joint family under the Mitakshara, hold some property in common and the requisite legal foundation has been laid for the conclusion that that property is undivided family property, then the presumption of law in respect of all other property in the hands of any of the members of the family is that the same is joint, and if a member of such a coparcenary alleges that any particular property is, in fact, not part of the joint estate but his own separate property, he has to rebut the presumption and prove his allegation. But if that is done, and if an interest, in the particular property, is claimed by some other member on the ground that though originally separate it subsequently became joint property, the onus of establishing the claim is undoubtedly on the member who advances it.

Now, here inasmuch as according to the finding already arrived at, Venkata Rao's estate, with its accretions, devolved on Niladri and the first respondent as mere tenants in common, it is for the first respondent to show that, subsequent to such devolution, Niladri's share ceased to be his separate property and that the shares of the two were merged into a common whole with the incident of survivorship attaching to it. In other words the first respondent has to make out that he and Niladri had, by mutual consent, express or implied, altered radically the character of their title to the estate by substituting for the several ownership

of each in his respective moiety (with absolute power to alienate and with right to transmit by inheritance to his own heir), a joint ownership, with a restricted power of transfer and a right on the part of the survivor to take the whole in the event of the other dying sonless. Does the evidence prove that any arrangement of the kind took place? If the first respondent were able to satisfy the Court, that, as alleged in his written statement, he and Niladri held other property which was joint and that they incorporated therewith the property now in dispute, the contention under consideration must succeed. But he has clearly failed to show any such incorporation. It is conceded that Niladri and the first respondent derived no property at all from any ancestor in their paternal line save Sami Rao, their father. It is conceded also that when Sami Rao left his father's house many years ago and went to reside with Venkata Rao, Sami Rao possessed no ancestral or other funds, and it is admitted that his subsequent acquisitions consisted only of certain jewels (said to be worth Rs. 10,000 or 15,000) which were presented to him by his father-in-law, his mother-in-law and his wife. But it is stated by the first respondent himself and two other witnesses, on his behalf, one his servant and the other his relation, that a couple of months after Venkata-ramanayamma's death Sami Rao, having himself fallen ill, handed over to Niladri the key of the box containing the former's jewels with the object of transferring the ownership in them to both the sons. This entirely uncorroborated story that a man, who had then two sons and a daughter living—the sons being in affluent circumstances whilst the daughter was not well provided for—took it into his head to give away to his sons alone the whole of the comparatively little property he had, in order that that little might form a common stock with which the extensive separate property in question was to become incorporated, is one which, on the face of it, bears evident marks of invention for the purposes of this litigation, and is, therefore, altogether unworthy of serious consideration. Moreover, even if Sami Rao had really parted with the jewels, as alleged, how would that advance the first respondent's case? For nothing was done by the brothers with reference to the jewels, and it is difficult to understand how the mere fact of joint possession thereof by them lends the slightest support to the theory of incorporation. Nor does the first respondent's contention stand on a better footing with reference to the other circumstances relied on in proof

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of the alleged incorporation, viz. (i) joint residence and messing together, (ii) investment of the annual surplus income in trade for the benefit of both the brothers, or in property acquired in their joint names, and (iii) Niladri's expenses being in excess of those of the first respondent. In drawing inferences from circumstances like the above, it must be borne in mind that facts not distinctly inconsistent with the presumption of the continuance of the original tenancy in common cannot afford any support to the first respondent's contention. (Compare *Robinson v. Preston*(1).) To support it the circumstances relied on should be unequivocal, and should point unmistakably to an intention to effect a mutual transfer of the kind suggested. But those referred to above do not point to any such conclusion. The only fair inference to be drawn from them, taking them all together, is that the brothers did not feel any necessity for dividing either the corpus or the income, and found it convenient for the time being to live together and manage their property in common. To hold that because the brothers merely refrained from dividing what in law was separate—their conduct here amounted to nothing more—therefore they intended to effect a complete change in their relative rights would be unreasonable and unwarranted. Let us now look at each circumstance separately. So far as residence and food go, matters continued exactly as they had been prior to 1884, when the brothers owned no property derived from their father or mother. As to joint investment the interest possessed by the brothers in the business carried on with the aid of their surplus incomes, as well as in property acquired thereby, is *prima facie* of the same character as that possessed by them in the incomes so invested (see *Robinson v. Preston*(1)), and there is absolutely nothing to show that in the present case their interest was otherwise. No doubt the brothers did occasionally borrow money on their joint promissory notes. But surely tenants in common may do so for the purposes of their common estate. Why, then, should it be assumed that such acts were done by the brothers as members of a joint Hindu family, the very point to be proved, and not as tenants in common as they were shown to have been at starting? Again, the argument founded on inequality in the expenses of the brothers is entitled to little or no weight, since it entirely dis-

(1) 4 K. & J., 505.

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regards the ordinary latitude likely to be allowed between brothers out of natural affection and good feeling—a consideration which ought not to be lost sight of in dealing with an argument like that in question (*Lala Muddun Gopal Lal v. Mussumat Khikhinda Koer*(1)). Lastly, as to the documents referred to in the argument with reference to this part of the case, it is to be observed that they really only bear upon one or other of the circumstances just dealt with, and therefore require no further notice. For these reasons, differing from the District Judge, we must hold that the second ground, taken for the first respondent's contention in regard to survivorship, also fails, and, consequently, Niladri's moiety passed to the appellant as his widow and heir.

There remains a minor point in appeal suit No. 164 raised by the appellant, viz., that certain inam lands included in the plaint property, but found by the District Judge to belong to the second respondent, were really purchased with money which belonged to Niladri and the first respondent, and were, therefore, properly included in the present suit.

The second respondent admits in his evidence that he did receive from the brothers in November 1891 when, he was in their employ as a clerk, Rs. 4,000, which sum was entered in their accounts as sent to him for the purchase of inam lands. He also admits that he bought at a court-sale held in that very month the lands in dispute for less than Rs. 2,000. He moreover concedes that he has not repaid any portion of the Rs. 4,000 sent to him as recited in the accounts. Nor is it his case that the sum was a gift or a loan to him. In these circumstances his interested evidence that the lands were acquired with his own funds cannot be depended upon and there is no other evidence to prove the plea. The property must, therefore, be held to have been acquired by him with the money and for the benefit of his then employers—Niladri and the first respondent.

We must now determine whether the alleged will of Niladri, exhibit K, is genuine or not. This is the only question in appeal suit No. 165. The District Judge was of opinion that it is not, and with that conclusion we concur. [Their Lordships then discussed the evidence relating to exhibit K and proceeded:]

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To sum up then: We find that the will of 1866 was revoked, that there was no right of survivorship between Niladri and Appa Rao, that on Niladri's death the appellant as his widow succeeded to his property and that the will of 1892 is not genuine. The result of these findings is that in appeal suit 164 there will be a decree for partition and delivery to the appellant of a moiety of the disputed properties including the inam lands in the hands of the second respondent with proportionate mesne profits from 1st December 1892 until delivery of possession or three years from date of decree, the amount thereof to be ascertained in execution. Provided, however, that the following items in schedule C1 shall be excluded:—Nos. 3, 17, 22, 23, 38, 75, 77, 81 and 87; and provided also that Nos. 37, 51, 97, 98, 103 and 121 in the schedule to the Commissioner's report be included. Item No. 7 in plaintiff schedule C1 should be described as 'a box' only, and item No. 79 in the same schedule should be described as containing only two pearls. In appeal suit No. 165 there will be a declaration that exhibit K is not genuine. In other respects both the suits must be dismissed, the parties will pay and receive proportionate costs in each case in the Lower Court as well as in this Court. The decrees of the Court below will be modified accordingly.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

MUTHIA CHETTI (RESPONDENT), APPELLANT,

v.
ORR (APPELLANT), RESPONDENT.*

Execution—Receiver—Moneys collected by receiver in execution of decree misappropriated by him—Discharge of judgment-debtor.

In execution of a decree a receiver was appointed to collect certain rents due to the judgment-debtor. Some of the judgment-debtor's tenants paid the rents due by them into the hands of the receiver, but the receiver did not pay the money into Court:

* Letters Patent Appeal No. 21 of 1895.

Held per Shephard, J., that the payment by the tenants to the receiver did not pro tanto discharge the judgment-debtor from liability under the decree.

Held per Davies, J., that payment by the tenants to the receiver pro tanto discharged the judgment-debtor from liability under the decree.

APPEAL under section 15 of the Letters Patent against the order of MUTTUSAMI AYYAR, J., in appeal against appellate order No. 63 of 1892(1).

The respondents were the holders of a decree passed in original suit No. 415 of 1884 on the file of the District Munsif of Sivaganga against the appellant and others. A certain portion of the amount due on the decree was collected at various times. On 31st August 1889, on the application of the respondents a receiver was appointed to collect the melvaram payable to the appellant by the tenants of the village of Kambanur for fasli 1299. The evidence showed that the receiver had collected a sum of Rs. 845-2-7. But he did not pay this money into Court and absconded. The respondents then in April 1891 put in another application for the execution of the decree praying for the arrest and imprisonment of the judgment-debtor and the attachment and sale of his movable properties. In this application the respondents did not give the appellant credit for the sum of Rs. 845-2-7 collected by the receiver. The appellant opposed the issue of execution on the ground that the decree debt had been satisfied by the sum collected by the receiver.

The Munsif and on appeal the District Judge allowed the appellant's contention.

On appeal to the High Court MUTTUSAMI AYYAR, J., reversed the order of the District Munsif and the District Judge.

The appellant now appealed under section 15 of the Letters Patent.

Mr. Johnstone for appellant.

Mr. Ryan for respondent.

SHEPHARD, J.—The point raised by this appeal is one on which authority is naturally scanty, because it could hardly arise if ordinary care were taken. It seems that, in execution of a decree obtained by the respondent, a receiver was appointed to superintend the harvest and collect the melvaram payable to the appellant. It

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is not explained why such an expensive and cumbrous way of executing an ordinary decree was adopted. The receiver thus appointed apparently was not required to give, and, anyhow, did not give the security which the 503rd section of the Code requires. He collected certain moneys on account of melvaram, but instead of paying them into Court, misappropriated them and absconded. A fresh application having been made for execution, the appellant met it by claiming credit for the moneys so collected, but not paid into Court. The question is whether the appellant, the judgment-debtor, or the respondent, the decree-holder, must bear the loss occasioned by the defalcation of the receiver. Mr. Justice Muttusami Ayyar reversing the order of the Courts below has decided the question in favour of the decree-holder, and I have arrived at the same conclusion. Such authority, as there is, is in favour of it, although it must be admitted that the circumstances of Lord Massareene's(1) case were quite different from those of the present case. The case is one which cannot be decided upon any theory of agency. A receiver appointed to collect moneys is not an agent of either party; he is an officer of the Court deputed to collect and hold the moneys collected by him in accordance with the orders of the Court. The party at whose instance a receiver is appointed has no greater or less control over his acts than the other party to the litigation. It is by the Court only that he can be dismissed as well as appointed. The argument on behalf of the appellant was to the effect that, as he or the tenants indebted to him were bound to pay the melvaram to the receiver, so a payment by them must *pro tanto* operate as a complete discharge. Unless such discharge and satisfaction of the decree was effected by the payment, the appeal must clearly fail. What then is there in the provisions of the Code to justify us in holding that a judgment-creditor must be deemed to be satisfied by the mere fact of a receiver getting in moneys due to the judgment-debtor? The ordinary right of a judgment-creditor is to have the amount of his debt paid into his own hands. As to that proposition, I apprehend there can be no doubt; see *Soobul Chunder Law v. Russick Lall Mitter*(2). The money may be paid out of Court immediately to the judgment-creditor or it may be paid into Court and taken out by him. Then only is he bound to certify to the Court under

(1) *Hutchinsen v. Massareene*, 2 Ba. & Be., 49.

(2) I.L.R., 15 Cal., 202.

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section 258 the fact of payment. There is a special provision in the 336th section of the Code entitling the debtor to personal release on his paying the money to an officer of the Court, and there is a similar provision in the 341st section for the case of a debtor in jail paying the money to the officer in charge of the jail. But in the latter section it is expressly declared that a discharge under it does not operate as a discharge of the debtor from his debt. It is a personal discharge only. These provisions, which were relied upon by the appellant's counsel, so far from supporting his argument, rather indicate that, as a general rule, the receipt of money by an officer of the Court is not by itself a good discharge. Payment into Court by the judgment-debtor stands on a different footing. It is expressly recognized by the 257th section, and a debtor, who, on his debt being attached under the 268th section pays the money into Court, is discharged as effectually as if he had paid it to his creditor. In the present case we are not concerned with any question as to the discharge of a third person, nor with the case of a payment made by the judgment-debtor. The money which came to the receiver's hands was collected by him from persons who were indebted to the judgment-debtor. There was no payment by the judgment-debtor either out of Court to the judgment-creditor or into Court. The most that the judgment-debtor can say is that his tenants have paid to the receiver moneys due to him and obtained thereby a good discharge. The Code does not provide that such a payment shall be deemed equivalent to a payment by the judgment-debtor to the judgment-creditor personally. A provision to that effect would be inconsistent with the scheme of the Code and the position of a receiver—for a receiver who has collected moneys due to the judgment-debtor does not hold them for the judgment-creditor. He holds them for the Court in order that the Court may decide regarding them. (See *In re Dickinson*(1).) Even if the moneys had been paid into Court it would not necessarily follow that the judgment-creditor would have been satisfied.

There is an apparent hardship in holding that a judgment-debtor whose tenants have made payments to a receiver may be called upon a second time to pay money in satisfaction of the decree. The answer to that is that, if he thought the receiver was

1) L.R., 22 Q.B.D. 187

not a person to be trusted, he ought to have insisted on the Court's taking proper security. It is begging the question to say that it was not his business, but that of the judgment-creditor to see that security was given.

When once it is admitted that the receiver is not the agent of either party and that the decree-holder, until full satisfaction of the decree has been obtained, is entitled to go on executing his decree, the only question is whether the decree has in fact been satisfied. Is the judgment-debtor in a position to call upon the judgment-creditor to show cause under the provisions of the 258th section? In my opinion the question must be answered in the negative and therefore the appeal should be dismissed.

DAVIES, J.—A receiver was appointed by the Court under section 503, Code of Civil Procedure, at the instance of a judgment-creditor holding a money decree to execute his decree by taking possession of and selling crops, or rather the melvaram share thereof, belonging to the judgment-debtor. The receiver acted accordingly, but instead of remitting the sale-proceeds amounting to Rs. 845 odd to the Court, he embezzled the amount and absconded. As no security had been taken from the receiver, as it ought to have been, the money is lost and is irrecoverable. The judgment-creditor has now applied to the Court to again recover the decree amount from the judgment-debtor without giving him credit for the amount already collected by the receiver. The question, therefore, is whether the judgment-debtor is liable to pay that amount over again owing to the defalcation of the receiver, or whether the loss must be borne by the judgment-creditor.

The District Munsif and the District Judge held that the judgment-creditor must be the sufferer on the ground that the property which was available for the satisfaction of the decree-debt had been taken from the control of the owner, the judgment-debtor, at the instance of the judgment-creditor who had applied for the appointment of the receiver, and had not seen that due security was given by him, whereas the judgment-debtor was in no way to blame.

The learned Judge of this Court has held to the contrary, ruling that the loss occasioned by the receiver's default must, in accordance with English precedents, fall upon the estate, and as the estate in this case was the estate of the judgment-debtor, it was the

judgment-debtor who must bear the loss. The rule is no doubt equitable enough where the parties have all got an interest in the estate, because the loss is shared by them all, but here the case is quite different.

In this Court, it is urged on the one hand that the receiver should be treated as the agent of the judgment-creditor, as it was on his motion the receiver was appointed, and as it was the judgment-creditor's fault that due security was not taken, he should bear the loss. On the other hand it is argued that the decree-debt has not been satisfied and that the judgment-debtor's liability to pay it lasts until the judgment-creditor is actually paid the money due.

The solution of the difficulty appears to me to lie in the determination of the question as to when a judgment-debtor is to be considered discharged of the decree-debt, and the correct answer is, in my opinion, when he has paid the money into Court, or out of Court to the decree-holder, or otherwise as the Court directs. Section 257 of the Civil Procedure Code is my authority for the proposition. It directs that "all money payable under a decree shall be paid" in one of the three modes stated above, and although there is no express declaration that such payment operates as a discharge of the decree-debt, it seems obvious that when the judgment-debtor has paid the money payable by him in the manner in which the law directs him to pay it, he can do no more, and is henceforth absolved from further liability, or in other words, has discharged his debt. It will be conceded that a payment direct to the decree-holder—the judgment-creditor himself—subject of course to the certificate required by section 258 to be given to the Court is a valid discharge, and we find classed with such valid discharge, two other alternative modes of discharge, entirely free from any condition or proviso such as payment out of the Court to the decree-holder is subject to. The three modes of payment being classed together as alternative courses, they must be taken to be of equal efficacy, and when one course is shown to have the effect of a discharge, it follows that the others have the same effect. I take it therefore that there is a distinct implication from the directions in the section itself, that a payment into Court, or otherwise as the Court directs, of the money "payable under a decree" is an absolute discharge of the judgment-debtor as it is unconditional, just as a payment to the decree-holder

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becomes a complete discharge on compliance with a subsequent condition. It must be remembered that the Court holds money so paid into it to the credit of the decree-holder, and there are various provisions of law indicating that a payment into Court by a debtor is tantamount to a payment to the party entitled to receive it. I may instance the case of a garnishee which seems directly in point. The payment of the amount of his debt into Court "shall discharge him as effectually as payment to the party entitled to receive the same" as declared in section 268 of the Code of Civil Procedure. Then there are the cases of payment of a deposit into Court (a) by a defendant under section 376 of the Code of Civil Procedure which is regarded under the following section as held by the Court on plaintiff's account to whom it shall be payable, and (b) by a mortgagor under section 83 of the Transfer of Property Act which is held "to the account of the mortgagee." Decrees for foreclosure and redemption drawn up under sections 86 and 92 of this Act also provide for payment into Court as being equivalent to payment to the plaintiff or the defendant as the case may be. Supposing that in any of these cases the money paid in were to be misappropriated by a servant of the Court or of the bank or treasury where the money was kept, it surely could not be contended that the depositor, or the person who had made the payment under the decree, was bound to make good the loss by paying twice over. It would indeed be a case of "*bis vexari*" if the Court should issue process to recover an amount already paid to it. This convinces me that payments made into or by order of Court under plain directions of the law are good and valid discharges of the debts on account of which the Court itself undertakes to receive them, and that any loss accruing thereafter cannot be charged to the person making the payment, and if anybody is to be held responsible, it must be the officers of the Court or their master the Government. If payments into Court or payments made as ordered by the Court are valid discharges, as in my opinion they are, the further question arises in this case whether the receipt by the receiver of the money which he had realized by sale of the judgment-debtor's property amounted to a payment under direction of the Court, for it is not pretended the money ever reached the Court, so as to be deemed as having been paid into it. Now I presume that payments made to bailiffs executing a warrant of arrest or a warrant of attachment

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and authorized to receive them, would be considered cases falling under clause (c) of the section 257 as payments made "otherwise as the Court directs." These processes against the person or the property of the judgment-debtor are issued under the authority of section 254 of the Code, and the forms are to be found in the fourth schedule Nos. 136 and 154. Each form provides for payment being made by the judgment-debtor to the process server of the amount of the decree and costs of execution, in which case the warrant ceases to have effect, the judgment-debtor being released from custody in the one case or his property in the other, these directions being more expressly given in sections 336 and 275 of the Code itself. This latter section is instructive as showing that payment into Court is a satisfaction of the decree so far as the judgment-debtor is concerned, as may be gathered from the wording, "if the amount decreed with costs, &c., be paid into Court, or if satisfaction of the decree be otherwise made through the Court." But this is by the way. From the references made it cannot be doubted that a payment to an officer of the Court under direction of the Court is as effectual as a payment made directly into Court. The case of a receiver seems precisely on the same footing. He is an officer of the Court equally with a bailiff or a process server, and he collects the money due under the decree also by direction of the Court, and payment to him is therefore as good and valid as to the Court itself, falling as it does under clause (c) of section 257. In this view I come to the conclusion that the judgment-debtor, appellant in this case, has discharged the decree-debt in execution to the extent of the Rs. 845 and odd of money collected by the receiver, and that execution can proceed only for the balance due if any. I would therefore reverse the decision under appeal and restore that of the District Munsif with appellant's costs throughout to be paid by the respondent.

It appears that the appointment of the receiver was made by the Munsif without the express authorization of the District Court, which is required by section 505 of the Code, but as the appointment has been treated throughout as a valid one, its validity cannot well be questioned at this late stage of the case; at any rate it is a matter to which the principle of "*quod fieri non debet factum valet*" may most appropriately be applied.

In consequence of the difference of opinion between their Lordships, the case was referred to the Full Bench consisting of

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COLLINS, C.J., SHEPHARD and DAVIES, JJ., who delivered the following judgment:—

JUDGMENT.—The appellant not being represented and not appearing, we dismiss the appeal with costs. Under the provisions of section 575, Civil Procedure Code, the order of this Court, dated 24th January 1894, in *Orr v. Muthia Chetti*(1) prevails, and the order of the District Court of Madura, dated 26th August 1892, passed on C.M.A. No. 8 of 1892, is reversed with costs.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

1897.
January 7.

SUBRAMANIAN CHETTI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

RAKKU SERVAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Succession Certificate Act—Act VII of 1889, s. 4—Debt due to Hindu family jointly.

In a suit by the members of a joint Hindu family for a debt due on a document which is executed in favour of a deceased member of the family, but on the face of which it does not appear that the debt is a joint debt, the plaintiffs need not produce a certificate under the Succession Certificate Act, if they can prove that the debt was due to the family jointly:

Venkataramanna v. Venkayya(2) explained.

Quære; whether a plaintiff, in a suit to recover money by the sale of property mortgaged, need produce a certificate under the Succession Certificate Act.

SECOND APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura (West), in appeal suit No. 763 of 1894, reversing the decree of S. Ramasami Ayyangar in original suit No. 158 of 1894.

The suit was brought on a mortgage executed by the first defendant, the managing member of a joint Hindu family consisting of himself and defendants Nos. 2 to 5. The mortgage was executed on the 15th of November 1870 and provided that the mortgagee should enjoy the property for four years, after which

(1) I.L.R., 17 Mad., 501.

* Second Appeal No. 1130 of 1895.

(2) I.L.R., 14 Mad., 377.

time the mortgagee might redeem on payment of the mortgage money. The mortgage was executed in favour of Nachiappa, the father of plaintiffs Nos. 1 and 2, and on his death (some time before 1881) the mortgage debt passed by survivorship to his sons and his brother Subramanian Chetti. Subsequently Subramanian Chetti assigned his share to plaintiff No. 3. The plaintiffs were for some time in possession of the land when, as they alleged, they were ousted by the defendants. They now sued to recover the amount due under the mortgage-deed by the sale of the property mortgaged. The District Munsif decreed for them. On appeal the Subordinate Judge reversed the decree of the District Munsif on the ground that the plaintiffs had not produced a certificate under the Succession Certificate Act. He said, "there is nothing in exhibit A to show that the debt was a joint debt, due to the father and sons. In *Venkataramanna v. Venkayya*(1) the Madras High Court have held that a Hindu is not entitled to sue on a bond executed in favour of his undivided father, deceased, without the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt claimed was due to the joint family consisting of the father and the son. The District Munsif dwells on this point in paragraph 6 of his judgment. The defendants have taken an issue on the question, and there is no admission. Under section 4 of Act VII of 1889, no Court can pass a decree unless a certificate is produced. The arguments of the District Munsif are not supported by law. In the recent Full Bench case of *Fateh Chand v. Muhammad Bakhsh*(2), it has been held by the Allahabad High Court that production of certificate of succession is a condition precedent to decree in a suit for sale on mortgage, dissenting from the ruling of the Calcutta High Court in *Kanchan Modi v. Baij Nath Singh*(3). Therefore, following the rulings of the Madras and Allahabad High Courts, the suit ought to have been dismissed."

The plaintiffs appealed on the following grounds:—

(1) That the Subordinate Judge is wrong in holding that a succession certificate was necessary.

(2) The debt being due to an undivided family and the suit being one for sale of mortgaged property, the Act does not apply.

(1) I.L.R., 14 Mad., 377.

(2) I.L.R., 16 All., 259.

(3) I.L.R., 19 Calc., 336.

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SERVAL.

(3) Even if succession certificate was necessary the Subordinate Judge should have merely given time to the plaintiffs for producing it and not dismissed the suit.

Krishnasami Ayyar for appellants.

Sivasami Ayyar for respondents.

JUDGMENT.—As the Munsif found that the debt was a joint debt and that finding was not disputed in appeal, we must decide, following *Venkataramanna v. Venkayya*(1), that no succession certificate was necessary. The strict interpretation put on that case by the Subordinate Judge, viz., that it is only when the fact of the debt being a joint one appears on the face of the document that a certificate is not necessary, has not been adopted by this Court itself which has recognized other proof of the debt being joint beyond what appears on the face of the document.

It has further been urged that this being a suit on a mortgage for sale of the mortgaged property, the Succession Certificate Act does not apply, and the case of *Baid Nath Das. v. Shamanand Das*(2) has been relied on in support of the contention. That case, however, is in conflict with the Full Bench case of *Fateh Chand v. Muhammad Bakhs*(3). We are not called upon to decide the matter now, as we find for another reason that no certificate was required. The second appeal must, therefore, be allowed, and we reverse the decree of the Lower Appellate Court and restore that of the District Munsif. The appellants' costs in this and the Lower Appellate Court must be paid by the respondents. The time for payment of the mortgage money is extended to three months from this date.

(1) I.L.R., 14 Mad., 377.

(2) I.L.R., 22 Cal., 143.

(3) I.L.R., 16 All., 259.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

1897.
July 15.

KATTAYAN AND OTHERS.*

*Warrants issued under Act XIII of 1859—Execution outside jurisdiction—
Criminal Procedure Code, s. 83.*

Section 83 of the Criminal Procedure Code applies to warrants issued under section 1 of Act XIII of 1859, and consequently such warrants may be executed outside the local jurisdiction of the Magistrates issuing them.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by J. K. Batten, Acting District Magistrate of Trichinopoly.

The case was stated as follows :—

“The second-class Stationary Magistrate of Kulittalai in this district has received three warrants issued, apparently under section 1 of Act XIII of 1859, by the second-class Magistrate of Coonoor for the arrest of three persons resident in this district.

“As the Government of India is advised that there is reasonable room for doubt whether the provisions of the Code of Criminal Procedure (1882) regarding warrants apply to warrants issued under section 1 of Act XIII of 1859, and whether a warrant under that Act can be executed at all outside the jurisdiction of the Court which issues it, I have the honour to request an authoritative ruling on the point.”

The Public Prosecutor (Mr. Powell) for the Crown :

I am instructed to put before the Court the arguments for and against the legality of executing warrants issued under section 1 of Act XIII of 1859 outside the jurisdiction of the Court issuing them. Whether such a procedure is legal or not depends upon

* Criminal Revision Case No. 29 of 1897.

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whether section 83 of the Criminal Procedure Code applies to these warrants, for there is no other provision by which they could be executed outside the jurisdiction.

First as to the considerations which would seem to show that the procedure in question is illegal, and that section 83 of the Criminal Procedure Code does not apply to these warrants: Sections 75 and 93 of the Code would seem to limit the provisions of Chapter VI, in which section 83 occurs, to warrants issued under the Code. Now warrants issued under the Code, as opposed to warrants not issued under the Code, must mean warrants for the arrest of persons triable under the Code. But the workman for whose arrest a warrant is issued under the Act is not triable under the Code. Only those persons are triable under the Code who are charged with having committed an offence (see section 5 of the Code), *i.e.*, with having done some act which renders them liable to punishment [section 4, clause (p)]. Now the workman for whose arrest a warrant is issued under Act XIII of 1859 has done nothing punishable; he only becomes liable to punishment when he has failed to obey the Magistrate's order directing him to repay the advance or perform the work. It would, therefore, appear that when the warrant issues he is not triable under the Code and that consequently the warrant is not issued under the Code.

Next as to the considerations which show that section 83 of the Criminal Procedure Code is applicable to warrants issued under Act XIII of 1859: The reasoning which I have put before the Court assumes that the fraudulent breach of a contract is not an offence within the meaning of the Code, because it is not the mere breach of contract which is punishable, but the failure to obey the order of the Magistrate. But the preamble to Act XIII of 1859 would show that it was intended to punish fraudulent breaches of contract; for it declares that "the remedy by suit in the Civil Courts for the recovery of damages is wholly insufficient, and it is just and proper that persons guilty of such fraudulent breaches of contract should be subject to punishment"; and the Act prescribes the modes of bringing such fraudulent breaches of contract to punishment.

Moreover before the Procedure Code of 1882 was passed, it seems clear that warrants issued under Act XIII of 1859 could be executed outside the jurisdiction. At the time when that Act was passed, Acts VII of 1854 and XVII of 1856 were in force;

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and under section 5 (1) of the former Act and section 1 (2) of the latter Act, warrants issued under Act XIII of 1859 could have been executed outside the jurisdiction. Before these Acts were repealed, the Criminal Procedure Code, Act XXV of 1861, came into force. Under section 84 of that Code, warrants could be issued outside the jurisdiction of the Magistrate issuing them. The provisions of that Code were, by section 21, applicable to all offences, whether under the Penal Code, or under any special or local law, triable by Criminal Courts. Now the word offence was not defined in that Code and consequently was not restricted to punishable acts. The effect of this was to make section 84 of the Code applicable to warrants issued under Act XIII of 1859,

(1) Section 5 of Act VII of 1854 was as follows:—

The warrant of any Magistrate or Justice of the Peace having jurisdiction in any part of the territories under the Government of the East India Company for the arrest of any person charged with having committed any offence, whether such warrant be issued under the provisions of this Act or not, may be executed within the jurisdiction of any other Magistrate or Justice of the Peace having jurisdiction in any part of the said territories, whether in the same Presidency or not, upon having a written authority under the hand and seal of the Magistrate or Justice of the Peace within whose jurisdiction it may be executed, previously endorsed thereon, and which endorsement may be to the following effect:—

To the Nazir [or other officer as the case may be] of the Zillah of

"This warrant may be executed in the Zillah or District of [describing the Zillah or District of the indorsing Magistrate or Justice of the Peace] by any of the officers to whom the same is directed or by

" [describing by his name of office the officer to whom a similar warrant, issued by the indorsing Magistrate or Justice of the Peace, would be directed].

(2) The preamble to Act XVII of 1856 and section 1 thereof were as follows:—

Whereas by Act VII of 1854, certain provisions were made for the execution, in any part of the territories under the Government of the East India Company, of warrants of arrest issued by competent officers in any other parts thereof, and whereas it is expedient that similar means should be provided for the execution as aforesaid of all other criminal process issued as aforesaid, it is enacted as follows:—

Any criminal process whatever including summonses, subpoenas, and search warrants, as well as warrants of arrest, issued by any Magistrate having jurisdiction in any part of the territories under the Government of the East India Company, may be executed within the jurisdiction of any other Magistrate having jurisdiction in any part of the said territories, whether in the same Presidency or not, upon having a written authority under the hand and seal of the Magistrate within whose jurisdiction it is to be executed previously endorsed thereon. Provided that no summons or subpoena shall be issued by a Magistrate to compel the attendance of a defendant or witness from any place beyond the local limits of his jurisdiction, unless special ground shall be proved to the satisfaction of the Magistrate in support of the application, which grounds shall be recorded before the summons or subpoena is issued,

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because the word offence would cover fraudulent breaches of contract. The same reasoning applies to the Code of 1872, in which the corresponding sections were section 8 and section 167, and in which the word offence was not defined.

Again by sections 7 and 8 of the Code of 1872, all criminal trials, and by section 6 all enquiries by Magistrates were to be held according to the provisions of the Code. It cannot be denied that even in its first stage a case under Act XIII of 1859 is either a criminal trial or an enquiry. The only reported case that can be found with reference to this is *Pollard v. Mothial*(1), where the question was whether a case under Act XIII of 1859 could be tried summarily. The point deserving of notice in this case was that all the Courts dealing with it accepted the fact that the Criminal Procedure Code governed Act XIII of 1859. The Procedure Code Act X of 1882 for the first time defined the word 'offence' (as an act or omission made punishable by any law). It is unreasonable to suppose that the Legislature by this mere definition intended to take away from Magistrates issuing process under Act XIII of 1859, the right so essential for its working and so long existent of having process executed in another jurisdiction. Had this been the intention, it would have been clearly expressed.

If the new Code does not apply to Act XIII of 1859, there is no provision of law and no procedure prescribed governing the proceedings before a Magistrate under that Act. How is the Magistrate to secure the attendance of witnesses and what process is to be adopted to compel production of documents?

If process cannot be executed beyond the jurisdiction of the Sub-Magistrate, *e.g.*, if the Sub-Magistrate of Coonoor cannot issue any summons or warrant beyond a radius of 5 or 6 miles, and can neither summon a defaulting cooly from Ootacamund, nor issue a bailable warrant for him in Mettupalaiyam, Act XIII as a safeguard of the planting interest is absolutely valueless.

ORDER.—We are clearly of opinion that section 83 of the Criminal Procedure Code is applicable to warrants issued under the provisions of the Act XIII of 1859. There are no words in that section limiting the operation of it to warrants issued under the Code. The reference to warrants issued under the Code made in sections 75 and 93 cannot, we think, be taken to have the effect

(1) I.L.R. 4 Mad., 224.

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suggested. It cannot be supposed that, if when the Code of 1861 and 1872 were in force, the sections in them corresponding to section 83 of the present Code were applicable to warrants issued under Act XIII of 1859, that state of the law was intended to be altered in the Code of 1882. To hold that none of the provisions of Chapter VI of the Code apply to such warrants would lead to the conclusion that there is no provision made for the issuing or executing of them. It is not necessary to say whether, under the Act of 1859, breach of contract is constituted an offence. The language of the Act appears to us to indicate that such was the intention of the Legislature, but at any rate the Act authorizes the Magistrates, on a complaint being made, to issue a warrant, and the only question is whether the provisions of the Criminal Procedure Code apply to that warrant. We think that the provision in question does apply.

APPELLATE CIVIL.

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

IN SECOND APPEAL No. 792 of 1895:

PERIAVENKAN UDAYA TEVAR (DEFENDANT), APPELLANT,

v.

SUBRAMANIAN CHETTI (PLAINTIFF), RESPONDENT.*

IN SECOND APPEAL No. 1440 of 1895:

SUBRAMANIAN CHETTI (PLAINTIFF), APPELLANT,

v.

PERIAVENKAN UDAYA TEVAR (DEFENDANT), RESPONDENT.*

Limitation Act, s. 19—Acknowledgment—Deposition signed by the debtor.

To satisfy the requirements of section 19 of the Limitation Act an acknowledgment of a debt must amount to an acknowledgment that the debt is due at the time when the acknowledgment is made.

A record made by a Judge of the evidence given by a debtor as a witness at the trial of a suit and signed by the debtor is a writing signed by the debtor within the meaning of section 19 of the Limitation Act.

* Second Appeals Nos 792 and 1440 of 1895.

1896.
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5, 7, 13.

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SECOND APPEALS against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), modifying the decree of S. Ramasami Ayyangar, District Munsif of Sivaganga, in Original Suit No. 178 of 1894.

The plaintiff sued to recover from the defendant the sum of Rs. 963-3-11, together with interest thereon amounting to Rs. 419, which he alleged to be due under an agreement made in the year 1887.

The defendant is the present Zamindar of Sakkandi, and prior to 1887 his deceased brother was the Zamindar. Prior to the agreement now sued on, the defendant and his brother mortgaged to the plaintiff and his brother half of the village of Sakkandi. The plaintiff and the defendant's brother subsequently prevailed on several ryots of the village to execute in favour of the plaintiff muchilikas in which the occupancy rights in the village were recognised as belonging to the ryots who executed the muchilikas. The occupancy rights in the village were, however, claimed by one Kylasam Chetti, and in 1887 the late Zamindar (the defendant's brother) agreed to indemnify the plaintiff against the costs of any suit that Kylasam Chetti might bring in respect of his occupancy rights. Kylasam Chetti brought a suit (Original Suit No. 1 of 1888 on the file of the Sub-Court) against the plaintiff and the ryots asserting his occupancy rights in that village and obtained a decree. Kylasam Chetti took out execution for his costs. One warrant was issued for Rs. 620 against the ryots; this sum the defendant paid having borrowed the money for that purpose from one Annamalai Chetti. Another warrant for Rs. 963-3-11 was issued against the plaintiff. On the 8th November 1890, plaintiff paid the sum of Rs. 963-3-11, which he now sued to recover with interest. The suit was instituted on the 21st June 1894; and the plaintiff relied on an acknowledgment contained in a deposition given by the plaintiff in Original Suit No. 451 of 1891 on the 7th April 1892 as giving a fresh starting point to the period of limitation.

The deposition was in the following terms:—

"I know of the attachment process having been brought in Original Suit No. 1 of 1888. When the process was brought I executed a promissory note for Rs. 1,000 to Annamalai Chetti for the amount the ryots had to pay. The process against the ryots was for Rs. 600 and odd. It was for Rs. 1,600 and odd.

"The promissory note I executed for Rs. 1,000 was on account of the process of attachment and arrest brought against the ryots in Original Suit No. 1 of 1888. It is not true that Rs. 300 and odd out of this amount was due to Annamalai Chetti on prior dealings. This promissory note is with Annamalai Chetti. A process was brought against the plaintiff for Rs. 600 and odd and he paid this amount as he was one of the defendants. Two processes were brought then. One against the ryots for Rs. 1,000, and the other against the plaintiff for Rs. 600 and odd.

"Q. The Zamindar had agreed to pay all the costs. Why did you execute a promissory note for Rs. 1,000 only, and why did the plaintiff pay the balance of Rs. 620 and odd?

"A. A warrant had been brought against him for this amount and so he paid. He paid as he was one of the defendants (the first defendant). This amount of Rs. 600 and odd also I was bound to pay under the original understanding, but the plaintiff paid it, as a warrant was brought for his arrest."

The defendant pleaded that he was not a party to the agreement; that the agreement was not supported by consideration; and that it was illegal.

Both the Lower Courts found that the agreement was supported by consideration, and that the defendant was a party to it. The District Munsif, however, held the consideration, for the agreement was illegal and dismissed the suit.

On appeal the Subordinate Judge reversed the decree of the Munsif. As to the acknowledgment contained in defendant's deposition, he said:

"Defendant's acknowledgment of liability in exhibit B on account of money paid by plaintiff under the warrant of arrest only covers 600 or 620 and odd rupees and not Rs. 963-3-11. Probably it is due to some mistake or misapprehension, but I cannot go behind the document. To the extent of the claim admitted, this is a good acknowledgment within the meaning of section 19 of the Limitation Act and in modification of the Munsif's decree I shall direct defendant's payment to plaintiff of Rs. 620 with interest at 6 per cent. from date of suit."

Both plaintiff and defendant appealed.

Sundara Ayyar and Krishnasami Ayyar for appellant.

Narayana Rau for respondent in second appeal No. 792.

Narayana Rau for appellant.

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Sundara Ayyar and Krishnasami Ayyar for respondent in second appeal No. 1440.

JUDGMENT.—We are clearly of opinion that there was nothing illegal or opposed to public policy in the contract between the parties, so as to render the plaintiff's suit unsustainable. With regard to the alleged bar by limitation, the appellant urges two pleas, viz.: (1) that an acknowledgment in a deposition made by a debtor is not sufficient to satisfy the requirements of section 19 of the Limitation Act, inasmuch as a witness is bound to answer the questions put to him, and any acknowledgment cannot, therefore, be regarded as voluntary; and (2) that, in fact, the terms of the acknowledgment in exhibit B, relied on by the Lower Appellate Court is insufficient.

The first point was ably discussed in the case of *Venkata v. Parthasardhi*(1). The two learned Judges in that case took opposite views, but we have no hesitation in expressing our concurrence with the view adopted by Muttusami Ayyar, J., viz., that a deposition given and signed by a witness in a suit is as much a writing contemplated by section 19 as is a letter addressed by him to a third party. There is nothing in the language of the section or in the policy on which it is founded to justify us in restricting its scope by excluding statements made in depositions or other proceedings before a Court of Justice. The form of the writing is immaterial. All that is necessary is that the acknowledgment should be in writing and should be signed by the party, or by his agent duly authorized in that behalf. The object was merely to exclude oral acknowledgments. It is true that a deposition is made on compulsion, and its form is often, in fact, generally, determined mainly by the frame of the questions put to the witness. In construing, however, the sufficiency of any alleged admission in a deposition, this fact should be carefully borne in mind, and this brings us to the second point urged upon us, viz., that the words used by the defendant in exhibit B are not such an acknowledgment as the Act requires. This contention, we think, is well founded. The words used are—"This amount of Rs. 600 and odd also I was bound to pay under the original understanding, but the plaintiff paid it, as a warrant was brought for his arrest." These words admit that a liability existed at the time

(1) I.L.R., 16 Mad., 220.

of the original understanding that is some three years before the acknowledgment was made, but they do not admit any liability as existing at the time that the statement was made. It is true that they do not deny such liability, but that is not sufficient. It is possible that, had the witness been given the opportunity, he might have stated that the debt had been satisfied subsequent to the original understanding, but it was not necessary for him then to have stated this. It was his duty to answer the questions put to him, and the statement cannot be construed as implying any admission beyond what is on a reasonable construction contained in the words themselves. To satisfy the requirements of the section, the words must be such as to show that there was an existing jural relationships, as debtor and creditor, between the parties at the time when the admission was made, or at some time within the period of limitation prescribed by law, according to the nature of the suit. In the present case there is no such admission. The admission merely is that in 1888 the defendant was bound to pay the sum. That admission might be made now without conflicting with the defendant's plea that the recovery of the debt is now barred.

On this finding we must set aside the decree of the Lower Appellate Court, and dismiss plaintiff's suit with costs throughout. This involves the dismissal of second appeal, No. 1440 of 1895 with costs.

APPELLATE CIVIL.

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

PALANI KONAN (PLAINTIFF), APPELLANT,

v.

MASAKONAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Suit by a purchaser from a coparcener—Decree for share of coparcener in specific property.

In a suit to recover possession of property purchased by the plaintiff, if it is found that the property is not the separate property of the plaintiff's vendor, but

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* Second Appeal No. 762 of 1895.

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belongs to the joint family of which plaintiff's vendor is a member, the plaintiff is not entitled to a decree for his vendor's share in that property and the suit must be dismissed.

SECOND APPEAL against the decree of T. Weir, District Judge of Coimbatore, in Appeal Suit No. 183 of 1893, reversing the decree of T. T. Rangachariar, District Munsif of Coimbatore, in Original Suit No. 353 of 1891.

Plaintiff sued to recover possession of certain land from defendants Nos. 1 to 4, by whom he alleged he had been dispossessed. He claimed to be the owner of the land by purchase from Karupayyi, the mother and guardian of the minor sons of Iyavu Chetty. The property in question had previously been purchased by Iyavu Chetty in his own name.

The defendants Nos. 1 to 4 denied the alleged dispossession, and set up title in Nachi Chetty, the brother of Iyavu Chetty. Nachi Chetty was thereupon made fifth defendant and contended that the land did not belong exclusively to Iyavu Chetty.

The Munsif found that the land was the separate property of Iyavu Chetty, and gave plaintiff a decree. On appeal the District Judge found that the property was the joint family property of Iyavu Chetty and Nachi Chetty and reversed the decree of the Munsif.

The plaintiff appealed on the following ground amongst others:—

"The plaintiff is, at any rate, entitled to the moiety belonging to Iyavu and his sons, and the learned Judge ought not to have dismissed the suit altogether."

Desikachariar for appellant.

Kasturi Rangayyanar for respondents.

JUDGMENT.—The only ground urged upon us in this second appeal is that, even on the finding of the District Judge that Iyavu Chetty and Nachi Chetty were undivided, and that the property sold to plaintiff was their joint family property, still the District Judge ought not to have dismissed the suit *in toto*, but should have given plaintiff a decree for one-half of the property, as being the share of Iyavu Chetty therein. We cannot admit this contention. The case of *Venkatarama v. Meera Labai*(1) is a clear authority for holding that the purchaser of an undivided

(1) I.L.R., 13 Mad., 275.

share of one member of a Hindu family in specific family property cannot sue for partition of that portion alone, and obtain delivery thereof by metes and bounds. Still less can he do so in a case like the present where he sues on an allegation that the property is the self-acquisition of the vendor, and it is proved that it is joint family property. The course, which the plaintiff should take is pointed out in the case to which we have referred. He can recover nothing in this suit.

The decree of the District Judge was, therefore, right. We affirm it and dismiss this second appeal with costs.

APPELLATE CIVIL.

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

PERUMAL AYYAN (PLAINTIFF), APPELLANT,

v.

ALAGIRISAMI BHAGAVATHAR AND OTHERS (DEFENDANTS),
RESPONDENTS. *

Limitation—Article 132, Limitation Act—Hypothecation bond for payment on certain date—On default in payment of interest whole amount payable on demand—Meaning of "payable on demand."

When a hypothecation bond provided for the repayment of the principal sum on a certain date with interest in the meantime payable monthly, and further provided that, on default in payment of interest, the principal and interest could become payable on demand:

Held, that the period of limitation prescribed by article 132 of the Limitation Act began to run from the date of the default. *Hanmantram Sadhuram Pity Bowls*(1) and *Ball v. Stowell*(2) distinguished.

SECOND APPEAL against the decree of J. W. F. Dumergue, District Judge of Madura, in Appeal Suit No. 829 of 1894, reversing the decree of K. Krishnama Chariar, District Munsif of Madura, in Original Suit No. 307 of 1894.

This was a suit brought on a registered bond to recover, by the sale of certain property thereby hypothecated, the sum of

* Second Appeal No. 850 of 1895.

(1) I.L.R., 8 Bom., 561.

(2) I.L.R., 2 All., 322.

PALANI
KONAN
v.
MASAKONAN.

1896.
October 1
November
12.

PERUMAL
AYYAN
v.

ALAGIRISAMI
BHAGA-
VATHAR.

Rs. 724-7-9, being the balance of principal and interest due on the bond.

The bond was executed on the 9th of February 1882 by the first defendant in favour of the plaintiff. Its terms are set out in the judgment. It provided for the payment of the principal in two years and for the payment of interest in the meantime monthly. On default in the payment of interest the principal with interest at an enhanced rate became payable on demand. Default in payment of interest was made in March 1882, and, except for a payment of Rs. 150 on the 18th October 1885, the defendant had not paid anything on account of the bond. The plaintiff never made any demand for payment; but instituted this suit on the 18th June 1894. The defendants pleaded, amongst other things, that the suit was barred by limitation. The District Munsif held that article 132 of the Limitation Act was applicable—a finding that was not disputed in appeal. He also held that the cause of action arose on the 9th February 1884—the expiry of the two years prescribed by the bond for repayment; and in the result passed a decree ordering the payment of the sum claimed with interest, and in default directing the sale of the hypothecated property.

On appeal the District Judge reversed the decree of the District Munsif. He held that the money became payable when the first default was made in payment of interest, that is, in March 1882. He further held that the payment of Rs. 150 on the 18th October 1885 did not operate under section 20 of the Limitation Act to give a fresh starting point for the period of limitation since the money was not paid as interest, and that, if it was regarded as part payment of principal, the fact of payment did not appear in the handwriting of the first defendant.

The plaintiff appealed.

Bhashyam Ayyangar, Pattabhirama Ayyar and Gopalasami Ayyangar for appellant.

Sivasami Ayyar, Madahava Rau and Natesa Ayyar for respondents.

JUDGMENT.—The only question argued before us is that of limitation. The decision on that question depends upon the construction to be placed on the terms of the bond as to the time when the money became due and payable. The bond runs as follows :—

PERUMAL
AYYAN
v.
ALAGIRISAMI
BHAGA-
VATHAR.

“As I have received Rs. 300 (three hundred) in respect of both items in accordance with the said particulars, I shall pay you every month Rs. 3, being the interest on the said amount at 1 per cent. per mensem and (shall pay) the principal Rs. 300 in two years' time and receive back this, the three deeds and the former debt bond. If, in the meantime, the hypothecated chits fall to my lot, I shall receive the sums due thereon, and pay them endorsing payment herein below. If there be default in making payments as aforesaid, in subscribing to the said chits, or in paying the interest every month, I shall pay in full the principal with interest at 1½ per cent. on demand by the holder out of my said hypothecated properties and other properties. I shall pay the commission due for taking the first collections.”

This bond was executed on the 9th February 1882. If, therefore, the interest had been regularly paid, the principal would not have become due until the 9th February 1884, and the suit having been instituted within twelve years from that date, viz., in June 1894, would not have been barred by limitation. It is, however, admitted that no payment at all was made until October 1885, and the Lower Appellate Court has found that the payment then made was not made on account of interest, but on the general account, and that this payment did not, therefore, give rise to a new *tempus a quo* so as to save the bar by limitation.

The Lower Appellate Court held that the money became due on the first default in payment of interest, viz., in March 1882, and that, as the suit was not brought within twelve years from that date, it was barred.

It is admitted that there is nothing to show that any demand for payment was made by the plaintiff before the 9th February 1884, and it is argued by the appellant before us that, in the absence of such demand, the money did not become due until the 9th February 1884, and that the suit was, therefore, improperly dismissed as time barred.

We do not think that this contention can be sustained. It is conceded that, if the bond ran simply “I shall pay the principal with interest on demand,” no demand would have been necessary to make the money due, and that time would have run from the date of the bond, *Hempammal v. Hanuman*(1) and *Rameshcar*

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

APPA RAU SANAYI ASWA RAU (PLAINTIFF), APPELLANT,

1896.
December 4.

v.

KRISHNAMURTHI (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, s. 5—Suit under s. 77 of Registration Act—Act III of 1877—Applicability of Limitation Act, s. 5—Filing of suit on re-opening of Court.

When the period of limitation, prescribed by section 77 of the Indian Registration Act, 1877, for suits brought under that section, expires on a day when the Court is closed, section 5 of the Indian Limitation Act, 1877, does not apply, and the suit, if instituted on the day that the Court re-opens, is barred.

APPEAL against the decree of N. Saminada Ayyar, Subordinate Judge of Ellore, in Original Suit No. 6 of 1895.

The facts of the case were as follows:—

The plaintiff, a Zamindar, obtained from the mother and guardian of the minor defendant (his tenant) a muchalka, which he sought to have registered by the Sub-Registrar of Gudivada. The mother and guardian of the defendant denied execution, and the Sub-Registrar declined to register the document. Thereupon the plaintiff appealed to the Registrar of Kistna, who rejected the appeal. The order of the Registrar was passed on the 6th December 1894, and the thirty days allowed by section 77 of the Indian Registration Act, 1877, for the institution of a suit in the Civil Court for a decree, directing the document to be registered, expired on 5th January 1895. On that day the Court was closed, it then being the Christmas holidays. On the 8th January 1895, the Court re-opened and on the same day plaintiff filed this suit, praying for a decree ordering the Sub-Registrar of Gudivada to register the muchalka. The Subordinate Judge, relying on *Veeramma v. Abbiah*(1), dismissed the suit on the ground that it was barred by limitation.

The plaintiff appealed.

Bhashyam Ayyangar and *Gopalasami Ayyangar* for appellant.
Sivasami Ayyar for respondent.

PERUMAL
AYYAN
v.
ALAGIRISAMI
BHAGA-
VATHAR.

Mandal v. Ram Chand Roy(1). The fact that there is a previous covenant to pay the money within a certain date does not, we think, alter the meaning or effect of the words in the later clause making the money payable on demand. The words 'on demand' must, we think, be regarded as a technical expression equivalent to 'immediately' or 'forthwith.' That, we think, was the intention of the parties. The defendant having failed to pay the interest according to the stipulation in the first part of the bond, the money became payable forthwith, and no actual demand was necessary to complete the plaintiff's cause of action.

The appellant's vakil has referred to *Hannantram Sadhuram Pity v. Bowles*(2) and *Ball v. Stowell*(3), but neither of them is on all fours with the present case. In the former, the words were 'if so required,' and the High Court held that there was a deliberate omission by the plaintiff to realize the condition on which the amount should become payable. In other words, it held that the intention of the parties was that the money should not be payable unless and until the plaintiff required the defendant to pay it. In the second case, it was found that the money was to become due only on default in payment of both premia and interest, and there was no proof that there was default in payment of the premia.

In the present case, we are of opinion that the plaintiff's right to sue accrued on first defendant's first failure to pay the stipulated interest, that is, in March 1882. The Lower Appellate Court has found as a fact, that the payment made by first defendant in October 1885 was not made on account of interest. That is a finding of fact which we cannot question in second appeal. Time, therefore, ran against plaintiff from March 1882, and his suit, not having been brought within twelve years from that date, was barred by limitation and was rightly dismissed.

We, therefore, confirm the decree of the Lower Appellate Court and dismiss this second appeal with costs.

(1) I.L.R., 10 Cal., 1034. (2) I.L.R., 8 Bom., 561. (3) I.L.R., 2 All., 322.

* Appeal No. 188 of 1895.

(1) I.L.R., 18 Mad., 99.

APPA RAU
SANAYI ASWA
RAU
v.
KRISHNA-
MURTHI.

JUDGMENT.—Though the precise point for decision in the Full Bench Case (*Veeramma v. Abbiah*(1)) related to the applicability of section 7 of the Limitation Act alone to suits brought under section 77 of the Registration Act, yet having regard to the reasoning, as a whole, adopted by the learned Judges in arriving at their conclusion that section 7 did not apply, we think we cannot but hold, on the strength of that decision, that section 5 also is inapplicable to such suits.

Arguments, however, have been urged before us, which appear to have considerable force in favour of the applicability of section 5, but we think the question is concluded by the Full Bench decision, and consequently that we are not at liberty to discuss it.

The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

NALLAPPA REDDI (PLAINTIFF), APPELLANT,

v.

RAMALINGACHI REDDI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Registration—Indian Registration Act, 1877, s. 50—Loss of sale-deed.

When a deed of sale of immovable property for more than Rs. 100 is lost within the time allowed for the registration of the same, the purchaser may bring a suit against the vendor to compel the execution and registration of a fresh deed;

and if, after the execution of the lost sale-deed, the vendor has resold the property by a registered deed and delivered possession thereof to another who has notice of the sale to the plaintiff, the latter is entitled, as against the subsequent purchaser, to a decree for the possession of the property.

SECOND APPEAL against the decree of C. Venkoba Chariar, Acting District Judge of Trichinopoly, in Appeal Suit No. 162 of 1891, modifying the decree of M. A. Tirumala Chariar, District Munsif of Kulittalai, in Original Suit No. 313 of 1890.

On the 10th of December 1889 the first defendant executed in favour of the plaintiff a sale-deed of certain land for Rs. 800, and

received from the plaintiff Rs. 280, part of the purchase money, the balance being payable, as the plaintiff alleged, at the time of registration. The deed was never registered. But on the 22nd December it was, with some other things, stolen from the plaintiff's house, and the plaintiff had not succeeded in recovering it. In January 1890 the first defendant sold the land in question to defendants Nos. 2 and 3. The sale-deed to these defendants was registered, and under it they had been put in possession of the land. The plaintiff now sued to compel the first defendant to execute and register a fresh sale-deed and for possession of the land, or, in the alternative, for the return of the part purchase money paid and for damages.

The District Munsif passed a decree directing the first defendant, on the plaintiff paying into Court the balance of the purchase money, to execute and register a fresh sale-deed, and directing all the defendants to deliver up possession of the land to the plaintiff. On appeal the District Judge, in reversing the decree of the District Munsif, said:

"The District Munsif is, I think, clearly wrong in treating the suit as if it was one for specific performance of a contract of sale. Here the sale-deed was executed and delivered, but the title alone had to be perfected by registration of the deed. This was not done. The matter did not stop with a mere agreement to sell, which would in that case be a mere personal right enabling plaintiff to obtain a conveyance. There is no allegation in the plaint that there was any contract that a fresh deed of sale was proposed to be executed and registered. Section 27, Specific Relief Act, has, I think, no application to this case, and the decree directing the first defendant to execute a fresh deed of sale and to have it registered, is, in my opinion, clearly unsustainable on the facts disclosed in the case. I think, also, that the decision in I.L.R., 14 Madras, page 55, does not govern this case. I consider that the decision reported in 16 Madras, page 341, shows the principles which govern cases of this kind, and under the dictum therein ruled, the plaintiff has, I conceive, no right to obtain a second conveyance.

"The District Munsif has also awarded possession to plaintiff, and in this, I think, he is clearly wrong. The second and third defendants have been in possession under a perfectly valid title. Their deed of sale is registered and they have possession.

(1) I.L.R., 18 Mad., 99.

* Second Appeal No. 1233 of 1895.

NALLAPPA
REDDI
v.
RAMA-
LINGACHI
REDDI.

NALLAPPA
REDDI
v.
RAMA-
LINGACHI
REDDI.

"Plaintiff's sale-deed was unregistered, and therefore exhibit I prevailed over it under section 50, Registration Act. The second and third defendants paid first defendant Rs. 1,000 before the Sub-Registrar, and this fact is endorsed on exhibit I. There is nothing to show that this was a sham payment. The defendants' first witness wrote it and he speaks to its execution. There is nothing in the evidence or in the circumstances of the case to lead to any suspicion in the matter. Plaintiff himself says that the first defendant asked him to take back his Rs. 280, and permit him to sell the lands to second and third defendants for Rs. 1,000, as they made him a better offer than plaintiff. I, therefore, find the fourth issue for defendants Nos. 2 and 3. The question of notice of a previous contract of sale does not arise in this case."

The District Judge, however, granted the plaintiff a decree for Rs. 348, which sum was made up of the part purchase money paid by the plaintiff with interest, interest on the balance which plaintiff had kept ready for payment on registration, and the value of the stamp paper on which the sale-deed had been engrossed.

Plaintiff appealed.

Seshagiri Ayyar for appellant.

Pattabhirama Ayyar for respondent.

ORDER.—The plaintiff's sale-deed having been lost, he was entitled to claim that the first defendant should execute a fresh deed of sale and register it, and assuming, as found by the Munsif that second and third defendants had notice of the sale to the plaintiff, he was further entitled to possession.

The cases applicable to this are *Nynakka Routhen v. Vavana Mahomed Naina Routhen*(1) and *Nagappa v. Devu*(2). In *Venkatasami v. Kristayya*(3) relied on by the District Judge, the sale-deed had not been lost, and so there could be no claim for specific performance. The District Judge's decision on this point is therefore wrong, and he is requested to find, on the evidence on record upon the issue, whether defendants Nos. 2 and 3 had notice of the sale to the plaintiff; in which case the Munsif's decree will have to be restored, and that of the District Judge reversed. The District Judge is requested to submit his findings within one month from the date of the receipt of this order.

(1) 5 M.H.C.R., 123. (2) I.L.R., 14 Mad., 55. (3) I.L.R., 16 Mad., 341.

Seven days will be allowed for filing objections after the finding has been posted up in this Court.

NALLAPPA
REDDI
v.
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LINGACHI
REDDI.

APPELLATE CIVIL.

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

KALIAPPA GOUNDEN (PLAINTIFF), APPELLANT,

v.

VENKATACHALLA THEVAN AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1896.
October 14.

Madras Act II of 1864, s. 38 — Sale for arrears of revenue—Confirmation of sale after cancellation.

When a Collector has passed an order under section 38 of Madras Act II of 1864, setting aside a sale for arrears of revenue, he cannot subsequently confirm the sale.

SECOND APPEAL against the decree of T. Weir, District Judge of Coimbatore, in Appeal Suit No. 211 of 1893, reversing the decree of T. T. Rangachariar, District Munsif of Coimbatore, in Original Suit No. 154 of 1892.

This was a suit to recover certain land with mesne profits. The land originally belonged to the first defendant, and for arrears of revenue due by him was sold by the Collector on the 20th March 1883 and purchased by the plaintiff.

On the 2nd November 1883 the Collector passed an order setting aside the sale. But on the 29th August 1884 he passed the following order:—

"Read arzi No. 515 of this year which you submitted, stating that you had (already) under our order given certain information in detail regarding the cancellation of the sale of the fields, Nos. 110 and 111 in the village of Senjeri.

"The above-mentioned order has been cancelled, and the sale of the said lands is confirmed in the name of Senjeri Kaliappa Gounden who purchased the said lands."

And on the 8th November 1884 the Collector issued a sale certificate in the name of the plaintiff.

* Second Appeal No. 844 of 1895.

KALIAPPA
GOUNDEN
v.
VENKATA-
CHALLA
THEVAN.

The District Munsif gave the plaintiff a decree, but on appeal the District Judge reversed the decree of the District Munsif.

Plaintiff appealed.

Ramachandra Rau Saheb and *Kasturi Rangayyengar* for appellant.

Desikachariar for respondents.

JUDGMENT.—There is no provision in Act II of 1864 which enables a Collector to revive a sale which he has once cancelled. In the present case the Head Assistant Collector cancelled the sale on the 2nd November 1883. He had no power to revive the sale nearly a year afterwards as he purports to have done. The issue of the certificate was, therefore, ineffectual to create any title in the plaintiff.

We dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

ARUMUGAM PILLAI (DEFENDANT), APPELLANT,

v.

ARUNACHALLAM PILLAI (PLAINTIFF), RESPONDENT.*

Registration of wills after death of testator—Inquiry by registering officer into disability of testator—Indian Registration Act, ss. 35, 40, 41.

The procedure prescribed by section 35 of the Indian Registration Act is not applicable to the registration of wills which, under section 40 of that Act, are presented for registration after the death of the testator by persons claiming under them.

SECOND APPEAL against the decree of E. J. Sewell, Acting District Judge of Tanjore, in Appeal Suit No. 211 of 1894, confirming the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in Original Suit No. 30 of 1893.

The plaintiff, the maternal uncle of one Manikam Pillai, deceased, applied to have a document purporting to be the will of Manikam Pillai registered. The Sub-Registrar refused registration, and on appeal the Registrar confirmed the decision of the Sub-Registrar. Thereupon the plaintiff filed this suit under

section 77 of the Indian Registration Act, making the divided paternal uncle of Manikam Pillai the defendant in the suit.

The defendant contended that the will was not genuine, that Manikam was a minor on the alleged date of its execution, and therefore not competent to make the will, and that moreover he was unconscious and not in a fit state of mind to execute any testamentary disposition.

The following were the issues framed in this suit for decision:—

Whether or not the deceased Manikam Pillai was a major at the time of the execution of the alleged will.

Whether the will is genuine and was duly executed by the deceased Manikam Pillai.

Whether or not suit is barred by limitation.

Whether the plaintiff is entitled to have the will registered.

On all these issues the Subordinate Judge found for the plaintiff and directed the registration of the document.

On appeal the District Judge found on the second issue that the will was duly executed by Manikam Pillai. On the first issue, as to whether the testator was a minor at the time of the execution of the will, the District Judge said: "I consider, therefore, that a Registering officer is not permitted by the Registration Act to refuse registry of a will when presented by any person other than the testator, on the ground of the minority of the deceased testator when he executed the will," and did not allow the appellant to argue whether in fact Manikam Pillai was a minor at the time when the will was executed.

The question of limitation under the third issue was raised upon the following facts:—

The District Registrar's order of refusal was made on 3rd November 1892. The plaintiff filed his suit before the Tiruvadi District Munsif on 2nd December within thirty days of the order. The District Munsif came after some months to the conclusion that the suit was not within his pecuniary jurisdiction and returned it to be filed in the Subordinate Judge's Court. That order is dated 21st July 1893. The suit was filed before the Subordinate Judge on the same day. With regard to this the District Judge said: "I consider therefore that the suit was instituted when the plaintiff was presented to the District Munsif of Tiruvadi on 2nd December 1892, and, therefore, is not barred by limitation." In the result he confirmed the decree of the Subordinate Judge.

ARUMUGAM
PILLAI
v.
ARUNA-
CHALLAM
PILLAI.

1897.
January 5.

* Second Appeal No. 1067 of 1895.

ARUMUGAM
PILLAI
v.
ARUNA-
CHALLAN
PILLAI.

Defendant appealed.

Sivasami Ayyar for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—The bar of limitation could not avail if the plaint was originally presented in the proper Court, and we consider that it was so presented in that the Munsif had jurisdiction. On this ground, but not on the grounds given by the Judge, we hold that the suit was not time-barred.

With regard to the question whether the alleged minority of the testator was a valid reason for the Registrar refusing registration, we agree in the conclusion arrived at by the Judge. A clear distinction is made in section 41 of the Registration Act between the case of a will presented by the testator himself, and that of a will presented by any other person entitled to do so. In the former case the rules laid down in section 35 are made applicable, but in the latter case special rules are given. In these special rules no provision is made for an enquiry as to the testator's minority or sanity, for which enquiry provision is made in the rules in section 35. It would not be reasonable to hold that the special rules (a), (b) and (c) of section 41 are merely supplemental to the rules in section 35, because at least in one instance the same rule in substance appears in both sections. The second appeal, therefore, fails and is dismissed with costs.

PRIVY COUNCIL.

P.C.*
1897.
March 4, 5.
April 7.

SRI RAJA VIRAVARA THODHRAMAL RAJYA LAKHSHMI
DEVI GARU (DEFENDANT),

AND

SRI RAJA VIRAVARA THODHRAMAL SURYA NARAYANA
DHATRAZU BAHADUR GARU (PLAINTIFF).

[On appeal from the High Court at Madras.]

Hindu law—Impartibility not established—Possession of one member of joint family at a time—What constitutes partition.

A zamindari granted by the Government in 1803 to a Hindu descended in his family, possession being held by one member at a time. The estate, however,

* Present: Lords WATSON, HOBHOUSE and DAVEY, and Sir RICHARD COUCH.

was not impartible. But whether it was, or was not, impartible was adjudged immaterial to the question raised on this appeal.

The last zamindar having died without issue in 1888, his widow was in possession when this suit was brought by a male collateral descended from a great grandfather common to him and to the last zamindar. The plaintiff claimed to establish his right as member of an undivided family holding joint property against the widow who alleged that her husband had been sole proprietor. In proof of this she relied on certain arrangements as having constituted partition, viz., that in 1816, two brothers, then heirs, agreed that the elder should hold possession, and that the younger should accept a village, appropriated to him for maintenance in satisfaction of his claim to inherit: again, that in 1866, the fourth zamindar compromised a suit brought against him by his sister for her inheritance, on payment of a stipend to her, having already, on the claim of his brother, granted to him two villages of the estate; and, by the compromise, this was made conditional on the sister's claim being settled: again, that in 1871, the fourth zamindar having died pending a suit brought against him to establish the fact of an adoption by him, an arrangement was made for the maintenance of his daughter, and two widows, who survived him, the previous grant for maintenance of his brother holding good, the adoption being admitted, and the suit compromised:

Held, that there was nothing in the above which was inconsistent with the zamindari remaining part of the common family property; and that the course of the inheritance had not been altered:

Held, also, that the claimant was not precluded by the family compromise of 1871, or in any way, from maintaining this suit; and that it was not barred by limitation.

APPEAL from a decree (2nd March 1893) of the High Court, which affirmed a decree (19th December 1890) of the District Judge of Vizagapatam.

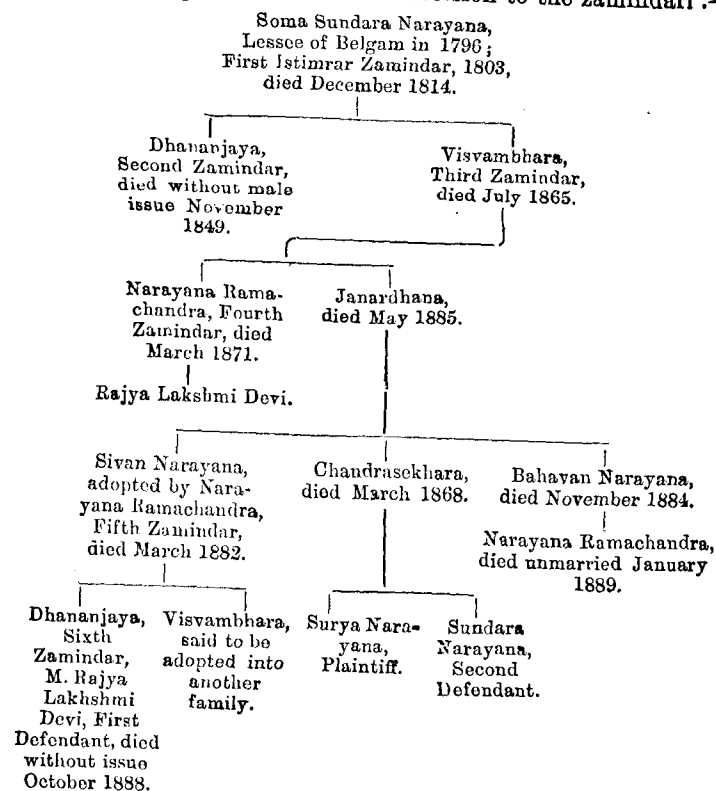
The plaintiff, now respondent, was Surya Narayana, great-grandson of the third zamindar of the Belgam Zamindari. The first defendant, now first appellant, Sri Raja Lakhshmi Devi Garu, was widow of the last zamindar, who died in 1888, and who was also great-grandson of the third zamindar. A second defendant, who did not appear on this appeal, was the plaintiff's younger brother Sundara Narayana Dhatrazu. The Collector of Vizagapatam, Agent to the Court of Wards, and guardian of the first defendant, had been made a defendant, by order of 10th September 1889.

The zamindari had been granted by the Government on the 21st October 1803, by a *sanad i milkeut istimrar*, or deed of permanent property, following Regulation XXV of 1802.

SRI RAJA
LAKHSHMI
DEVI GARU
AND
SRI RAJA
SURYA
NARAYANA
DHATRAZU
BAHADUR
GARU.

SRI RAJA
LAKSHMI
DEVI GARU
AND
SRI RAJA
SURYA
NARAYANA
DHATRAZU
BAHADUR
GARU.

The following table shows the succession to the zamindari :—



The main question on this appeal was whether the zamindari was the joint family property in the hands of the sixth zamindar the widow's husband; or had ceased to be joint family property by reason of certain acts, which were alleged by the defence to have had the effect of partition, and to have altered the course of descent, so that the zamindari had become the separate property of her husband, the last owner. If that was the result of those acts, the widow would have become entitled to her widow's estate in the zamindari. The facts appear in their Lordship's judgment. The following were the principal transactions alleged to have had the effect of partition :—

In February 1816, Visvambhara, second son of the first zamindar, executed two deeds of receipt and acquittance (Pharikati) (the particulars of which are set forth in the judgment on this appeal) on receiving a grant of a village, part of the Belgam Zamindari from his elder brother Dhananjaya. In 1866,

Ramachandra, the fourth zamindar, granted to his only brother, Janardhana, two villages of the zamindari as Taoji, or gift for maintenance. Against this Ramachandra, a suit was brought by Sivan Narayana, alleging himself to have been adopted by Ramachandra, who did not admit the adoption, and who died in 1871, while the suit was pending. Janardhana, the natural father of Sivan Narayana, and Ramachandra's two widows with his daughter, who survived him, were made parties to the suit, which was then compromised by razinamas, dated the 6th September 1871. In those documents reference was made to the previous grant of Taoji to Janardhana, and a family agreement was made that Sivan Narayana should succeed as adopted son of Ramachandra, Janardhana, continuing to hold his two villages; and provision being made for the women of the senior branch.

The plaint (25th April 1889) alleged that the zamindari, recently granted, was partible among the heirs of the grantee, and that the plaintiff and his brother Sundara Narayan were entitled to the estate in equal shares, the defendant widow being only entitled to maintenance. The prayer was that one-half might be allotted to the plaintiff in severalty, excluding the villages granted in 1866, with one-half of the movables, and with mesne profits.

The Court of Wards filed the widow's written statement; in effect raising questions, the subject of the issues, whether the zamindari was partible or impartible, whether there had been partition, whether the estate had been acquired by the last owner himself, whether the plaintiff was estopped, by the acts of those through whom he claimed, from maintaining this suit, and whether it was barred by limitation.

The District Judge decreed in favour of the plaintiff that he was entitled to one-half of the property left by the late zamindar including the Zamindari of Belgam. In his judgment the zamindari was partible. The family was not ancient: the grant in 1796 was merely of a life estate. The grant in 1803 was not made in any manner which carried with it an implication that it was to be impartible. The duration of the family was not sufficient to give rise to a custom over-riding the ordinary law; and the mode in which the parties had dealt with each other was consistent with the estate being that of an ordinary undivided family under Mitakshara law, even though that family might have entertained the mistaken belief that the estate descended to a single heir.

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The District Judge held that the property was not the 'self-acquisition' of any one who came after the common ancestor, Visvambhara. It had always gone in the direct line of primogeniture, and there never had been any loss of the estate which could be followed by the acquirement of any one of the successive zamindars.

Also, he found that there had never been any partition. There had not been in the transactions of different years, which had been alleged on behalf of the widow to amount to partition, any intention whatever to affect the undivided status of the family. He held, moreover, that there was no estoppel, in consequence of the execution of the razinamas of September 1871, to bar the plaintiff's maintaining this suit. The agreement of that year recognized the adoption of Sivan Narayana, and his right to take the place of his adoptive father, while provisions for the maintenance of the females of the senior branch, and the males of the junior branch, were, at the same time, settled. Nothing was arranged as to the order of succession on the extinction of the senior branch, if it should occur, nor was any arrangement made for that succession in a manner contrary to the ordinary rules of inheritance of the Hindu law. This latter would have been invalid, and would not have been binding on the plaintiff, nor would it have affected his right to claim, as a member of a joint family, his share of the undivided estate.

As to limitation, the District Judge held that no question could arise under article 127 of Act XV of 1877. The plaintiff's branch, though existing, had not been shown to have had any right of possession until the property vested in 1888 on the death of the late zamindar in his collateral relations as his heirs. Till then, there was no exclusion of the plaintiff's branch, and not till then was there any possession held by another adversely to his branch.

The above necessarily cut away the ground that the widow could hold the zamindari against the plaintiff and his brother. The case put by the defendant's counsel was that the zamindari itself had not been divided, being impartible, but that the members of the family having become divided as to living and as to property and having agreed to a decree of separation in 1871, their status had become that of divided members of the family, and that this status must govern the right of succession to the zamindari, even if the latter was undivided,

This argument the Judge considered to fail, even if the facts were as alleged, on the ground that property, which was designedly excluded from a partition, remained joint, and was governed by the rule of succession which excluded a widow while undivided males were in existence.

Against this decision the Collector, as guardian of the widow, defendant, appealed to the High Court, which dismissed the appeal.

The High Court (PARKER and SHEPHARD, JJ.) considered, as to the alleged impartibility, that there had been no indication of an intention to impress that character on the estate granted in 1803. On the contrary there was clear indication of an intention the other way. The grant was to an individual not connected with the family of the original zamindar, and was not made as a restoration of an original estate. It was true that, as often as there had been a devolution of the estate, the eldest son, or in absence of a son, the brother, of the last holder, had assumed the position of zamindar. The estate had, no doubt, been treated by the family as if it had been impartible, and as if all that the junior branch could claim was a right of suitable maintenance. This state of things had continued for about seventy years. In the opinion of the Judges, in the case of a family of comparatively modern origin, evidence of conduct extending over such a short period was wholly inadequate to prove a special custom. The alleged usage would not be from ancient times. They referred to *Amrithnath Chowdhry v. Goureenath Chowdhry*(1) and *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*(2). They considered it a matter beyond dispute that the zamindari was not impartible and that there was no such special custom, though the members of the family had agreed in treating it as impartible.

That being so, only two defences were raised, viz., renunciation under the compromise of 1871 and limitation. As to the first, the Judges held that no question beyond that of the present enjoyment of the zamindari had been raised by the parties, and that Janardhana had had shown no intention to separate himself and his descendants from the right of succeeding to the zamindari. As

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(1) 13 M.I.A., 542.

(2) 14 M.I.A., 570.

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to the second point, the bar by limitation, the Court considered that there never had been, till 1888, any holding possession adversely to the right which was claimed in this suit, that right being to succeed in default of direct male heirs of Ramchandra. Thus no question of limitation could arise.

The defendant widow having appealed from the High Court's decree, affirming the decree of the first Court.

Mr. A. Cohen, Q.C., and Mr. J. H. A. Branson for the appellant argued that the judgments in the Courts below had not given due weight to the transactions of 1816, of 1865-66, and of 1871-72. The result of those family arrangements had been a partition, effective to render Dhananjaya, the sixth zamindar, the inheritor of a separate zamindari; and in this his widow had obtained her widow's estate for life. Whilst the family had acted in the belief that the family estate was impartible and must remain in the hands of the zamindar for the time being, their arrangements had been such that the senior branch, on the one side, had given, and the junior branch, on the other side, had accepted, satisfaction for the separate possession of the zamindari being permanently made over to the senior branch. This had constituted partition. The evidence had shown that Ramachandra and Janardhana having lived separate had separated from each other in estate at the time of Sivan Narayana's suit of 1870-71. The plaintiff was estopped by the acquittance and discharge given. The compromise should be regarded. Moreover, this claim had originally been based, as shown by the plaint, on the case that the Zamindari of Belgam was an ordinary partible estate. But both the Courts below had found that, although it was not impartible, it had been dealt with by the family as if had been impartible. The compromise had been made on this footing. There had been a renunciation by the junior branch, and an acquisition by Ramachandra which might be considered to give the property the character of acquired estate. Reference was made, as to what constituted partition, to *Appovier v. Rama Subba Aiyar*(1), *Sri Raja Jaganadha v. Sri Raja Pedda Pukir*(2), *Rai Raghunathi Bali v. Rai Maharaj Bali*(3), *Periasami v. Periasami*(4), *Malikarjuna Prasada*

(1) 11 M.I.A., 75.

(3) L.R., 12 I.A., 112; I.L.R., 11 Cal., 777.

(4) L.R., 5 I.A., 61; *Sivagnana Tevar v. Periasami*, I.L.R., 1 Mad., 312.

(2) I.L.R., 4 Mad., 371.

Naidu v. Durga Prasada Naidu(1), *Thakur Darriao Singh v. Thakur Darri Singh*(2), *Bhaiya Arduwan Singh v. Udey Pratab Singh*(3). Reliance was placed on limitation. It was argued that article 127, schedule II of the Limitation Act XV of 1877, applied on the alleged exclusion of those through whom the plaintiff claimed for more than twelve years before his demand. Reference was made to *Ramachandra Narayan Singh v. Narayan Mahadev*(4).

Mr. J. D. Mayne for the respondent contended that there had been no evidence given of partition of the zamindari. As regarded the present claim of a coparcener in a joint family estate against the widow of the last possessor, it was not essential to have determined whether the estate was partible or impartible. The evidence had, however, shown it to be partible. The estate had never been partitioned, and the right of the present claimant had never been extinguished. There had been no renunciation of right, precluding the claim now made, nor any break in the undivided rights of the family coparceners. Thus there was no reason for considering the estate to be the separate estate of the last possessor, nor any reason for considering it to have been his 'self-acquired' property. Neither by estoppel nor by limitation was this suit barred. He referred to the judgment in *Appovier v. Rama Subba Aiyar*(5), *Sri Raja Jaganadha v. Sri Raja Pedda Pukir*(6), and *Bhaiya Arduwan Singh v. Udey Pratab Singh*(3).

Mr. J. H. A. Branson replied.

Afterwards on 7th April, their Lordships' judgment was delivered by Lord DAVEY:—

This is an appeal against a decree of the High Court of Madras affirming a previous decree of the District Court of Vizagapatam. The appellant, who was defendant in the action, is the widow of the late Zamindar of Belgam who died on the 29th October 1888 without leaving any issue and intestate. She claims to be entitled to a widow's estate in the entire zamindari. The respondent (plaintiff in the action) claims to be entitled in possession to one moiety of the zamindari on the ground that the zamindari was part of the joint property of his and the late zamindar's family and

(1) I.L.R., 17 Mad., 362.

(3) L.R., 23 I.A., 64; I.L.R., 23 Cal., 838.

(4) I.L.R., 11 Bom., 216.

(6) I.L.R., 4 Mad., 371.

(2) L.R., 1 I.A., 1.

(5) 11 M.I.A., 75.

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he alleges that the zamindari being partible in title his brother Surandara Narayana (who was made a defendant in the action, but is not a party to this appeal) is entitled to possession of the other moiety. On the other hand the widow and appellant contends that the zamindari was impartible in title and that owing to certain family arrangements, it had become the separate property of her late husband.

The Zamindari of Belgam was originally created by a sunnud, dated 21st October 1803, granted by the Government to Somasundara Narayana (the first zamindar). The sunnud itself has been lost, but the contents of it sufficiently appear from the kabuliat or counterpart executed by the zamindar and dated 28th April 1804 which was put in evidence. It appears from this document to have been in a form which is stated to have been usual in grants by the Madras Government of that period. It conferred on the zamindar liberty to transfer by sale gift or otherwise his proprietary right in the whole or any part of the zamindari and granted the estate to him his heirs, successors and assigns at the permanent assessment therein named. It would seem from the arrangements made in the family that the zamindari was regarded as impartible. But whether that be so or not it has been now decided in the case of *Venkata v. Narayana*(1) on the construction of a sunnud of similar form and granted about the same date that the zamindari thereby created was not impartible or descendible otherwise than according to the ordinary Hindu law. It must be taken therefore that the Zamindari of Belgam was not impartible whatever the parties may have thought and the misapprehension of the parties could not make it so or alter the legal course of descent. It will however be found that as between the appellant and the respondent the question whether the zamindari is partible or not is of no importance. Even if impartible it may still be part of the common family property and descendible as such in which case the widow's estate of the appellant would be excluded. The real question therefore is whether it has ceased to be part of the joint property of the family of the first zamindar or (in other words) whether there has been an effectual partition so as to alter the course of descent.

Somasundara Narayana, the grantee and first zamindar, died in the year 1814, leaving two sons Dhananjaya No. 1 and Visvam-

bhara No. 1. Dhananjaya was allowed by his brother to succeed to the estate and became second zamindar. Two documents, dated the 16th and the 18th February 1816, were executed on this occasion and were the first transaction relied on by the appellant in proof of the separation of estate or partition which she alleged had taken place. The first document was a 'pharikat sunnud' given by Visvambhara in the following terms:—

"As we have both equally divided and taken all the cash, "jewels and other (property) in the palace to which both of us are "entitled, I bind myself not to claim (anything) from you at any "time. I shall reside in the village of Addapusila which you were "pleased to give me for my maintenance and act according to "your wishes."

By the second document (also called a 'pharikat sunnud') Visvambhara stated:—

"I or my heirs shall not at any time make any claims against "you or your heirs in respect of property movable or immovable, "or in respect of (any) transaction. As our father put you in "possession of the Belgam Zamindari, I or my heirs shall not "make any claim against you or your heirs in respect of the said "zamindari."

Their Lordships do not find any sufficient evidence in the arrangement made by these documents of an intention to take the estate out of the category of joint or common family property so as to make it descendible otherwise than according to the rules of law applicable to such property. The arrangement was quite consistent with the continuance of that legal character of the property. The elder brother was to enjoy the possession of the family estate, and the younger brother accepted the appropriated village for maintenance in satisfaction of such rights as he conceived he was entitled to. In the opinion of their Lordships it was nothing more in substance than an arrangement for the mode of enjoyment of the family property which did not alter the course of descent.

The second zamindar died in 1849, leaving two widows and one daughter Ratna Mani Amma but no son. At this time the estate was in the hands of a mortgagee and remained so during Visvambhara's life. He died in 1865, leaving two sons Ramachandra and Janardhana. A suit was commenced by Ratna Mani Amma (her father's widow being then dead) to recover the zamindari from Ramachandra. This suit ended in a compromise by

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(1) L.R., 7 I.A., 38.

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which the plaintiff withdrew her claim to the estate on condition of Ramachandra paying her Rs. 500 a year. Ramachandra had, already by a kararnama, dated 13th October 1866, on the application of his brother Janardhana and with a view to enable him and his family to live decently, granted to him as *touji* the villages of Addapusila and Vuddavolu conditional on Ratna Mani's suit being settled in the manner mentioned. Ramachandra seems to have recovered possession of the estate from the mortgagees and succeeded as fourth zamindar. This transaction does not tend to support the case of the present appellant.

Ramachandra having no male issue adopted Sivan Narayana, the eldest son of Janardhana, but afterwards attempted to repudiate the adoption. In 1870 a suit was commenced by Sivan Narayana against Ramachandra to establish the adoption and praying for a decree establishing his title to the zamindari after the defendant's death. During the pendency of the suit Ramachandra died without male issue, but leaving one daughter and thereupon the suit was revived against Janardhana and Ramachandra's two widows and his daughter. Their Lordships observe that these persons were the only persons then interested in contesting the adoption of Sivan Narayana and they must assume that they were made defendants to the suit for the purpose of establishing the adoption against them. The suit was compromised as regards Janardhana and one of the widows (named as second defendant) on the terms contained in a razinama, dated 6th September 1871, and as regards the other widow on behalf of herself and her infant daughter in another razinama of the 16th September 1871. These are the documents which are chiefly relied on by the present appellant in support of her case.

By this compromise Janardhana agreed that the plaintiff was the adopted son of his elder brother, that the right to the zamindari should pass to the plaintiff and that Janardhana should be enjoying or continue to enjoy (for the words are translated both ways) the villages of Vuddavolu and Addapusila attached to the zamindari which had been in his possession and enjoyment in accordance with the khararnama executed in his favour by his late elder brother, and he also agreed to the provision to be made for Ramachandra's widows and daughter. The other defendants agreed to the plaintiff being the adopted son of the second defendant and her late husband and to the right of the zamindari being the plaintiff's,

Provisions were made for the two widows during their lives out of lands attached to the zamindari. It was arranged that Ramachandra's daughter should be married to Sivan Narayana's son, or in default provision should be made for her out of lands of the zamindari—and there were other provisions for the benefit of the widows.

The terms of the compromise seem to have been carried out and Sivan Narayana as adopted son of Ramachandra succeeded to the zamindari. He died in March 1882 and was succeeded by his son Dhananjaya (2) who died on the 29th October 1888 intestate, leaving the appellant his only widow and no issue.

The respondent is one of the two sons of Chandrasekhara (deceased), the second son of Janardhana, and he and his brother are his only two surviving grandsons. It is alleged and seems to have been admitted in the case that Visvambhara (2), a brother of the late Zamindar Dhananjaya (2), had been adopted into another family and was excluded from any share in the property of his natural father's family, and the proceedings in the suit were conducted on that assumption. Their Lordships will only point out that if any mistake has been made with respect to this fact, nothing that is decided in this suit will affect his interest (if any) in the zamindari. Visvambhara applied to be made a party to the suit, but his petition was refused on other grounds, and no evidence was gone into as to his adoption into another family.

The present suit was commenced by the respondent on the 25th April 1889 against the appellant, the respondent's brother, and the Court of Wards as guardian of the appellant. The plaint ignores the adoption of Sivan Narayana and proceeds on the assumption that he succeeded to the estate with the permission of his natural father Janardhana and his natural brothers and managed the estate on behalf of himself and the other members of the family. It alleges that the estate is partible and is owned and enjoyed by the family of the plaintiff. The prayer is that, excluding the villages of Vuddavolu and Addapusila, the zamindari be divided so as to give the respondent his half share, and the same recovered from the appellant. The defence was in substance (1) that the zamindari is impartible, (2) that the respondent was estopped by the family compromise of 1871 from maintaining the suit, and (3) that the suit is barred by the Law of Limitations. The validity of the adoption of Sivan Narayana is not now in dispute.

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On the first point their Lordships have already expressed their opinion and have pointed out that as between the appellant and respondent the question is immaterial. It only arises as between the respondent and his brother who is not a party to this appeal. The District Court decreed the respondent possession of half of that part of the zamindari which is within the local jurisdiction of the Court, and that was all that the plaintiff asked for.

On the second point their Lordships agree with the Courts below that the course of descent of the zamindari was not altered by the compromise of 1871, and that the widow is not entitled to succeed to a widow's estate as heir of the late zamindar. The only question raised in the litigation of 1870 was as to the fact of Sivan Narayana's adoption by Ramachandra, and it does not appear that any other contention was raised by Janardhana when he was made a party to the suit or was in the contemplation of the parties. They may (as has been suggested) have been under the erroneous impression that the zamindari was impartible, but there was nothing in the compromise inconsistent with the zamindari (even if impartible) remaining part of the common family property. The two villages were originally granted by Ramachandra to Janardhana as *towji* only and in order to provide a decent maintenance for him and his family, and in 1871 it was agreed that Janardhana should continue to enjoy the villages in accordance with Ramachandra's grant. It is said that Janardhana and his family have dealt with these villages in a manner inconsistent with their holding them for their maintenance only. Their Lordships express no opinion on the point, but even if they have exceeded their rights that will not alter the effect of what was done by the agreement of 1871. It is impossible to treat that agreement as a deed of partition by which the zamindari was converted into the separate or acquired property of Sivan Narayana.

Their Lordships also agree with the Courts below that the suit is not barred by the Law of Limitations. As between the appellant and the respondent the suit is not one for partition. The claim of the latter is not to hold jointly with the appellant, but to succeed adversely to her as one of the right heirs on the death of the last zamindar. There has been no denial of the title of Janardhana and his family or exclusion of them from the estate. On the contrary the possession has been under and in accordance with the agreement of 1871 by which a provision was made for the junior branch.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellant will pay to the respondent his costs of the appeal.

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APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

MAHADEVI AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
APPELLANTS,

v.

NEELAMANI (PLAINTIFF), RESPONDENT.*

Hindu Law—Po-Brahman—Alienation by widow for religious purposes—'Res judicata'—Decision on title in proceedings under Land Acquisition Act, 1870.

When a Po-Brahman receives a salary for the performance of his duties, a gift to him by the widow of the person whose exequial rites he has been appointed to perform to reward him for having performed any of those exequial rites is not a gift binding on the reversioners.

In proceedings under the Land Acquisition Act, 1870, to apportion the compensation payable, a decision by the Judge on a question of title does not operate as *res judicata* between the parties to those proceedings.

APPEAL against the decree of J. P. Fiddian, District Judge of Ganjam, in Original Suit No. 9 of 1894.

The plaintiff brought this suit to recover possession of a village with mesne profits. The village in question had formed part of the estate of the late zamindar of half of Tekkali taluk and had been given to the plaintiff by the late zamindar's widow. The first and second defendants were the daughters of the zamindar and, having, on the death of his widow, succeeded to his estate, had obtained possession of the village in question, which till then had been in possession of the plaintiff. The other defendants were the ryots of the village.

The circumstances under which the gift had been made were as follows:—In accordance with a custom prevailing among the Oriya zamindars, the late zamindar had appointed the plaintiff Po-Brahman (son Brahman) to perform his exequial rites. After

* Appeal No. 148 of 1895.

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the death of the zamindar without male issue his widow succeeded to his estate, and requested the plaintiff to offer the *pinda* to the zamindar at Gaya. This the plaintiff did, and some seven or eight years after he had done so, the widow on the 10th August 1874 executed in his favour the deed of gift in question. The motive for the gift was stated in the deed to be the fact that the plaintiff, having been appointed Po-Brahman by the late zamindar, had, in accordance with the custom prevailing in the late zamindar's family, "performed just like a son *pindathanam* and other ceremonies at Sri Gaya" in order that the late zamindar might attain salvation. The plaintiff, however, did not allege that he had performed any ceremonies at Gaya except the *pindathanam*.

The deed was attested by the first and second defendants, but under circumstances which their Lordships held did not create an estoppel.

The first and second defendants pleaded that the gift did not bind them. Their contention on this point as set out in their written statement was as follows:—

"The plaintiff was appointed (not adopted) to the office of "Po-Brahman by the late Sri Gopinadha Devi Garu, and he "performed the duties thereof in consideration of receiving the "perquisites attached thereto.

"The offering of *pinda* is not outside the duties of the said "office, nor is it an indispensable ceremony. It is rather a spiritual "luxury than a spiritual necessity. The plaintiff made the pil- "grimage to Gaya and other holy places at the expense of the late "Sri Radika Patta Mahadevi Garu as much on his own as on her "account and took advantage of the occasion to perform the said "*pindathanam* and received the usual dues for it.

"There was no agreement that he should be given a village in "consideration of making the said *pindathanam*. It is not in any "case such an act as deserved to be remunerated by a free and "absolute gift of a valuable village like the plaint village, which is "one of the best villages in the defendants' *Khandam* of the Tekkali "taluk, and which yields an income of over Rs. 1,000 per annum, "and which is worth more than Rs. 20,000.

"The alienation is not, therefore, for a family necessity and is "not such as, when made by a widow with limited powers, would "bind the reversioners."

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At the trial the first and second defendants adduced evidence to the effect that it was usual to give a Po-Brahman a salary and certain mamools and perquisites, and that the plaintiff as Po-Brahman had received Rs. 2 per mensem and 2 garces of paddy per annum.

The plaintiff also relied on a decision of the District Judge in proceedings under the Land Acquisition Act X of 1870. In 1891 about 14 acres of land in the village in question were compulsorily acquired for the East Coast Railway. The Collector inquired into the matter under section 11 of the Act, and under section 15 of the Act referred the case to the District Judge "to determine "the amount of compensation to be paid to the person interested." The District Judge in giving judgment said: "Before fixing "the amount it is necessary to decide who is entitled to it, in order "that the owner may adduce evidence as to its value." And he framed the following issue:—

"How far the deed of gift (exhibit A) by the Mahadevi "(second claimant) to the first claimant is valid as against the "reversioners (daughters), claimants 3, 4 and 5."

He then found that the gift was valid and that the plaintiff was entitled to the compensation, the amount of which he then proceeded to determine. The only parties who appeared before the Judge in these proceedings were the plaintiff in the present suit, who claimed the whole of the compensation to be awarded; the widow of the late zamindar who admitted the validity of the deed under which plaintiff claimed and requested that the compensation should be paid to the plaintiff; and the eldest sister of the first and second defendants, who denied the validity of the gift and contended that the compensation should be paid to the widow on behalf of the estate. Though the first and second defendants did not appear at these proceedings, the following notice was, prior to the proceedings, served on the agent of the first defendant:—

"The fourth claimant Muktamala Patta Mahadevi of Tekkali "is hereby informed that the 1st day of February 1893 has been "fixed as the date of hearing for the purpose of settling the dis- "putes in respect of the amount of compensation fixed by the "officer making reference in the matter of 14 acres 25 cents of wet "and dry lands in Vallabharoyipadu village, which belong to you "and which were taken possession of by Government for the East "Coast Railway. You should, therefore, appear on the said date "either in person or by a Vakil with the evidence and documents

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"you possess and represent to the Court the amount of compensation you claim for the right you possess in respect of the said land and other points relating thereto."

In the present suit, the District Judge found that the alienation had not been made for such a purpose as to bind the reversioners, *i.e.*, it was not made to secure the offering of the pindam, and it was only made as a reward for services past; and as to the question of *res judicata*, he found that the first and second defendants had due notice of the enquiry into their title and must be held to be bound by the decision in the proceedings under the Land Acquisition Act of 1870.

First and second defendants appealed.

Pattabhirama Ayyar for appellants.

Bhashyam Ayyangar and *Seshachariar* for respondent.

JUDGMENT.—We agree with the Judge that there was no such necessity for the gift by the widow as would be binding on the reversioners. As the plaintiff was already in receipt of a regular income as Po-Brahman, and the ceremonies performed by him at Gaya were performed in the same capacity, and many years before the gift, there was no justification for the grant which was purely voluntary.

The next finding of the Judge is that the question of title in regard to the plaint property is *res judicata* by reason of the decision under section 39 of the Land Acquisition Act of 1870. Assuming that the appellants were made parties to the proceedings under that section, though the question is doubtful owing to the faulty character of the notice (Exhibit III) served on the first appellant, we do not think that the finding in the Land Acquisition case in favour of the validity of the plaint gift operates as *res judicata* in this case, inasmuch as the litigation under that Act is a special form of proceeding confined to the determination of the amount of compensation due and the persons to whom it should be paid. Such a proceeding cannot be treated as a 'suit' within the meaning of section 13 of the Code of Civil Procedure, so as to render a decision come to therein binding when the same question arises in what is strictly a suit. Further, for the reasons stated by Pontifex, J., in *Nobodeep Chunder Chowdhry v. Brojendro Lall Roy*(1), we should not be justified in holding,

(1) I.L.R., 7 Cal., 406.

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on even general grounds, that an adjudication under the Land Acquisition Act should be held to be conclusive in disputes connected with property other than that to which the enquiry under that Act related.

As to the estoppel which the Judge has also found in plaintiff's favour, we must again differ from him. We find, on the statements of the appellants which have not been contradicted, that they put their signatures to the deed as attesting witnesses under pressure. There is no evidence to show that they were aware of the exact terms of the document or that, in attesting the document, they were doing any thing likely to affect their reversionary rights. There is absolutely nothing to indicate that they were willing or intended to part with those rights. Considering that they were *purdanashin* and young women at the time and that the plaintiff was the confidential manager of the affairs of their mother, under whose protection they were living, it lay on the plaintiff to prove that they acted with full knowledge and with independent advice, but the plaintiff has not even attempted to prove this. In these circumstances, we could not have held the appellants bound by the deed of gift, even had they been the executing parties. In no view can their mere attestation of the document amount to an estoppel in a case such as this, where there has been no alteration of plaintiff's position in consequence of their act.

We are, therefore, of opinion that the plaintiff has failed to establish the validity of the gift upon which he sues.

We must, accordingly, reverse the decree of the Lower Court and dismiss the plaintiff's suit with costs throughout.

[REPORTER'S NOTE.—Though the case of *Ram Chunder Singh v. Madho Kumari*(1) does not appear to have been relied on in the argument for the respondents, it was considered by their Lordships before delivering judgment. The distinction between that case and the present, it is suggested, is that, in the present case, the decision which was held to be *res judicata* was made on a reference by the Collector under section 15 of Act X of 1870, and was, therefore, made in a proceeding under the Act. In the former case, however, the Judge who gave the decision that was held to be *res judicata* does not appear to have been proceeding under the Act: for both from the report in the Lower Court(2) and from the report in the Privy Council (see at p. 492) it is gathered that the Judge was proceeding not on a reference from the Collector under section 15 of the Act, nor on a reference under section 38 of the Act (which are the only ways in which the question of apportionment and a question of title as incident thereto can come before a Judge under the Act), but in a suit instituted by the plaintiff independently of the Act.]

(1) I.L.R., 12 Cal., 484.

(2) I.L.R., 9 Cal., 411 (see at p. 412).

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

1896.
December 7.

ALANGARAN CHETTI AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
APPELLANTS,

v.

LAKSHMANAN CHETTI AND OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 3 AND 4), RESPONDENTS.*

*Mortgage—Transfer of Property Act, s. 101—Renewal of mortgage—Priority over
subsequent incumbrance.*

Where a mortgagee, subsequently to the execution of the mortgage deed, takes another mortgage in renewal of the former deed, he has priority over incumbrances subsequent to the first deed.

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura (West), in Original Suit No. 10 of 1893.

The plaintiff sued on a simple mortgage deed (exhibit A), executed in favour of one Narayana Chetti and the first defendant by the third defendant. The deed was dated 16th October 1879, and after reciting that certain monies were due on a prior mortgage deed (Exhibit E, dated 28th March 1871), executed by the third defendant in favour of the deceased undivided brother of Narayanan Chetti and in favour of the first defendant, provided for the payment of the monies due under the former deed with interest, and to secure the payment mortgaged certain immovable properties of the third defendant.

After the execution of the deed of the 28th March 1871, but before the execution of the deed now sued on, the first defendant on different dates made further advances to the third defendant and obtained from the latter two simple mortgage deeds, whereby the third defendant mortgaged the same properties that he mortgaged under the deeds of 28th March 1871 and of 16th October 1879. Upon these deeds the first defendant brought a suit against the third and obtained a decree for the sale of the mortgaged properties. At the sale, the properties were bought in by the first defendant.

* Appeal No. 172 of 1895.

The plaintiff now sued to recover the amount due by the deed of the 16th October 1879 by the sale of the properties thereby mortgaged.

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The only defence necessary to be mentioned for the purposes of this report was the defence of the first defendant to the effect that the mortgage sued on was subsequent to the mortgage deeds on which he had sued and obtained a decree.

The Subordinate Judge decreed in favour of plaintiff.

Defendant No. 1 appealed.

Sundara Ayyar for appellants.

Subramania Ayyar for respondent No. 1, plaintiff.

JUDGMENT.—The only point urged is the question of priority raised in the third issue. It is contended that the principle laid down by the Privy Council in *Gokaldas Gopaldas v. Puranmal Premeekhdas*(1) is applicable only to the case of a purchaser of the equity of redemption. There is no ground for limiting the principle to that case only. It is true that that is the only case provided for by section 101 of the Transfer of Property Act, but that is a—if not the—very extreme case where otherwise an extinguishment of the charge would ordinarily be presumed. This Court has, in several instances, applied the principle to cases like the present. *Rupabai v. Audimulam*(2), *Seetharama v. Venkatakrishna*(3), and see also judgment in appeal No. 113 of 1895.

The Subordinate Judge was, therefore, right in holding that, by the mere execution of A; the security under E in respect of the plaint debt was not given up.

The appeal accordingly fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

MANA VIKRAMA (PLAINTIFF), APPELLANT,

v.

RAMA PATTAR (DEFENDANT), RESPONDENT.*

Contract—Usage imported as term of a contract—Practice on a particular estate.

In order that the practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be

(1) I.L.R., 10 Cal., 1035. (2) I.L.R., 11 Mad., 346. (3) I.L.R., 16 Mad., 94.
* Second Appeal No. 1878 of 1895.

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March 26.
April 14.

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shown that the practice was known to the person whom it is sought to bind by it, and that he assented to its being a term of the contract: and when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he and all prior assignees (if any) for value knew that the practice was a term of the original contract.

SECOND APPEAL against the decree of J. A. Davies, District Judge of South Malabar, in Appeal Suit No. 844 of 1894, confirming the decree of V. Rama Sastri, District Munsif of Temelprom, in Original Suit No. 245 of 1893.

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

Bhashyam Ayyangar, Sankaran Nayar, and Govinda Menon for appellant.

Sundara Ayyar and Subramania Ayyar for respondent.

JUDGMENT.—The appellant, the Zamorin of Calicut, sued for Rs. 541-2-6, said to be the amount of renewal fees due by the respondent, in respect of certain lands held by him under a permanent grant known as *anubhavom*, made long ago by a predecessor of the appellant to a predecessor in title of the respondent who is an assignee for value. The original grant was made many years ago, but it was renewed or confirmed by exhibit I in 1873. Exhibit I stipulates for the yearly rent and the amount of a certain fee which the grantee was to pay, but contains no reference to any renewal fee payable to the grantor.

The appellant's claim was based on an express agreement by the respondent as well as upon custom. The Lower Courts held that the agreement was not proved, and that no binding custom was made out.

It was contended by the learned Advocate-General on behalf of the appellant that the District Judge was in error in applying to the case the rule that a party setting up a custom, having the force of law, should prove the antiquity, uniformity and certainty of the custom, inasmuch as what was set up here was not a custom of the district but the special custom prevailing in his own estate with reference to lands held under *anubhavom* tenure.

But in the plaint the custom was referred to as the "custom of the country." The Lower Court cannot, therefore, be said to have erred in dealing with it as a general custom. This consideration is sufficient to justify the dismissal of the appeal.

It is, however, desirable to point out that even upon the ground on which the claim was sought to be based before us, the appellant

could not succeed. For, assuming for argument's sake that the evidence in the case is, as suggested on behalf of the appellant, sufficient to prove a well-established practice, according to which persons holding under the Zamorin lands on *anubhavom* tenure make periodical payments similar to that here claimed, it is clear that such practice cannot affect the respondent's right under the assignment. Now a practice of the kind in question is not in law a 'usage,' with reference to which the Courts are at liberty to import into a contract incidents not excluded by the terms of such contract, even though a party to the contract was not *actually* cognizant of the usage. "To constitute a usage," as was observed in *Adams v. Otterback*(1) by the Supreme Court of the United States when referring to a contention similar to that in the present case and which was founded on the practice of a particular bank, "it must apply to a place rather than to a particular bank; it must be the rule of all the banks of the place or it cannot consistently be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement." In order, therefore, to render the practice, even though invariable of particular persons, as in the present instance, relevant, as the same Court pointed out in a later case, "mere knowledge of such a usage would not be sufficient, but it must appear that the custom actually constituted a part of the contract." (*Bliven v. The New England Screw Company*(2).) In the case just cited, a screw company being the sole manufacturers of wooden screws were unable to supply the demands of all their customers as fast as needed. The company adopted the system of apportioning their articles as fast as produced among their customers, having regard to the date of their orders. It was held that, the practice being well known to the plaintiffs who had ordered such goods, proof of the practice and of the company following it in complying with plaintiff's orders was admissible as a defence in a suit for failing to deliver in time. The same principle was recognized in *Scott v. Irving*(3). There evidence was given of a practice prevailing at Lloyd's in London of setting off in account between the broker employed by the assured to recover the loss and the underwriters the amount of premium due by the broker to the underwriters

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(1) 15 Howard, 545. (2) 23 Howard, 431. (3) 1 B. & Ad., 612.

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against the loss and that such set off and adjustment were treated as payment to the assured. It was held that the assured was not bound by the practice. Lord Tenterden observed, "Such a usage however can be binding only on those who are acquainted with it and have consented to be bound by it. There may possibly be cases proved where an assured being cognizant of such usage may be supposed to have assented to it and therefore may be bound." *Womersley v. Dally*(1) is perhaps even more analogous to the present case. There the plaintiff had been a tenant of a farm belonging to an extensive estate, the property of a family named Thornhill, and the defendants had purchased certain parts of the estate including portions of the farm. It was proposed to offer evidence of a usage on the Thornhill Estate that in all lettings it should be understood that the tenants should keep one-third of their farms arable and two-thirds in grass and pay £5 an acre on leaving, for any excess beyond the proportion of arable over grass. Martin B refused to admit the evidence, it not appearing that the plaintiff was not cognizant of the usage. On a motion for a new trial, it was contended that the evidence was admissible on the same principle as that on which the evidence of the "custom of the country" is admitted. But Pollock, C.B., replied to the contention: "No. The law takes cognizance of the divisions of the country into counties or parishes which are legal and public divisions; but not into properties or estates which are purely private in their nature. Estates may be very small and if large are only accidentally so. It would be impossible to draw any legal distinction between an 'estate' of 100 acres and 100,000, and there would be no legal presumption of notoriety arising from the fact of usage as to terms of letting a particular estate. *Non Constat* that the party becoming a tenant for the first time would hear of it." And eventually the whole Court held that the evidence was clearly inadmissible, since it was as to the practice of a particular person on letting his farms—a practice not proved to have been known to the tenant.

No doubt the present case is distinguishable from those above cited, for while in them the person, who was sought to be bound by the practice, was a party who originally entered into the contract, here he is an assignee for value. But that distinction makes the

(1) 26 L.J. Exch., 220.

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appellant's position only more onerous. For it is clear that the party relying on the practice should show before an assignee for value is held affected by the practice, not only that it originally entered into and formed a part of the contract, but also that the assignee, and if there have been more assignments for value than one, every prior assignee was, before he took the assignment, aware of that fact. To hold otherwise would, it is obvious, often result in injustice to assignees for value, who are certainly liable to be misled as to the nature and extent of their obligations under grants or contracts assigned to them, the written instruments evidencing which (like exhibit I in the present case) contain no reference to the practice relied on and the incidents said to be annexed thereby. Such being the rule applicable to the appellant's case, as presented in this Court, we must hold that the appeal fails, since it is not even alleged by the appellant that the respondent had knowledge that the practice formed part of the contract. It is therefore unnecessary to enter into the other questions as to the existence of the practice and as to its forming part of the contract.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

SANGILI VEERA PANDIA CHINNA TAMBIAH AND ANOTHER
(PLAINTIFFS), APPELLANTS,

1897.
[July 5, 6, 9.]

v.

SUNDARAM AYYAR AND OTHERS (DEFENDANTS NOS. 1 to 3),
RESPONDENTS.*

Madras Forest Act, ss. 10 and 11—(Claim to uninterrupted flow of natural stream—Jurisdiction of Forest Settlement officer.

A Forest Settlement officer appointed under section 4 of the Madras Forest Act, 1882, has, under sections 10 and 11 of that Act, jurisdiction to decide a claim by a riparian owner to the uninterrupted flow of the water of a natural stream.

APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Tinnevely, in Original Suit No. 40 of 1893.

* Appeal No. 191 of 1895.

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VEERA
PANDIA
CHINNA
TAMBIAR
v.
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AYYAR.

The plaintiff, the Zamindar of Sivagiri, brought this suit to establish his right to the uninterrupted flow of a natural stream called Kattar or Pedukulam. This stream flowed through Government land for some distance, and then, after flowing through the plaintiff's zamindari, emptied itself in a tank in one of plaintiff's villages.

The plaintiff complained that at a certain point in the course of the stream the defendants had recently cut a new channel which had the effect of diverting some of the water to a tank situated on Government land; and he claimed that he was entitled to an uninterrupted flow of the stream. The defendants denied the plaintiff's right to an exclusive use of the water and asserted that at the spot where the plaintiff alleged the cutting of a new channel a stream had, since the time of the ayacut, branched off to feed the tank on Government land.

The defendants also relied on a decision of the Forest Settlement officer as constituting a bar to the present suit under Madras Act V of 1882. In 1886 a preliminary notification was issued under section 4 of that Act, declaring that it was proposed to constitute a reserve forest. A part of the river in question, including the point at which the plaintiff alleged that a new channel had been cut, lay within the boundaries of the forest proposed to be reserved. In response to an invitation under section 6 of the Act by the Forest Settlement officer, plaintiff presented a claim through his agent. The nature of the claim was stated in Exhibit XI:—

"Claimant's agent states that the claim relative to the feeders of Pedukulam is that the stream sweeping the base of Moonji Malai on either side should be allowed to be repaired by the claimant, that the repairs he refers to are the removal of stones, sand, trees and rubbish, and that Kottayur Karnam Padagalin-gam Pillai, Muthusami Muppan and Sundara Teven should be examined on his behalf."

"The District Forest officer admits the claimant's right to the water that flows naturally by the two natural streams into his tank without prejudice to the water that flows naturally into other channels that branch from the two natural streams in question."

"The claim to the natural flow of water into the tank is admitted by the District Forest officer. Claimant has produced evidence to show that the streams feed no other irrigation work

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"than the claimant's Pedukulam tank. This is disproved by evidence offered by the District Forest officer, from which it appears that there are branches from the natural streams feeding other tanks belonging to Government."

"However that may be, the claimant's right to the water that flows naturally into his tank without prejudice to what may naturally flow into other channels is valid. To this extent, therefore, the claimant's right is admitted and recorded under section 11 of the Forest Act."

The Subordinate Judge dismissed plaintiff's suit.

Plaintiff appealed.

Ramakrishna Ayyar and *Seshachariar* for appellant.

The Government Pleader (*Mr. Powell*) for respondent No. 3.

Pattabhirama Ayyar for respondent No. 1.

Sivarama Ayyar for respondents Nos. 1 and 2.

JUDGMENT.—The question in this appeal relates to the rights of the parties to the use of the natural stream called Kattar or Pedukulam.

The stream rises in, and flows through, Government lands, before it empties itself into the Pedukulam tank, which is situated within the zamindari of the plaintiff.

The defendants Nos. 1 and 2 are persons who hold land under Government, which land is now partly irrigated by a channel taken off from the said stream within the limits of the Government land above the zamindari.

The third defendant is the Secretary of State for India in Council.

Plaintiff sues to establish his exclusive right to the waters of the stream and for an injunction to restrain the defendants from in any way interfering with that exclusive right.

This claim to exclusive right to the water was put forward before the Forest Settlement officer in 1886, and was by him disallowed after due enquiry under Act V of 1882 (The Madras Forest Act).

The plaintiff did not appeal against that decision, and it therefore became final.

The Subordinate Judge, therefore, held that the plaintiff was precluded from re-agitating the question in this suit.

The plaintiff, as appellant before us, contends that the Subordinate Judge was in error, on the ground that the Forest

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Settlement officer had no jurisdiction to give an adjudication on the question. The appellant's argument is that the exclusive right which he now claims over the water is not one of those rights which are specified in section 10 or 11 of the Act, and in regard to which alone the Forest Settlement officer had jurisdiction. We cannot accept this contention. As a mere riparian proprietor the plaintiff could only have a right to the lawful use of the water flowing through his land subject to the similar rights of other riparian proprietors, but his claim to the exclusive use of the water shows that he claimed more than the rights of a riparian proprietor. Now a claim to use the water of a natural stream in a manner not justified by natural right is undoubtedly a claim to an easement. (Gale on Easements, p. 20, 6th edition.)

In other words, the right claimed by the plaintiff was, in the language of Lord Watson in *Dalton v. Angus*(1), "a right of property in the owner of the dominant tenement—not a full or absolute right—but a limited right or interest in land which belongs to another whose *plenum dominium* is diminished to the extent to which his estate is affected by the easement."

It seems, therefore, clear that the right claimed by the plaintiff was a right in respect of water flowing in a defined channel on Government land, that is of a water-course, and, therefore, within the jurisdiction of the Forest Settlement officer under section 11.

It is contended by the appellant that the rights of way, pasture and forest produce referred to in clauses (a), (c) and (d) of the section are rights to be exercised on the land itself, and that, by analogy, the right to a water-course referred to in clause (b) must be of a similar restricted kind. There is, in our opinion, no ground for such a limitation, but even if it were otherwise, the right which the plaintiff claims was such as falls within the words "a right in or over any land" in the first line of the section, and was, therefore, a right in respect of which the Forest Settlement officer had jurisdiction to adjudicate under section 10.

In a word, the right claimed was one on which the Forest Settlement officer had a right to adjudicate either under section 10 or section 11, and in either case, the appellant's objection that he had no jurisdiction fails. The result is that on this ground

alone the decree of the Subordinate Judge dismissing the suit must be upheld.

It was, however, urged that even if the plaintiff had not an exclusive right to the water of the stream, he had a right as a lower riparian proprietor to obtain an injunction to restrain the defendants from using the channel inasmuch as such user was in excess of the third defendant's right as a higher riparian proprietor. In regard to this we observe that neither in the plaint, nor when framing issues, did the plaintiff rely on his rights as a riparian proprietor, or raise any issue as to whether the defendants had used the water in a manner not justified by their riparian rights, and the question has not been tried. Considering how long the matter has been in dispute we do not think we should be justified in allowing the plaintiff to raise at this stage a fresh issue of fact which he might and ought to have raised in the Lower Court.

We must, therefore, dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

RAGAVENDRA RAU AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

JAYARAM RAU (PLAINTIFF), RESPONDENT.*

Hindu Law—Marriage—Prohibited degrees.

A marriage between a Hindu and the daughter of his wife's sister is valid.

APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in Original Suit No. 41 of 1893.

Suit for partition by the adopted son of one Narasinga Rau against the undivided nephew of the latter.

The facts of this case sufficiently appear from the judgment.

Sankaran Nayar and Narayana Rau for appellants.

Bhashyam Ayyangar, Pattabhirama Ayyar and Shadagapachariar for respondent.

JUDGMENT.—That the late Narasinga Rau's widow Seshammal did in fact adopt the respondent as the son of her husband was

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* Appeal No. 111 of 1896.

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practically admitted on behalf of the appellants, the first of whom is Narasinga Rau's undivided nephew and the second that appellant's son, a minor. It was, however, contended on their behalf that Narasinga Rau did not authorise Seshammal to make the adoption and even if it is found that he did so authorise her, the adoption is invalid in consequence of the relationship which existed between Narasinga Rau and the natural mother of the respondent.

Now as to the authority, we are satisfied that the evidence on the point adduced on behalf of the respondent fully establishes that a few days before his death, Narasinga Rau gave Seshammal power to take the respondent in adoption. The testimony of the witnesses who speak to this point is highly probable. It is clear that, for several years before Narasinga Rau died, both he and Seshammal had been on unfriendly terms with the first appellant. It appears also that since the time the male child which Seshammal bore to Narasinga Rau died about the year 1888, the latter had been desirous of adopting a son. Narasinga Rau's letter, exhibit Q, the genuineness of which there is no reason to doubt, furnishes cogent evidence of Narasinga Rau's anxiety to secure a boy for adoption. And another strong circumstance in favour of the view that Narasinga Rau had empowered his wife to adopt is the first appellant's omission to impeach the authority when, not long after Narasinga Rau's death, it was set up in an enquiry before the Tahsildar with reference to the mutation of names in the registry relating to the lands in litigation. Though the first appellant's attention was pointedly drawn to the contents of exhibit B, a deposition given by the natural father of the respondent, before the Tahsildar wherein it was distinctly asserted that Narasinga Rau had authorised Seshammal to adopt a son; the first appellant took no exception to that assertion, though if the evidence now adduced on his behalf were true, he must have known that the claim that Narasinga Rau had given such authority was totally unfounded.

We, therefore, concur with the Judge's finding that the authority set up is true.

Next as to the validity of the adoption so far as were able to follow the appellants' Vakils' arguments on the point, the chief contention was this—

The respondent's natural mother, being Seshammal's sister's daughter, could not, under the Hindu law, have been lawfully

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married to Narasinga Rau, and therefore the respondent could not have been validly adopted as his son. It being the settled law of this Court, except where there is evidence of special usage to the contrary, that the natural mother of the boy to be adopted, should be a person, who, in her maiden state, might lawfully have been married to the man for whom the adoption is to be made, the question for determination is whether a Hindu is, by law, precluded, as the appellants contend, from marrying his wife's sister's daughter. In support of this contention we were not referred to any text either in the *smritis* or in the leading commentaries. The only text, to which our attention was drawn on behalf of the appellants, is to be found in Aswalayana's 'Grihya Parisishta' which runs thus: "*Viruddha Sambandha* is that sambandhi (relation) "which is *viruddha* (contrary or improper) owing to the relationship (existing) between the bride and the bridegroom (before their marriage) being similar to that of a father or mother. As "for instance the daughter of a wife's sister (and) the sister of the "paternal uncle's wife." (Mandlik's 'Hindu Law,' p. 484.) A glance at the numerous rules, laid down by the ancient Hindu legislators with reference to the selection of a bride, is enough to show that they are, with very few exceptions, mere rules of caution and advice. Now does the passage, relied on by the appellant, belong to this class of hortatory texts, or does it lay down a rule of law rendering a marriage contrary to it unlawful? That it belongs to the former class is evident from the fact that none of the well-known authoritative commentaries prohibit the marriage of a wife's sister's daughter—a fact which by itself is sufficient to render it to the duty of the Courts to decline to accept the text in question as laying down an imperative rule. Nor is authority wanting to support this view. In Kulluka Bhatta's remarks on Manu III, 6 to 11, referring to the numerous minor objections to be avoided in selecting a bride, the commentator in terms points out that a violation of none of the rules contained in them affects the legality of the union. (Gurudass Bannerjee's 'Marriage and Stridhanam,' p. 56.) But in his comments on verse 5 of the same chapter, which deals with the really forbidden marriages between *Sagotras* and *Sapindas*, he observes thus: "In the matter of marriage, "as it has been ordained in this text, 'He who inadvertently marries "a girl sprung from the same original stock with himself (*Sagotra*) "and so forth must support her as a mother' and as it has been said

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"(by certain legislators) that if girls of the same *gotra* and so forth "be taken in marriage they must be deserted and that penance must "be performed if a marriage be contracted with a girl of the same "*gotra*, consequently together with those, the girls related as "mother's sapindas do not also become wives." ('Vyavastha Chandrika,' Vol. II, p. 475.) These observations clearly lead to the inference that marriages are to be held to be unlawful only in cases, as to which desertion of the girl and the observance of penance for atoning the offence committed in entering into the prohibited alliance are laid down by accepted authorities. But it is not pretended that any authority prescribes that if a man marries his wife's sister's daughter he must abandon her and perform penance. Further, nearly all the recent important text writers, who have considered the matter, are agreed that a marriage between a man and his wife's niece is valid.

Dr. Gurudass Bannerjee in his work on 'Marriage and Stridhanam' already cited, states that the law "does not prohibit "marriage with the wife's sister or even with her niece or her aunt" (p. 69). Syama Charan Sircar in the note to Vyavastha, 712 of the 'Vyavastha Chandrika,' wherein he states the substance of the authorities as to void marriages excludes from that category unions such as those described by him in Vyavastha, 698, inclusive of that between a man and his wife's sister's daughter (Vol. II, pp. 475 and 463). Mr. Mandlik in his edition of 'Vyavahara Mayuka and Yajnavalkya' observes: "As regards *Viruddha Sambandha* they "are permitted as a matter of course." (Appendix, p. 415.) Golap Chunder Sircar in his work on 'The Hindu Law of Adoption' expresses himself thus: "But be it specially noticed that no "marriage is invalid on the ground of relationship being incon- "gruous. In addition to the two instances mentioned in 'Grihya "Parisista' of Aswalayana there are other passages prohibiting on "the self-same ground the marriage by a man of his step mother's "sister, her brother's daughter and his children's daughter as "well as the preceptor's daughter; but however improper such "marriages may be, they are nevertheless valid. Such marriages are "generally contracted by high-class Brahmans of Bengal who are "compelled by the restrictions imposed by Kulinism to choose their "wives from a certain limited number of families" (p. 319). Lastly Jogendra Nath Bhattacharya expresses substantially the same view in his commentaries on Hindu Law. He writes "A text

'of Baudhayana and a passage from 'Grihya Parisista' are cited "in the Niraya Sindhu which excludes the following:—

- "(1) Stepmother's sister and sister's daughter.
- "(2) Paternal uncle's wife's sister.
- "(3) Paternal uncle's wife's sister's daughter.
- "(4) Wife's sister's daughter.

"The texts which exclude these are neither cited nor commented upon by Raghunandhana. In practice no hesitation is felt in this part of India in marrying paternal uncle's wife's sister. Marriage with stepmother's sister takes place sometimes in Bengal. Instances of marriages with wife's sister's daughter are also not altogether unknown in Bengal, though Hindu sentiment is very strong against these marriages." (2nd edition, p. 95.)

With reference to this concluding observation of Mr. Bhattacharya regarding the sentiments of the people as to the propriety of such marriages, it may perhaps be pointed out that there is little to indicate that these marriages are disapproved of by the members of any section of the community in this part of India. Be this however as it may, the unimpeachable evidence, adduced on behalf of the respondent, shows beyond the shadow of a doubt that marriages between a man and his wife's sister's daughter are common among the various sections of the Brahmin community and are regarded by all as perfectly valid. It is necessary to refer to this evidence briefly. The specific instances of marriages spoken of by the witnesses took place in various parts of the Presidency widely separated from each other, viz., the following eight districts:—Nellore, Madras, North Arcot, South Arcot, Tanjore, Trichinopoly, Coimbatore and Madura. The Honourable Mr. N. Subba Rao belonging to the Madhwa sect, a Vakil of this Court, stated that his own mother's sister was married to a person who had previously married that lady's maternal aunt. The witness also stated that his paternal grandfather, after the first wife's death, married that wife's sister's daughter and that the marriages, spoken of by him, took place long ago. These cases probably belong to the Nellore district. Mr. V. C. Desikachariar, an Ayyangar and a practitioner of this Court, residing in Madras, stated that his mother-in-law, who is his father-in-law's second wife, is the daughter of her husband's first wife's sister. The witness added that the late Mr. V. Sadagopacharlu, who was a very distinguished Vakil of this Court, had married the sister of his (Sadagopacharlu's)

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paternal uncle's wife and this took place long ago. Krishna-swami Ayyar, a Smartha Brahmin of Chittoor in North Arcot, deposed that his father married about twenty-five years ago, as his second wife, the witness's aunt who was the sister of the witness's mother. Ramachandra Ayyar, a Smartha Brahmin of Chidambaram in South Arcot, stated that his fourth and present wife is the daughter of his deceased third wife's sister and that the marriage took place in 1888. Ramakrishna Dikshathar, another Smartha Brahmin also from South Arcot, said his second wife is his first wife's sister's daughter and that he was married thirteen years ago. Mr. Govinda Rao, who is of the Madhwa sect and who is employed as Cirkil under the Collector of Tanjore, stated that he is married to his deceased wife's sister's daughter. P. Srinivasa-chariar, an Ayyangar, also belonging to the same district, stated that he had married the sister of Dewan Bahadur Srinivasa Raghava Ayyangar, the present Dewan of Baroda, and that when she died, he, the witness, married her sister's daughter. Mr. Srinivasa Rao, a Madhwa gentleman now in Bangalore, gave evidence to the effect that on the death of his first wife, the late Raja Sir T. Madhava Rao's daughter, the witness married her sister's daughter. Dewan Badadur Raghoonatha Rao stated that, in addition to two instances already referred to, viz., those of Govinda Rao of Tanjore and Srinivasa Rao of Bangalore who are both related to him, he knew many cases of a man marrying the niece of his wife. Ramachariar, who is a Madhwa too, spoke to having been present at seven or eight such marriages either in the Trichinopoly, Coimbatore or Madura district, and added that about 18 or 19 years ago he himself married his deceased wife's sister's daughter. Krishna Rao, the District Munsif of Kulittalai, stated that a sister of his and a daughter of another of his sisters were successively married to the same man in Coimbatore. Nearly all the witnesses affirmed positively that no exception whatever was at any time taken to any of the marriages spoken to by them.

On the part of the appellants nothing has been really urged to rebut the irresistible inference arising from such widespread usage as that established by the evidence just noticed, in favour of the validity of the marriages which the text of Aswalayana condemns on the ground of incongruous relationship.

We have, therefore, no hesitation in holding that the said text is not mandatory and that the appellant's contention founded thereon is entirely unsustainable.

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We think we are not precluded from arriving at this conclusion by the reference made to the above text in *Minakshi v. Ramanatha*(1). It would seem that on the strength of the statement in the *Dattaka Mimamsa* that a marriage between the persons mentioned in the text in question was a prohibited connection, it was assumed by the Court that the text was mandatory. But whether the text was mandatory or merely hortatory was not a matter for determination in that suit, and therefore the Court's observations cannot be treated as a binding decision on the point.

The only other objection taken to the legality of the adoption rested on the fact that the adoptive mother Seshammal is the cousin of the natural father of the respondent. But this contention also is untenable; since it has been ruled in this Court that the adoption of a son of even a wife's brother is good (*Sriramulu v. Ramayya*(2)). It is scarcely necessary to say that it is immaterial in such a case whether the adoption is made by a man himself or by his widow after his death; for the adoption is for him.

We must, therefore, confirm the decree of the District Judge and dismiss the appeal with costs.

APPELLATE CIVIL.

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

VELU GOUNDAN (PLAINTIFF), APPELLANT,

v.

KUMARAVELU GOUNDAN AND OTHERS (DEFENDANTS),
RESPONDENTS.*

VELU GOUNDAN (PLAINTIFF), PETITIONER,

v.

KUMARAVELU GOUNDAN (DEFENDANT), RESPONDENT.*

*Suit for partition of family property—Valuation of, for purposes of jurisdiction—
Suits Valuation Act, 1887—Court Fees Act, 1870, s. 7, clause (iv) b.*

In a suit by a member of a joint Hindu family praying for a partition of the family property and for the delivery to the plaintiff of his share, the value of the

(1) I.L.R., 11 Mad., 49.

(2) I.L.R., 3 Mad., 15.

* Appeal against Order No. 98 of 1896 and Civil Revision Petition No. 74 of 1896.

1896.
November
27.
December
10.

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suit for the purposes of jurisdiction is the amount at which the plaintiff values his share.

APPEAL against the order of C. Gopalan Nayar, Subordinate Judge of Madura (East), directing the return of the plaint presented by appellant for presentation to the proper Court, and petition under section 622 of the Code of Civil Procedure praying the High Court to revise the order of W. Dumergue, District Judge of Madura, in Civil Miscellaneous Appeal No. 37 of 1895, confirming the order of J. S. Gnanyar Nadar, District Munsif of Manamadura, in Original Suit No. 220 of 1895.

Plaintiff brought this suit originally in the Court of the District Munsif for partition alleging that the property to be divided was the property of a joint Hindu family consisting of himself, his father, his stepmother and the son of his stepmother. The following were the prayers of the plaint:—

“To divide and deliver to the plaintiff one-third share in the A “scheduled properties 1 to 29 by casting chits with strict regard “to the nature and fertility of the lands;

“To make the defendants give to plaintiff one-third share in “the B scheduled property 1 to 21 or pay the value thereof;

“To order the defendants to pay plaintiff the loss for fasli “1304 and costs of the suit together with further loss and to give “decree with other reliefs as the Court may deem fit to grant “considering the nature and circumstances of the case.”

In the plaint the plaintiff valued his share of the property at Rs. 1,996-4-0.

The District Munsif held that he had no jurisdiction, because that was determined by the value of the whole family property, which exceeded Rs. 4,000, and not by the value of the share claimed. In support of this position, the District Munsif quoted the rulings in *Vydinatha v. Subramanya*(1), *Khansa Bibi v. Syed Abba*(2), *Ramayya v. Subbarayudu*(3), *Krishnasami v. Kanasabai*(4).

The plaint was thereupon presented to the Subordinate Court of Madura (East), and the Subordinate Judge also returned the plaint for presentation to the proper Court on the ground that “section 8 of the Suits Valuation Act, read with clause

(1) I.L.R., 8 Mad., 235.

(3) I.L.R., 13 Mad., 25.

(2) I.L.R., 11 Mad., 140.

(4) I.L.R., 14 Mad., 183.

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“(iv) b of section 7 of the Court Fees Act, would make the value “of the suit both for Court fees and jurisdiction to be the value of “the plaintiff’s share, which, he says, is Rs. 1,996-4-0,” and that the suit was, therefore, within the District Munsif’s jurisdiction.

The plaintiff then appealed to the District Judge against the District Munsif’s order alone. The District Judge held that the order of the District Munsif was correct and dismissed the appeal. The plaintiff now filed a petition under section 622 of the Civil Procedure Code praying for the revision of order of the District Court, and filed an appeal against the order of the Subordinate Judge.

Sivasami Ayyar for appellant.

Respondents were not represented.

JUDGMENT.—Plaintiff, a member of an undivided Hindu family, sued for partition and delivery to him of his one-third share of the joint family property.

The value of the share claimed was below Rs. 2,500, but the value of the whole property exceeds Rs. 4,000.

The District Munsif, following the ruling in *Vydinatha v. Subramanya*(1), declined jurisdiction and returned the plaint for presentation to the proper Court. His action was upheld on appeal to the District Judge. The plaintiff meantime presented his plaint to the Subordinate Judge, who also declined jurisdiction and returned the plaint to be presented to the proper Court. The Subordinate Judge held that, under section 7, clause (iv) b of the Court Fees Act, the suit should be valued for purposes of Court fees at the relief sought in the plaint, viz., at the value of the share claimed, which was less than Rs. 2,500; and that, under section 8 of the Suits Valuation Act (VII of 1887) the valuation for purposes of jurisdiction should follow and be the same as that for Court fees, and that, therefore, the suit was within the jurisdiction of the District Munsif.

The view of the Subordinate Judge is, in our opinion, correct, and in accordance with the law as laid down in the Suits Valuation Act, which it seems to us expressly altered the law as laid down in *Vydinatha v. Subramanya*(1).

Some doubt was sought to be thrown on this view by the fact that in three cases *Khansa Bibi v. Syed Abba*(2), *Ramayya v.*

(1) I.L.R., 8 Mad., 235.

(2) I.L.R., 11 Mad., 140.

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Subbarayudu(1), *Krishnasami v. Kanakasabai*(2) all decided after the passing of the Suits Valuation Act—the decision in *Vydinatha v. Subramanya*(3) was treated as still containing the law applicable to the question.

In those cases, however, no reference was made to section 8 of the Suits Valuation Act, nor did they directly declare that the ruling in *Vydinatha v. Subramanya*(3) still governs cases within its scope.

Moreover in the recent case of *Chakrapani Asari v. Narasinga Rau*(4) this Court expressly approved the view that “when the suit relates to co-parcenary 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 this Suits Valuation Act and 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.” We think that these words correctly set forth the law as it now stands. The present suit, therefore, being for a share of the co-parcenary, and not involving a general partition, and the share being less than Rs. 2,500 in value, is within the jurisdiction of the District Munsif. We, therefore, confirm the order of the Subordinate Judge and dismiss this appeal, and in exercise of our revisional jurisdiction, we set aside the orders of the District Judge and of the District Munsif, and direct the District Munsif to receive the plaint and deal with it according to law. Costs throughout will be provided for in the decree of the District Munsif.

(1) I.L.R., 13 Mad., 25.

(3) I.L.R., 8 Mad., 235.

(2) I.L.R., 14 Mad., 183.

(4) I.L.R., 19 Mad., 56.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

KAMARAZU AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

1896.
December 10.

v

VENKATARATNAM (PLAINTIFF), RESPONDENT.*

Will by a Hindu—Construction of—Gift to daughter—Daughters’ estate.

A Hindu by will bequeathed to his daughters his separate property to be enjoyed by them ‘as they pleased’ :

Held, that the daughters took an absolute estate.

APPEAL against the decree of G. T. Mackenzie, District Judge of Godavari, in Original Suit No. 12 of 1894.

The plaintiff brought this suit to declare that he was entitled to certain monies in the hands of the defendants after the death of the widow and daughter of one Mallaya.

The monies in question were the proceeds of certain jewels which had been given by Mallaya’s widow and daughter to the defendants for charitable purposes.

The plaintiff claimed to be entitled to the monies as the reversioner to the estate of Mallaya, by whom he had been adopted, and with whom he had subsequently effected a partition.

The defendants contended that the jewels were the stridhanam of Mallaya’s widow and daughter, but on this point no decision was given either in appeal or in the lower Court, it being assumed by the Courts that the jewels had been inherited under the will of Mallaya. The will of Mallaya, after reciting amongst other things that provision had been made for the maintenance of his eldest daughter-in-law, proceeded :—

“ Out of the rent of the bazaar godown, the expenses relating to the repairs, &c., of the said godown and also the maintenance allowance which I have been paying every year to my eldest daughter-in-law, Nadipilly Ademmah, is deducted, and the balance of rent is divided and taken in equal shares by myself and my adopted son—I taking one half, and he the other half—in accordance with the deed of partition entered into between myself and my adopted son. It is hereby arranged

* Appeal No. 181 of 1895.

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"that my three daughters mentioned above, should, after my death, receive the amount relating to the half share I have been receiving. In the matter of the house in which (I am) residing, my adopted son Venkataratnam should enjoy one half and my daughters the other half, as mentioned in the *Pharikhat*, after the death of myself and my wife. My three daughters, viz., the said Kankatala Bangaramma, Korangi Rattamma and Devata Bapanamma, should, from the date of my death, take possession of the whole of my moveable and immoveable property—the whole of the moveable property relating to the Shroff trade carried on by me and referred to above, as also all the transactions, accounts, &c., relating thereto and also the said immoveable property—and enjoy the same happily as they please. The aforesaid people, that is to say, my daughters-in-law and my adopted son, have no right whatever to cause any obstruction in respect of my property. Even if they cause any, they shall not be valid. My daughters aforesaid should properly attend to the wants of myself and my wife till our death. My three daughters aforesaid should, after my death, take possession of *Pharikhat* and other documents which are with me, as also the aforesaid property, and manage the same as they please. I caused this will to be written while I am steady in mind and of my own free will. This should take effect from the date of my death."

Of the three daughters, two had died before the gift of the jewels in question.

The District Judge said: "The will which is now admitted by both parties leaves the father's property to his wife and daughter to be enjoyed as they please. Notwithstanding these words, I hold that this will bestow nothing more than the usual widow's and daughters' life-interest. If the property in question were land, they could not alienate it. Defendants, however, contend that this is movable property at the disposal of these ladies. I cannot accept this contention. It is not alleged that this Rs. 4,000 was taken from the income of the estate. As the greater part of it was jewels, it seems to have been part of the corpus of the estate. I am of opinion that not even the charitable object of the alienation justifies the alienation, and that plaintiff is entitled to the declaration which he solicits." And in the result gave a decree for plaintiff.

Defendant appealed.

Subba Rao and Gopalasami Ayyangar for appellants.

Mr. Smith for respondent.

JUDGMENT.—The terms of the will read in the light of the deed of partition referred to therein clearly indicate that the intention of the testator was to confer on his daughters an absolute, and not a limited, estate, in so far as the moveable property which was at his absolute disposal was concerned. There is nothing in the instrument or in the surrounding circumstances, which could lead one to think that the intention was to limit the gift to a daughter's estate, or in, other words, simply for their lives. The daughters thus having taken an absolute estate, the alienation sought to be impeached was within their rights. We must, therefore, overrule the view taken by the District Judge, and in reversal of his decree we dismiss the suit with costs throughout. This involves the dismissal of the memorandum of objections also.

APPELLATE CIVIL.

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

THILLAI CHETTI (DEFENDANT No. 1), APPELLANT,

v.

RAMANATHA AYYAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Mortgage to a co-owner—Suit to redeem—Right of one or more co-owners to redeem in absence of partition.

When several owners of undivided shares in immovable property mortgage their share with possession to another undivided sharer, a smaller number than the whole body of co-mortgagors cannot sue to redeem the mortgage until there has been a partition of the property mortgaged among the several co-owners. *Mamu v. Kuttu*(1) followed; *Naro Hari Bhawe v. Vithalbhat*(2) distinguished.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in Appeal Suit No. 803 of 1894, confirming the decree of S. Authinarayana Ayyar, District Munsif of Mana Madura, in Original Suit No. 58 of 1894.

* Second Appeal No. 1008 of 1895.

(1) I.L.R., 6 Mad., 61.

(2) I.L.R., 10 Bom., 648.

KAMARAZU
v.
VENKATA-
RATNAM.

1896.
November
24, 27.

THILLAI
CHETTI
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AYYAN.

The plaintiff and defendants were the undivided co-sharers of a Dharmasanam village. The predecessors in title of the plaintiff and of defendants 2 to 44 had mortgaged with possession their shares to the predecessors in title of the first defendant on the 20th August 1840. The plaintiff now sued to redeem the mortgage and deposited in Court the full amount of the mortgage, and he also prayed for a decree directing the first defendant to deliver up possession of the land to the plaintiff on behalf of all the sharers.

The first defendant contended that the plaintiff lands appertained to 120 pangu samuthayam. Out of the said 120 pangus, 28-8-6 pangus belonged to him, 1 $\frac{3}{4}$ and odd pangus to the plaintiff, and the rest to the other defendants. That the plaintiff, who owned only a few pangus, had no right to redeem the mortgage of the plaintiff lands for the village samuthayam from the first defendant who owned more pangus. That the other pangalis had not given the plaintiff permission to redeem the mortgage, and that though it should be found that the plaintiff had a right to redeem the mortgage, the plaintiff had no right to pay the share due for the first defendant's pangu, and to demand possession from the first defendant so far as the first defendant's share of the pangu was concerned.

Of the remaining 43 defendants, four supported the plaintiff's claim and 30 applied to be made plaintiffs, seven did not enter an appearance, and the remaining two entered an appearance, but did not contest the suit at the hearing.

The Munsiff passed a decree that, "on receipt of the mortgage money deposited in Court (Rs. 75-4-0), first defendant do put plaintiffs in possession of the mortgaged property with all title-deeds in his possession relating to the mortgaged property described in the plaint."

The first defendant appealed to the District Judge who dismissed the appeal, saying "with regard to the appeal it is contended that, under section 60, clause 4 of the Transfer of Property Act, the plaintiffs were entitled to sue for redemption of their shares only and not of the whole property. As the first defendant has not acquired the share of a mortgagor, the argument is clearly opposed to the law."

The first defendant appealed to the High Court on the following grounds:—

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AYYAN.

"The decrees of the Courts below are against the provisions of section 60, Transfer of Property Act.

"The Courts below erred in law in drawing a difference between a co-mortgagee and a co-owner.

"The Courts below failed to notice that the first defendant owned 28 shares out of the total number of 120 shares and he could not, therefore, be ousted from possession.

"The first defendant's ownership is distinctly raised in the second paragraph of his written statement and plaintiffs have not denied it.

"Even if the said right were disputed, the Courts below ought to have ascertained the extent of the shares belonging to the first defendant.

"The plaint has not been properly framed, and the Courts below ought to have dismissed the plaintiffs' suit."

Mahadeva Ayyar for appellant.

Natesa Ayyar for respondents.

JUDGMENT.—In this case the plaintiffs and defendants are the owners in shares of a certain village.

In 1840 the owners of the village mortgaged it to the first defendant's ancestor for Rs. 75-4-0. The plaintiffs sued to redeem the mortgage. The first defendant claimed to own the largest share of the village and objected to plaintiff's right to redeem the mortgage without the consent of the co-mortgagors. He specially objected to the plaintiff's right to redeem his (first defendant's) share of the mortgage. The District Munsif found that it could not be satisfactorily decided in the present suit to what share the first defendant was entitled, and on the strength of *Naro Hari Bhawe v. Vithalbhat*(1) decided that plaintiffs had a right to redeem the mortgage. He, therefore, decreed that, on payment of the mortgage money into Court, the first defendant should put the plaintiffs into possession of the mortgaged property with its title-deeds. In appeal before the District Court it was argued that, under clause 4 of section 60 of the Transfer of Property Act, the plaintiffs were entitled to redeem their own shares only, but not to redeem the whole property. The District Judge, however, held the argument to be invalid, "as the first defendant had not acquired the share of a mortgagor," and dismissed the appeal.

(1) I.L.R., 10 Bom., 648.

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AYYAN.

Against this decree the first defendant now urges this second appeal, and we think his plea is well founded. The decree is manifestly wrong and unjust since it requires the first defendant, who is not only the mortgagee, but also one of the chief owners of the property, to give up his possession of the property, including his own share, to the plaintiffs on payment of the mortgage money. No provision is made for securing to the first defendant or the other sharers of the village possession of their shares on their paying the plaintiff's their shares of the mortgage money, nor could any such provision be made in the present suit since their respective shares have not been ascertained and could not be conveniently ascertained in the suit. Thus the result of the decree would be to compel the first defendant and other co-owners and co-mortgagors to bring suits for the ascertainment of their shares and for the recovery of the same from the plaintiffs on payment of their contribution towards the mortgage money. This is the very evil which was pointed out and guarded against by the learned Judges who decided the case of *Mamu v. Kuttu*(1). There the fifth defendant was the purchaser of a share of the equity of redemption and was also the mortgagee in possession, and it was held that "to allow plaintiff to redeem the whole would enable him to get possession of the property to the exclusion of fifth defendant. Now, as fifth defendant is already in possession as assignee of the mortgagee and has also a share in the right to redeem, he cannot be required to surrender possession of the whole against his consent until plaintiff has, by a proper suit for partition, ascertained definitely to what shares in the property he and fifth defendant are, respectively, entitled.

"We cannot, therefore, allow a decree for redemption of the whole. A decree for redemption of a portion is equally impossible, for that would be to convert the suit into a suit for partition, which, without the consent of all the parties, could not be permitted."

That case is exactly on all fours with the present case and indicates the proper course for the plaintiffs to take if they desire to redeem the mortgage on their shares of the property. It is only necessary, in conclusion, to point out that the case *Naro Hari Bhawe v. Vithalbhat*(2) relied on by the District

(1) I.L.R., 6 Mad., 61.

(2) I.L.R., 10 Bom., 648.

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AYYAN.

Munsif proceeded on entirely different grounds. In that case the plaintiffs had a clear right to redeem the whole property at the time when they brought their suit, and the Court refused to allow that right to be defeated by the action of the defendants in purchasing a share in the equity of redemption *post litem motam*, but intimated that, if the defendants had acquired the share before suit, it would have been necessary to consider whether the ruling in *Mamu v. Kuttu*(1) should not have been followed. The District Judge also in the present case appears to have been under some misapprehension. He apparently thought that it was necessary for the first defendant to show that he had acquired the share of a mortgagor subsequent to the date of the mortgage. But that is not so. It is the possession of the twofold interest as mortgagee and mortgagor (prior to the plaintiffs' suit) that is of importance. First defendant had such twofold interest from the date of the mortgage, and the rule laid down by this Court in the case already quoted is clearly applicable.

We must, therefore, reverse the decrees of the Courts below and dismiss the plaintiffs' suit with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

VENKATANARASIMHA NAIDU (PLAINTIFF), APPELLANT,

v.

DANDAMUDI KOTAYYA (DEFENDANT), RESPONDENT.*

Landlord and tenant—Zamindar and raiyat—Relation between—.

A raiyat cultivating land in a permanently-settled estate is *prima facie* not a mere tenant from year to year, but the owner of the kudivaram right in the land he cultivates.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Gódvári, in Appeal Suit No. 253 of 1895, modifying the decree of S. Pereira, Acting District Munsif of Ellore, in Original Suit No. 100 of 1892.

The plaintiff was the Zamindar of Vallur, a permanently-settled estate, and the defendant cultivated land in that zamindary.

(1) I.L.R., 6 Mad., 61.

* Second Appeal No. 766 of 1896.

VENKATA-
NARASIMHA
NAIDU
v.
DANDAMUDI
KOTAYYA.

On the 4th March 1891 the plaintiff served on the defendant a notice to quit. The defendant did not quit the land, and in 1892 the plaintiff brought this suit to reject him. The District Munsif passed a decree in favour of the plaintiff. On appeal the District Judge, holding that the plaintiff had failed to prove that the defendant's tenancy had commenced since the date of the Permanent Settlement, reversed the decree of the District Munsif. Plaintiff appealed.

Pattabhirama Ayyar for appellant.

Ramachandra Rau Saheb for respondent.

JUDGMENT.—In this case the plaintiff, the holder of a permanently-settled estate, seeks, among other things, to eject the defendant from certain lands. Admittedly, the lands are situated within the plaintiff's estate and are subject to an annual assessment payable by the defendant to the plaintiff.

The decision of the case depends solely upon these facts, no other facts having been satisfactorily established by the evidence.

In this state of the case the lower appellate Court dismissed the suit in so far as the prayer for possession was concerned. On behalf of the plaintiff it was contended that the dismissal was erroneous, and that the error was caused by the lower appellate Court having wrongly thrown the *onus* of proof on the plaintiff. The argument in support of the contention was that upon the admitted facts, the finding must be that the defendant was a tenant from year to year; and as due notice to quit had been given, the tenancy had been determined before the date of the action and the defendant ought to have been ejected.

Section 106 of the Transfer of Property Act, to which reference was made on behalf of the plaintiff, does not apply to the case. If, however, there were a similarity between the relation of landlord and tenant in England and that subsisting here between the plaintiff and the defendant, the English rule embodied in that section, that a general occupation is an occupation from year to year would go far to support the contention for the plaintiff. But there is a very material difference between the relation of landlord and tenant in England and that of a zemindar and a ryot or cultivating proprietor, or, to speak more accurately, the person in whom, with reference to Government or its assignees, the right to occupy the soil for purposes of cultivation is to be taken as vested.

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Now a tenant, of course, derives his right from the landlord; and in the case of a person thus acquiring his title, the rule referred to is unquestionably a most equitable rule. For the theory as to the relation of landlord and tenant in England led to the view that, in the absence of proof to the contrary, every tenancy was to be taken to be a tenancy at will. In fact, such was the rule until the Judges altered it and laid down that general tenancies should be presumed to be, not tenancies at will, but tenancies from year to year; as was explained in *Doe v. Porter*(1), where Lord Kenyon pointed out that a tenancy from year to year succeeded to the old tenancy at will, which was attended with many inconveniences, and, in order to obviate them, the Courts very early raised an implied contract for a year and added that a tenant could not be removed at the end of the year unless he had received six months' previous notice, see *Doe. d. Martin v. Watts*(2). But sound and reasonable as this rule would be, if applied to cases in which the right of a defendant in possession is derived in a manner similar to that of a tenant in England, it cannot, on principle, be extended to cases in which the defendant's right is not so derived. Now, there is absolutely no ground for laying down that the rights of ryots in zemindaries invariably or even generally had their origin in express or implied grants made by the zemindar. The view that, in the large majority of instances, it originated otherwise is the one most in accord with the history of agricultural land-holding in this country. For, in the first place, sovereigns, ancient or modern, did not here set up more than a right to a share of the produce raised by raiyats in lands cultivated by them, however much that share varied at different times. And, in the language of the Board of Revenue which long after the Permanent Settlement Regulations were passed, investigated and reported upon the nature of the rights of ryots in the various parts of the Presidency, "whether rendered in service, in money or in kind and whether "paid to rajas, jagirdars, zemindars, poligars, mutadars, shro- "triendars, inamdars or to Government officers, such as tahsildars, "amildars, amins or thannadars, the payments which have always "been made are universally deemed the due of Government." (See the Proceedings of the Board of Revenue, dated 5th January 1818, quoted in the note at page 223 of *Dewan Bahadur Srinivasa*

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Raghava Ayyangar's 'Progress in the Madras Presidency'; See also paragraphs 75 to 78 of the exhaustive observations of the Board as to the relative rights of zamindars and raiyats in the Board's Proceedings of the 2nd December 1864 appended to the second report of the Select Committee on the Rent Recovery Bill, 1864, V, Madras Revenue Register at p. 153.) Therefore to treat such a payment by cultivators to zemindars as 'rent' in the strict sense of the term and to imply therefrom the relation of landlord and tenant so as to let in the presumption of law that a tenancy in general is one from year to year, would be to introduce a mischievous fiction destructive of the rights of great numbers of the cultivating classes in this province who have held possession of their lands for generations and generations. In support of the view that there is no substantial analogy between an English tenant and an Indian ryot it is enough to cite the high authority of Sir Thomas Munro. Writing in 1824, he observes: "the raiyat is certainly not like the landlord of England, but neither is he like the English tenant" (Arbuthnot's 'Selections from the Minutes of Sir T. Munro,' Vol. I, p. 234). And why is this so? It is for the simple reason that the rights of raiyats came into existence mostly, not under any letting by the Government of the day or its assignees, the zemindars, &c., but independently of them. According to the best Native authorities, such rights were generally acquired by cultivators entering upon land, improving it, and making it productive. As observed by Turner, C.J., and Muttusami Ayyar, J., in *Siva Subramanya v. The Secretary of State for India*(1), "Menu and other Hindu writers have rested 'private property on occupation as owner.'" And in *Secretary of State v. Vira Rayan*(2) the same learned Judges pointed out "according to what may be termed the Hindu common law, a 'right to the possession of land is acquired by the first person 'who makes a beneficial use of the soil.'" Hence the well-known division in these parts of the great interests in land under two main heads of the *melvaram* interest and the *kudivaram* interest. Hence also the view that the holder of the *kudivaram* right, far from being a tenant of the holder of the *melvaram* right, is a co-owner with him. Sir T. Munro puts this very clearly. He says: "A raiyat divides with Government all the rights of the 'land. Whatever is not reserved by Government belongs to him.

(1) I.L.R., 9 Mad., 285.

(2) I.L.R., 9 Mad., 175.

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"He is not a tenant at will, or for a term of years. He is not 'removable, because another offers more'" (Arbuthnot's 'Selections from the Minutes of Sir T. Munro,' Vol. I, p. 234; see also *Ibid*, p. 253). No doubt, the view of the majority of the Judges (Morgan, C.J., and Holloway, J., Innes, J., dissenting) in *Fakir Muhammad v. Tirumala Chariar*(1) was different. But in *Secretary of State for India v. Nunja*(2), Turner, C.J., and Muttusami Ayyar, J., stated that they saw strong reason to doubt whether the view of the majority in that case was right.

It thus seems unquestionable that *prima facie* a zamindar and a raiyat are holders of the *melvaram* and *kudivaram* rights, respectively. When, therefore, the former sues to eject the latter, it is difficult to see why the defendant in such a case should be treated otherwise than defendants in possession are generally treated, by being called upon, in the first instance, to prove that they have a right to continue in possession. One can see no other reason for making such a difference than that certain legislative enactments, especially those passed at the beginning of the century, refer to raiyats as tenants and to the payments made by them as rents. But considering that those enactments were intended for particular purposes and considering that Regulation IV of 1822 expressly declares that the actual rights of any of the land-holding classes were not intended to be affected by the earlier regulations, the phraseology of those enactments should not be taken to operate to the prejudice of persons between whom and zamindars the *prima facie* relation is only that between the holder of the *kudivaram* right and the holder of the *melvaram* right in a given piece of land as shown above. Consequently it is obvious that, in a suit like the present, the zamindar should start the case by evidence of his title to eject. In other words, he has to prove that the *kudivaram* right in the disputed land had been vested in him or his predecessors and that the land subsequently passed to the defendant or some person through whom he claims under circumstances which give the plaintiff a right to eject. This is clear from *Srinivasa Chetty v. Nanyunda Chetti*(3). See also *Appa Rau v. Subbanna*(4), and *Venkatacharlu v. Kandappa*(5). In the first mentioned case Muttusami Aiyar and Tarrant, JJ., said: "But

(1) I.L.R., 1 Mad., 205.

(2) I.L.R., 5 Mad., 163.

(3) I.L.R., 4 Mad., 174.

(4) I.L.R., 13 Mad., 60.

(5) I.L.R., 15 Mad., 95.

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"Viraman's (the then defendant's) tenancy has been found to be that of an ordinary pattadar, and we apprehend that such a tenancy, when there is no evidence of a contract as to its origin and duration, or that the *kudivaram* right vested in the mittadar (the then plaintiff) at any time, entitles the tenant to the right of occupancy for the purpose of cultivation determinable on the conditions prescribed by (Madras) Act VIII of 1865." The contention that the raiyat was merely a tenant from year to year was distinctly raised in the above case, but was virtually, if not expressly, overruled. We must likewise decline to accept the similar contention urged here on behalf of the plaintiff. It may, perhaps, be asked what is the nature of the holding of persons in the position of the defendant in the lands they hold, if they are not tenants from year to year. There can be no hesitation in replying to this question that in essence there is no difference between a raiyat holding lands in a zamindary village and one holding lands in a Government village (Arbuthnot's 'Selections from the Minutes of Sir T. Munro,' Vol. I, p. 254), and like the latter raiyat the former raiyat, in the absence of proof of contract or of special or local usage to the contrary, is entitled to occupy his lands so long as he pays what is due, and if he should commit any default in this or other respect, until he is evicted by the processes provided by law.

The decree of the lower appellate Court is right; the second appeal fails and is dismissed with costs.

The memorandum of objections is also dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

KRISHNA MENON (PLAINTIFF), APPELLANT,

v.

KESAVAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, s. 28, sched. II, art. 10—Civil Procedure Code—Act XIV of 1882, s. 214—Right of pre-emption asserted by one in possession under an otti mortgage in Malabar.

Land in Malabar was in the possession of the defendants and was held by them as otti mortgagees under instruments, executed in August 1873 and January 1876. The plaintiff having purchased the jenm right under instruments executed and registered in May and June 1877, now sued in 1893 for redemption:

Held, that the defendants' right of pre-emption was not extinguished under Limitation Act, section 28, and that they were not precluded from asserting it by article 10 owing to the lapse of time, and that Civil Procedure Code, section 214, was inapplicable to the case, because the persons asserting a right of pre-emption were in possession.

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of Palghat, in Original Suit No. 31 of 1893.

Suit brought to redeem an otti mortgage. The facts of the case were as follows:—

"The 45 parcels of land in suit belonged to the Naduvakat tarwad (the members of which have since been made parties to the suit as defendants Nos. 36 to 63). Nos. 1 to 21 were passed by Naduvakat Kunjunni Nair to the first defendant on a panayom of Rs 7,000 under a deed, dated 16th August 1873, and Nos. 22 to 45 under a similar deed, dated 26th January 1876. The defendants Nos. 2 to 11 are members of the first defendant's illom. Under two deeds, dated 14th May 1877 and 10th June 1877, the plaintiff purchased jenm title to the plaint lands excepting Nos. 19 and 21 from the Naduvakat tarwad."

The mortgagees asserted their right of pre-emption, and on this ground, among others, resisted the plaintiff's suit to redeem.

The Subordinate Judge dismissed the suit.

Plaintiff appealed.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar), Sankaran Nayar and Raman Menon for appellant.

1897.
March 15, 16,
17, 18.
April 29.

* Appeal No. 33 of 1896.

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Sundara Ayyar for respondents Nos. 4 and 6.

ORDER.—The plaintiff, as the purchaser of the jenm right in a number of plots of land including those in suit under exhibit B, dated 14th May, and exhibit C, dated 10th June 1877, sues to redeem from the defendants those held by them on mortgage under exhibits I and II, dated 6th August 1873 and 26th January 1876, respectively. In the Court below the parties were at issue, as to whether the mortgages were such as, according to the usage of Malabar, carried with them the right of pre-emption. But that is no longer disputed.

The principal question for determination is whether the defendants are precluded from asserting their right of pre-emption for all or any of the reasons urged on behalf of the plaintiff.

First, exhibits A and III, executed on the 10th June 1877 by the plaintiff and the first defendant, are relied on on behalf of the plaintiff as disentitling the defendants from insisting upon the right in question. Exhibit III is only a counterpart of exhibit A. After reciting the abovementioned mortgages to the defendants and the purchase of the jenm right by the plaintiff, the documents merely state that on the one part the first defendant agreed to receive in January-February 1878 from the plaintiff Rs. 17,000 due to him and the value of improvements at certain specified rates and to surrender the mortgaged property, and on the other part the plaintiff agreed to pay the mortgage amount and the value of improvements when the first defendant surrenders the lands. The plaintiff's case is that there were disputes between himself on the one side and the first defendant and his deceased younger brother Thuppan Nambudri on the other in respect of the actual amount due under exhibits I and II, as also about the period for which the defendants were entitled to hold the lands and that exhibits A and III were executed in settlement of those disputes.

The defendants' case is as follows:—No disputes existed, and no settlement was made as alleged for the plaintiff. But the plaintiff had entered into an agreement with his vendors to advance funds for carrying on certain litigation connected with the alienation of their family property made by their Karnavan, the consideration being that the plaintiff was to receive a share of the property. The sale-deeds B and C were executed in pursuance of the said arrangement. The plaintiff anticipated difficulties in getting the

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tenants in possession of the lands purchased to recognize the sales. On the day exhibits A and III were executed, the plaintiff informed the first defendant that if the latter (he being the holder of a considerable portion of the lands) signed a document like those in question, that would facilitate the plaintiff getting other tenants to recognize the plaintiff's purchase. The plaintiff distinctly assured the defendant that nothing would be done under the documents to the prejudice of the defendants' rights to the lands held by them, and the defendants' family would not be deprived of the possession thereof especially as they were situated right in front of their family house and therefore of special value to them. Relying upon such representation the first defendant signed the documents in question. The story told by the four witnesses, who support the version put forward on behalf of the plaintiff, is that, on the morning of the 10th June 1877, the first defendant, and his deceased brother Thuppan, of their own accord, met the plaintiff who was then staying in one Malliseri Nambudri's house and that the plaintiff, who had been till then contending that no more than Rs. 8,000 were due to the defendants, was induced by the plaintiff's second witness to agree to pay the whole amount and exhibits A and III were executed then and there. The Sub-Judge did not believe these witnesses. None of them is independent and the story itself in some material details is not very probable. In agreeing with the Sub-Judge's view that the evidence is not reliable, it is sufficient to advert to a few circumstances which throw discredit upon the testimony. Now, a very material part of the story told by the plaintiff's witnesses is that exhibit C was executed in the same place and about the same time as exhibits A and III. This is put forward obviously for the purpose of making the alleged settlement of disputes between the plaintiff and the defendant look a little probable inasmuch as in exhibit C, not only the validity but the reality also, of the debt of Rs. 10,000 due to the defendant under exhibit II is denied. But notwithstanding that the documents bear the same date, viz., 10th June 1877, it is certain that exhibit C was not executed as alleged by the witnesses who support the plaintiff. This is directly proved by another of his witnesses, viz., Nilukutti, an executant of exhibit C. For she says it was executed not in Malliseri Nambudri's house but in Naduvakat house, the residence of the vendors. Next some of the provisions in exhibit C itself point to the same conclusion. For, as already stated, the mortgage for Rs. 10,000, exhibit II,

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was questioned in exhibit C; yet the evidence of the witnesses supporting the plaintiff implies that all disputes between the parties had been settled before exhibit C was executed. What necessity was there, then, for inserting in exhibit C an elaborate protest against the debt which the plaintiff had, according to his witnesses, just then agreed to treat as perfectly good and valid? The clear inference is that exhibit C had come into existence before exhibits A and III, which were antedated as stated by the defendant, and that the present story that all were executed about the same time in the Malliseri house is false. Again in consenting, as the witnesses say, to pay so large a sum as Rs. 10,000 over and above what he supposed to have been really due, the plaintiff would surely have insisted upon an explicit statement being made in A and III, that the right of pre-emption possessed by the defendant was waived. Not only is that not the case but strangely enough the witnesses do not even say that the slightest allusion to the subject was made during the negotiations for the settlement of the disputes or at the settlement.

Lastly, though the first defendant was the senior member in his family, the evidence abundantly shows that the actual manager was the deceased Thuppan. It is said that this man was present at the execution of exhibits A and III. Why then was his attestation at least not secured? It is impossible to believe that so shrewd a man as the plaintiff would have failed to secure such evidence of Thuppan's assent, if Thuppan was really there. These few circumstances are enough to show that the witnesses supporting the plaintiff's case are not truthful. Turning to the evidence in support of the defence, the first defendant was examined as the first witness in the suit on behalf of the plaintiff himself, and distinctly supported the defence. The plaintiff had thus the fullest opportunity to contradict the defendants' statements, but he abstained from going into the box. There is, therefore, no good reason to question the uncontradicted evidence of the defendant supported as it is by that of his sixth witness, who also is an apparently trustworthy witness, and considering the position of the parties at the time the defendants' account is not improbable. The first defendant was then comparatively young about 25 or 26 years of age and, as his deposition shows, inexperience in business. The plaintiff however occupied the important position of a Sub-Judge (though he was not then employed as such) in the very district where the defendant was a resident. The representations and assurances given by a person of the

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plaintiff's circumstances in life to one in the first defendant's position would not have then appeared necessarily fraudulent. The informal character of exhibits A and III, each of which is self-styled a 'Memorandum,' coupled with the fact that no schedule of property was originally attached to the documents, would have made the plaintiff's statement that he did not intend to get the documents registered wear an appearance of truth, and naturally would have led the defendant to believe that the documents were meant to be used only for the purpose of facilitating plaintiff's dealing with the other tenants. We must therefore find upon this point in favour of the defendants and hold that they are not precluded by exhibits A and III from setting up their right of pre-emption. The second contention was that the defendants having failed to sue to enforce their right within the year prescribed by article 10 of the Limitation Act, the right was extinguished under section 28 of that enactment and could not therefore be set up as a defence in the suit. This contention is unsustainable. Now the defendants as 'otti' mortgagees have since the dates of the mortgages admittedly held possession of the lands to which the right of pre-emption attaches. If the defendants had as *plaintiffs* to enforce their right of pre-emption, it was absolutely unnecessary for them to pray for any possession. All they could have claimed was a decree directing that, on payment of the proper price, the right to redeem which the jenmis had and of which the plaintiff had become the assignee, be transferred to them.

But a mere right to redeem is not capable of possession within the meaning of section 28. That section contemplates suits, which a person who is kept out of property, admitting of physical possession, could have brought for such possession. It is true that the language employed in some of the decided cases in describing the nature of the right to redeem is not quite uniform. For example in *Chathu v. Aku*(1) it was stated to be a right of action only, while the leading case of *Casburne v. Scarfe*(2) lays down perhaps more correctly that the right was not a mere right of action, but an estate in the land. Nevertheless in a case like this, where the mortgage in a measure partakes of the nature of a lease, even an English lawyer would, in accurate modern technical language, only say the mortgagor was seized of the right to redeem while the mortgagee was in possession of

(1) I.L.R., 7 Mad., 26.

(2) 2 W. & T.L.C., 1035.

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the land. Compare 'Pollock and Wright on Possession,' page 47, where it is pointed out that where a tenant occupies a close under a lease for years, the tenant has possession of the close, so that not only a stranger but the free-holder himself may be guilty of a trespass against him, but the free-holder is still seized of the free-hold. It is thus clear, apart from authority, that the right in question is not capable of possession within the meaning of section 28, and that the extinctive prescription referred to therein is inapplicable in the present instance. And *Chathu v. Aku*(1) already cited and *Kanharankutti v. Uthotti*(2) are clear authorities on the point. In the former case, it was held that where the equity of redemption of a certain estate became on the death of the mortgagor the property of two divided branches of a Malabar tarwad, and the rents and profits of the land paid by the mortgagee were enjoyed by the representative of one branch for fifteen years to the exclusion of the other branch, such enjoyment was not adverse possession within the meaning of section 28. In the second case cited above, *Handley and Weir, JJ.*, dealt with a contention similar to the present thus: "But section 28 only applies to suits for possession of property, third defendant has no need to bring any suit for possession of the property in question. He has already obtained a decree for such possession. The only suit he would have to bring to assert his right of pre-emption would be a suit to set aside the sale to the plaintiff and the first and second defendants and to compel them to convey the property to him on his paying the price they had paid, and even if such a suit is barred, the right is not extinguished by section 28."

Section 214 of the Civil Procedure Code was strongly relied on on behalf of the plaintiff. But that section contemplates cases where the party seeking to enforce a right of pre-emption is out of possession, and consequently it is inapplicable to instances like the present in which parties setting up such a right are already in possession. And it is to be borne in mind that the form of the decree to be given in the latter class of cases is not what is mentioned in section 214 relied on, but that adopted in *Ukku v. Kutti*(3).

The third contention was that, even if the right was not extinguished under section 28, yet, as it became barred under

(1) I.L.R., 7 Mad., 26. (2) I.L.R., 13 Mad., 490. (3) I.L.R., 15 Mad., 401.

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article 10 on the expiry of a year from the registration of exhibits B and C, the right cannot be urged by way of defence. This contention is manifestly untenable. For, if, notwithstanding that an otti mortgagee's right to sue to enforce his right of pre-emption has become barred, that right of pre-emption, owing to the inapplicability of section 28 to the case, is still unextinguished, it is difficult to see on what principle such right is to be held to be unavailable by way of defence. That there is nothing in the Limitation Act to support the present contention of the appellant is fully and clearly pointed out by the learned Chief Justice and Shephard, J., in *Orr v. Sundra Pandia*(1). In the Privy Council case in *Janki Kunwar v. Ajit Singh*(2) and the other similar cases cited for the plaintiff the parties affected by the law of limitation were out of possession, and these authorities are, therefore, not in point here.

The fourth and last contention was that the defendants should be held to have waived their right by long delay and inaction. But this contention is not supported by the facts of the case. Exhibit 53 shows that, so far back as 1878, the defendants openly repudiated the plaintiff's right under his purchase; and this circumstance is totally inconsistent with any intention on the part of the defendants to give up their right in favour of the plaintiff. As to exhibit A.T., the karar, which was executed in 1891 between the members of the first defendant's family and which was relied on as supporting the above contention, it is clearly against it. For the document distinctly provides that any claim that might be preferred in respect of the redemption of the lands in question should be resisted, and certainly one ground upon which such resistance could have been based was their right of pre-emption.

Lastly under exhibit II, some rent was payable though the amount was very small. But the defendants never paid any of this rent to the plaintiff. These circumstances apart, how could the defendants be held to have waived their right by mere inaction and delay, they being in possession and the price payable in respect of the lands in question not having been ascertained and fixed at any time? It is scarcely necessary to say that the ascertainment of the price is an essential preliminary to the defendant being put to their election—see *Cheria Krishnan v. Vishnu*(3).

(1) I.L.R., 17 Mad., 255. (2) I.L.R., 15 Calc., 58. (3) I.L.R., 5 Mad., 198.

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Now, in the first place, it is admitted that, before the plaintiff concluded the sales he relies on, neither he nor his vendors called upon the defendants to exercise their option to buy. In the next place, the plaintiff purchased under exhibits B and C, not only the lands under mortgage to the defendants but others also for two lump sums. It is not alleged that any agreement was entered into between the plaintiff and his vendors as to how much of those lump sums was to be taken as the proportionate price for the lands in question, and subsequent to his purchases the plaintiff did not make any proposal to the defendants as to the proportionate price or require *them* to make an offer on the point. Nor was any step taken for obtaining an adjudication by the Court of the amount which the defendants would have to pay if they decided to buy. In these circumstances the defendants were not bound to move in the matter unless called upon to do so by some act of the plaintiff; subsequent to his purchase and in the absence of any such act, they were entitled to await the demand for surrender of the property, and then assert their right of pre-emption. Consequently no presumption of waiver could be raised on the ground of delay and inaction in this case.

For the above reasons, we must hold that the defendants are entitled to rely on their right of pre-emption. But before a proper decree can be passed, it is necessary to determine what the proportionate price payable by the defendants Nos. 1 to 11 is. We therefore call upon the Sub-Judge to submit a finding on the point within two months after the recess. Fresh evidence may be taken on either side. The Sub-Judge should also submit a finding on the eighth issue on the evidence on record. 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 Davies.

THIRUKUMARESAN CHETTI AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

SUBBARAYA CHETTI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 215—Decree for account of dissolved partnership—Taking of accounts.

In a suit for an account of a dissolved partnership a decree should be passed under Civil Procedure Code, section 215, in accordance with form No. 132 in schedule IV; and it should direct an account to be taken of the dealings and transactions between the parties and of the credits, property and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the outstanding debts and effects.

Observations on the procedure to be adopted and the burden of proof on the taking of the account.

APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in Original Suit No. 56 of 1890.

The following statement of facts is taken from the judgment of Subordinate Judge:—

The parties to this suit were partners in trade of a native firm of merchants, who owned and kept three shops, one here at Kumbakonam and the other two at Udayarpalayam, for purchasing and selling cloths and twist; that kept at Kumbakonam was under the management of the plaintiffs' father and son and the second defendant, while the other defendants managed those kept at Udayarpalayam. The partnership was first formed on the 30th September 1877 between the first plaintiff and the defendants Nos. 1 and 3 only under certain terms and conditions, and the second plaintiff and defendants Nos. 2 and 4 were subsequently taken into the partnership. There were settlements of account amongst the partners on more than one occasion, and the last was made on the 11th January 1889: and differences having arisen amongst them at the time, it was resolved that they should abide by the decision of one Chockalinga Chetty and others, and that the accounts of the firm should be kept locked up in the bazaar at Kumbakonam, and that pending their decision, the business of their shops were also stopped.

1895.
August 25.
September 3.
1897.
February 24.

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The defendants answered that there was a complete and final settlement of accounts amongst the partners on the 30th November 1888, answering to 17th Kartigai of Sarvadhari, and that the plaintiffs, who owed first defendant under that settlement Rs. 567-7-2½ and promised to pay the amount soon, also retired from the partnership after this settlement; and they had, therefore, no right to sue for an account or ask for a share of the profits in the subsequent business carried on by themselves.

On the 7th October 1891, when the suit was brought on for examination of witnesses after one or two postponements of the hearing, the first defendant was placed in the box and examined by the defendants themselves. After his examination was partially made, on the following day both parties expressed a desire to settle their disputes out of Court and wanted a day's time for consideration; it was granted, and on the 9th of October they made up their differences as regards the shares to be allotted to each partner and the first defendant also agreed to withdraw his suit No. 5 of 1891, and consented to a fresh and proper settlement of accounts being made starting from the settlement made amongst themselves in the year Parthiva (1885) and ending with the 27th Margali of Sarvadhari (9th January 1889). They also agreed that the plaintiffs should have nothing to do with the new business carried on by themselves after this last date.

The parties first tried to avoid the expenses of a commission and promised to look into their accounts themselves and submit to Court abstract accounts of their assets and liabilities. But as it was found that even after three weeks nothing could be done by them, the Court decided on the 30th October 1891 upon appointing a pleader of the High Court as a Commissioner for the conduct of this investigation, and directed the parties to appear before him with their accounts and assist him in all possible manner. This investigation was not finished till shortly before the 4th January 1892, when his report accompanied by explanatory statements were received.

The Subordinate Judge passed the following decree:—

"The Court doth order and decree that defendants Nos. 1 to 3 as also defendants Nos. 5 to 7 as the heirs of fourth defendant, deceased, do pay plaintiffs Rs. 2,647-9-11 with interest thereon at six per cent. per annum from 26th Margali of Sarvadhari (9th January 1889) up to the date of plaint, i.e., 7th November 1890,

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"amounting to Rs. 299-2-0 and also subsequently up to the date of realization with proportionate costs; that the outstandings not realized, as per schedule annexed hereto including the sum owed by the first plaintiff's son-in-law, when realized, be distributed amongst the partners as follow: for plaintiffs 1½, for defendants Nos. 1 and 2 2, for third defendant 1, and for the fourth defendant's heirs, the defendants Nos. 5 to 7, ¾, and plaintiffs be given 1½ out of 5½ shares; that they be either sold in auction amongst the plaintiffs and defendants themselves and the assets ascertained, or a receiver appointed and directed to realize the same, as may seem desirable at the time of the execution of the decree, and that the defendants do bear their costs including the full costs of the first commission and a moiety of the second."

Plaintiffs appealed.

R. Subramania Ayyar for appellants.

Mahadeva Ayyar for respondents.

JUDGMENT.—This is a suit brought by two of the partners or a firm against the remainder for an account of the partnership business. The partnership was dissolved before the date of the suit. Although, in the first instance, certain issues were raised, those issues were not tried, and, in the result, nothing remained except to take an account. Under these circumstances, the proper course for the Judge to have adopted was to pass a decree under the 215th section of the Code of Civil Procedure, in accordance with the form given in the schedule. The decree should have directed an account to be taken of all dealings and transactions between the partners, between the dates agreed upon by them, viz., the date of the settlement in Parthiva and the 27th Margali (9th January 1889), and also on account of the credits, property and effects due and belonging to the partnership; and further it should have directed the appointment of a receiver of the outstanding debts and effects (see Daniell's 'Chancery Practice,' chap. xxi, section 10, and *Ram Chunder Shaha v. Manick Chunder Banikya*(1). Some of the directions, which are given in the actual decree, while finding a proper place in a preliminary decree, are most inappropriate in a final decree. The preliminary decree being drawn up, the next step was for the Court either to take the account itself or to appoint a Commissioner. A Commissioner was appointed and the usual directions were given him.

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The course taken by the Commissioner, as far as can be gathered from his report, was not, however, the convenient and proper one. Having found that the business at Udayarpalaiyam was conducted entirely by the defendants, he ought to have called upon them to render an account, and not merely to give up their books for examination. When this was done, the plaintiffs would have been in a position to make their charges—which, of course, opportunity should have been given to the defendants to meet. In all the steps taken, the statements made by either party ought to be supported either by affidavit or by evidence duly taken. Instead of pursuing this course, the Commissioner, after some examination of the defendants' books, seems to have called upon the plaintiffs to make charges against the defendants, and then proceeded to consider whether those charges were substantiated. By this procedure, the plaintiffs must have been seriously prejudiced, for the burden was cast upon them; whereas the burden of discharging themselves ought to have been cast on the defendants. For instance, with regard to the debts said to be due to the firm, which form one of the subjects of appeal, there does not seem to be any account verified by the defendants showing what amount remained uncollected. The Commissioner gives no particulars (p. 48, para. 22 of the book of documents). The Subordinate Judge dealing with the matter in paragraph 73 of this judgment observes that the plaintiffs have no proof of the defendants having collected more than Rs. 27,757-2-6. He does not say that the defendants swear they had not collected the balance of Rs. 5,505-2-1, still less that they explained why they had not done so, although, in the circumstances of the case, they ought to have been called upon for such explanation. The defendants' Vakil was unable to refer us to any evidence on the point. It was apparently in consequence of the unsystematic mode of inquiry adopted by the Commissioner that the Judge had to refer the accounts to another Commissioner, as explained by him in paragraph 53. The point on which this reference was made is the most important point raised in the appeal. It relates to the sum of Rs. 12,515-13-6, representing the value of twist sent from Kumbakonam to the Udayarpalaiyam shop. The accounts of the latter shop were, it is admitted, kept entirely by the defendants, under whose control the business was.

This matter again the Subordinate Judge deals with, as if a charge of misappropriation had to be proved by the plaintiffs;

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whereas it was for the defendants to explain what had become of the twist. The plaintiffs took exception in March to the manner in which the Commissioner had, in his report of January 1892, dealt with the matter, consequently another Commission was issued. The second Commissioner does not pretend to have disposed of the matter finally, for he says "the better way would have been to take an account of all receipts of twists from Kumbakonam as given in the Palliam accounts and to take a similar account of all debits of twists to the Palliam shop, as stated in the Kumbakonam accounts and then to compare one with the other." This course was not adopted, and what is more important the defendants have, as far as we can learn, never vouchsafed any explanation. The explanation given by the Subordinate Judge in the 59th paragraph of his judgment may be well founded; but, as it stands, it is no more than a suggestion based on no evidence to which we are referred.

As regards the next item—the Rs. 1,000 mentioned in paragraph 67 of the judgment—we see no reason to differ from the Subordinate Judge. Nor do we see any reason to differ as to the finding in the next paragraph to which objection was taken on behalf of the respondents.

With regard to the sum of Rs. 139-7-6 (paragraphs 41 and 42), it seems to us that the question is whether the plaintiffs or the defendants were in a position to recover the money. It is said that the decree is in the name or under the control of the defendants and that they never put the plaintiffs in a position to recover the money. If this is so, the plaintiffs ought not to be debited with it. There must be an inquiry on that head.

The last question relates to interest. The Subordinate Judge has dealt with this question in a rough and ready way. Since, however, it is found that the rate contracted for was generally 12 per cent. per annum, it was for the defendants to prove that a lesser rate had been paid. Here again we find the inconvenience of having no account rendered by the defendants and supported by their affirmation. There must be a proper inquiry with regard to this claim.

It is somewhat difficult to say what should be done with the decree framed by the Subordinate Judge, which cannot be allowed to stand as a final decree. It appears to us best to treat it as a preliminary decree and to have a final decree drawn up, when the inquiries yet to be made have been completed and the out-

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standings have been collected by the receiver. We must direct the Subordinate Judge to return findings on the following questions :—

1. Whether the defendants have duly accounted for the twist sent from Kumbakonam to Udayarpalaiyam, and, if not, what sum should be debited against them in respect thereof?

2. Whether the sum of Rs. 5,505-2-1 was, in fact, collected by the defendants, or could, with reasonable diligence on their part, have been collected by them?

3. Whether the plaintiffs were put in a position to recover the sum of Rs. 139-7-6?

4. Whether in respect of any and what debts collected by the defendants, any and what remission of interest was properly made by them and what fair sum (if any) should be debited against them accordingly?

Fresh evidence may be adduced on either side.

The findings are 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 findings have been posted up in this Court.

This appeal coming on again for hearing after the return of the findings upon the issues, referred by this Court for trial, the Court made the following order :—

ORDER.—Objections are taken to the findings on all the issues. As to the second, third and fourth issues, we are not prepared to disagree with the Subordinate Judge. The finding on the second issue, we must, however, observe, is not so clear as might be desired. It was for the defendants to explain why they did not collect the outstandings which were recoverable at the date of the dissolution. The Subordinate Judge does not say distinctly that he accepts the explanation given, but we must take it that he meant to do so. As to the first issue, the finding is unsatisfactory. The question still in doubt is as to what quantity of twist the defendants received at Udayarpalaiyam from Kumbakonam. The defendants admit that their own books are incomplete as to these receipts, being complete only as to the sales effected by them and the receipts from other places.

The quantity sent from Kumbakonam must be within the knowledge of the plaintiffs and as they are not satisfied with the defendants' account, they must themselves state from such materials as are available what quantities of twist were supplied from Kumbakonam from the 17th July 1885 till the 9th January 1889.

Having done this, plaintiffs must go on to show what is the difference, if any, to be accounted for by the defendants.

The account must be filed in this Court within two months. Two weeks allowed to the defendants to take objection. Parties to have access to the books.

This appeal coming on for hearing after the submission of the accounts, &c., the Court delivered the following judgment :—

JUDGMENT.—Nothing in the shape of an intelligible account is put before us. The plaintiffs, therefore, not having taken advantage of the opportunity given them, we must accept the finding so far as regards the matter of the first issue. The decree must be modified in accordance with the finding of the Subordinate Judge in paragraph 29. Subject to this, the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

VENKATRAMAYYA AND OTHERS (DEFENDANTS), APPELLANTS,

v.

KRISHNAYYA (PLAINTIFF), RESPONDENT.*

Court Fees Act—Act VII of 1870, ss. 6, 28—Civil Procedure Code—Act XIV of 1882, s. 54—Presentation of plaint improperly stamped.

A suit is not instituted, within the meaning of the explanation to s. 4 of the Limitation Act, by the presentation of a document purporting to be a plaint, if that document, while not undervaluing the claim, is written on paper that does not bear the proper Court fee.

SECOND APPEAL against the decree of F. H. Hamnett, District Judge of Kistna, in Appeal Suit No. 279 of 1894, reversing the decree of N. Somayajulu Sastri, District Munsif of Gudivada, in Original Suit No. 114 of 1893.

Suit to recover Rs. 205-7-3, the principal and interest due on a registered mortgage bond. The cause of action accrued on the 29th March 1881, and the plaint was filed on the 29th March 1893. The proper Court fee was Rs. 15-12-0, but the plaint was stamped with a stamp of As. 12. On the 30th March the plaint was returned to be represented with the proper stamp

* Second Appeal No. 1260 of 1896.

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within seven days and was represented within the time allowed. No explanation appears to have been given at any stage of the suit why the plaint was stamped with only a 12-anna stamp.

One of the issues raised in the suit was "whether the suit is barred, the plaint not having been properly stamped on 29th March 1893."

The District Munsif held that the suit was barred and dismissed the plaintiff's claim, but the District Judge on appeal reversed the Munsif's decree and gave a decree for a portion of the plaintiff's claim.

The defendants appealed.

Sriramulu Sastri for appellants.

Venkatarama Sarma for respondent.

SHEPHARD, J.—The question is whether the plaint, having been presented with an insufficient Court-fee stamp on the last day allowed by the law of limitation, viz., the 29th March 1893, and subsequently within the time fixed by the Court presented again with a proper stamp, can be said to have been duly presented within the time limited by the Act of Limitation. According to the 4th section of that Act, a suit is instituted when the plaint is presented to the proper officer, and unless the suit is so instituted within the period prescribed by the schedule, it must be dismissed. This suit, therefore, ought to have been dismissed, if, in point of law, there was no plaint presented on the 29th March 1893. The document presented as a plaint satisfied the requirements of the Civil Procedure Code, but it did not satisfy the requirements of the Court Fees Act, inasmuch as the stamp affixed was 12 annas when it ought to have been Rs. 15-12-0. That being the case, it was a document which, in view of the provisions of section 6 of the Court Fees Act, could not lawfully have been filed by the Court to which it was presented. Moreover, it was a document which, according to the 28th section of the same Act, possessed no validity. The Act not only imposes a restriction or disability on the Court with reference to an inadequately stamped document. It also, by declaring the invalidity of such document, makes the proper stamping of a document purporting to be a plaint an essential condition of the existence of a valid plaint. In other words, a plaint inadequately stamped is, in point of law, no plaint at all. I can find nothing in section 54 of the Civil Procedure Code to conflict with this view of the law. We are not concerned with the case of improper valuation, the case contemplated in

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clause (a) of section 54 of the Civil Procedure Code and sections 9 and 10 of the Court Fees Act. Nor are we concerned with the case of mistake or inadvertence on the part of the Court—the case to which the proviso to section 28 of the latter Act is applicable. The case before us is the one provided for in clause (b) of section 54 of the Civil Procedure Code. The object of that clause is to give the party who has presented a defectively stamped plaint an opportunity of supplying the defect. Instead of rejecting the plaint the Court must fix a time for the supply of the requisite stamp paper. But for this saving provision, a fresh plaint would have been indispensable, as it is, if the requisite stamp paper is not supplied within the time fixed. It appears to me that this provision of the law is in no manner inconsistent with the construction which I place upon the Court Fees Act. Because the law makes that provision in favour of the party whose plaint is defective in the matter of stamp, I cannot see why it should be said that the law empowers the Court to enlarge the period allowed by the Limitation Act, or gives retrospective validity to a document which, at the time when it was first presented, was invalid. Seeing that the Legislature had before them the proviso to the 28th section of the Court Fees Act, which declares in favour of retrospective validity in the case therein provided for, it is not to be supposed that, in framing section 54 of the Code, they intended that principle to be extended to cases not within the proviso. A still stronger argument of a similar character is furnished by section 582-A of the Civil Procedure Code. That section which became law on the 29th July 1892 refers, like the second paragraph of section 5 of the Limitation Act, to appeals and applications for review of judgment. The section provides for the case of an insufficiency of stamp "caused by a mistake on the part of the appellant as to the amount of the requisite stamp." It declares that, notwithstanding the insufficiency, the memorandum of appeal "shall have the same effect and be as valid as if it had been properly stamped." This section probably owes its origin to the decision of the Full Bench in *Bulkaran Rai v. Gobind Nath Tiwari* (1). It was there held that the practice of giving an appellant time to supply a deficiency of Court-fee stamp and treating the memorandum of appeal as validly presented on the day when it was presented with the defective stamp, was

(1) I.L.R., 12 All., 129.

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erroneous. This practice was one which generally prevailed in this and other Courts, and the effect of the new section was to legalize it, subject, however, to the condition that the deficiency of stamp was due to mistake on the appellant's part. In the absence of any such mistake it is clear now that in the case of appeals the decision of the Allahabad Court must prevail. The appeal must be rejected unless the memorandum adequately stamped is presented within due time. Since the Legislature has, by this new section, extended a limited indulgence to appellants, it cannot be supposed that it was intended to give plaintiffs, in respect of their plaints, the same indulgence in unqualified terms. To hold in favour of the plaintiff in the present case would mean that, whereas an appellant can take advantage of section 582-A only on proving mistake, a plaintiff may deliberately and with his eyes open affix an inadequate Court-fee stamp and, on the balance being furnished within a time fixed, demand to have his plaint treated as if at institution it had been properly stamped. This cannot possibly have been the intention of the Legislature, for the section already mentioned and the latter part of section 5 of the Limitation Act shows that appellants, not plaintiffs, are regarded as parties in whose favour the rigour of the law of limitation should be relaxed.

The case of *Skinner v. Orde*(1) is relied upon in this as in other cases as containing a dictum of the Judicial Committee in favour of the view advocated by the respondent's Vakil. *Skinner v. Orde*(1) is however easily distinguishable from the present case. There the petition as originally presented by the plaintiff was complete and valid, and only required the order of the Court under section 308 of the Code then in force to make it fully efficacious as a plaint. After the filing of the petition the plaintiff acquired the means requisite for paying the Court fee, and accordingly the proper stamp was affixed. The question was whether the plaintiff was, as regards the date of the presenting of his plaint, to be placed on the footing on which he could have been, had the order abovementioned been made, or whether the plaint should have been rejected altogether. There was no question, in that case, of validating a plaint which was, in its inception, invalid. In the present case, on the contrary, that is precisely the

(1) I.L.R., 2 All., 241.

contention which must be raised, and it clearly is not admissible, because a transaction *ab initio* void cannot be validated.

I have already given reasons for holding that the plaint as presented was of no legal force or effect whatever. I agree with the decision in *Jainti Prasad v. Bachu Singh*(1). I reverse the decree of the District Judge and restore that of the District Munsif with costs.

DAVIES, J.—I entirely concur.

APPELLATE CIVIL.

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

RANGAMMAL (PLAINTIFF), APPELLANT,

v.

VENKATACHARI (DEFENDANT), RESPONDENT.*

Fraudulent conveyance—Collusive decree—Fraud on creditors—Fraudulent purpose carried out—Suit by legal representative of the fraudulent transferor and judgment-debtor to set aside conveyance and restrain execution of decree—Widow of Hindu transferor.

A with the intention of defeating and defrauding his creditors made and delivered a promissory note to B without consideration and collusively allowed a decree to be obtained against him on the promissory note, and conveyed to B a house in part satisfaction of the decree: and it appeared that certain of A's creditors were consequently induced to remit parts of their claim. A having died, his widow and legal representative under Hindu Law, now sued B to have the promissory note and the conveyance set aside and to have the defendant restrained by injunction from executing the decree:

Held, (1) that the plaintiff was not entitled to relief, for A if now alive could not have claimed to have his own fraudulent acts set aside and the plaintiff was in no better position than he would have been.

Quære: Whether a widow might successfully maintain a claim for maintenance out of property alienated by her husband without consideration and fraudulently if she herself was no party to the fraud.

THIS was an appeal from the decision of Subramania Ayyar, J., reported as *Rangammal v. Venkatachari*(2). The facts and pleadings are fully set out in the judgment of the Court below, but for the purposes of this report may be here recapitulated.

(1) I.L.R., 15 All., 65.

* Original Side Appeal No. 51 of 1895.

(2) I.L.R., 18 Mad., 378.

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March 16.

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The plaintiff who was the widow and legal representative of one Virasami Ayyangar, deceased, sued to set aside (i) the mortgage of certain lands, dated the 3rd June 1891, executed by Virasami to the defendant, (ii) the decree in Civil Suit No. 319 of 1891, obtained by the defendant against Virasami in 1892, on a promissory note, also dated the 3rd June 1891, and (iii) the deed of sale of a house, dated 14th March 1893, executed by the latter to the former and for an injunction restraining him from enforcing the said mortgage and the sale, and from executing the decree.

The late Virasami Ayyangar was a trader, and at the time of the mortgage and of the promissory note mentioned above, was heavily indebted. The plaintiff alleged that Virasami in collusion with the defendant, for the purpose of defrauding his creditors executed the mortgage and the promissory note without receiving consideration for either of them and allowed the defendant to bring suit No. 319 of 1891, referred to above on the latter document and obtain a decree therein and executed the sale deed of the 14th March 1893 in part satisfaction of the amount alleged to be due under the said decree. The mortgage was found by the learned Judge in the Court below not to have been executed fraudulently without consideration. Upon this ground the plaintiff's suit with regard to the mortgage failed. The facts connected with the promissory note and the decree obtained thereon, as found by the learned Judge in the Court below were as follows: The promissory note was executed on the 3rd June, but no consideration for it passed then or at any other time. At about the time of the promissory note Virasami was indebted to one Virayya in the sum of Rs. 9,600, but, on the former representing his inability to pay a larger sum than Rs. 5,000, the latter accepted that sum in full discharge of his claim.

On the 18th November 1891, Messrs. King & Co., creditors of Virasami, filed a suit against him to recover the amount due to them. In the same month the defendant filed a suit to recover the amount alleged to be due on the promissory note of the 3rd June 1891. In February 1892 Messrs. King & Co. obtained a decree. On the 22nd February 1893, a notice was served on Virasami to show cause why the decree should not be executed. In the meantime the defendant had obtained a decree in the suit brought by him, and on the 14th March 1893, Virasami, in part satisfaction of the decree, executed in his favour the sale-deed which the plaintiff now sued to set aside. In August 1893, on Virasami

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representing to Messrs. King & Co. that he was unable to pay their debt in full, they accepted part of the sum due under the decree in full satisfaction thereof. On these facts the learned Judge held that the promissory note of 3rd June 1891 was executed to defeat Virasami's creditors, that the decree in the suit on the promissory note was collusively obtained and that the sale-deed was fraudulent.

The learned Judge, following *Venkatramanna v. Viramma*(1) and *Chenvirappa v. Puttappa*(2), held that the decree having been collusively obtained, Virasami could not have set it aside and that therefore the plaintiff could not set it aside. With regard to the sale-deed, the learned Judge held that the sale could not be set aside inasmuch as Virasami had gained his fraudulent object in executing the promissory note of the 3rd June 1891 in suffering a decree to pass against him and in executing the sale deed in that he had induced Virayya and Messrs. King & Co. to accept less than the sums due to them.

The plaintiff appealed.

Sundaram Sastri and *Kumarasami Sastri* for appellant.

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

JUDGMENT.—We have no doubt but that the finding of the Court below on both the issues raised before it is correct, and that the legal inferences drawn therefrom are also correct. It is urged in appeal that the appellant was materially prejudiced by the absence of an issue as to whether or not the fraud of the appellant's late husband was accomplished in a substantial manner. We cannot admit this plea. It was the appellant's case that her late husband's acts were without consideration and were done with a view to defraud creditors. The evidence of the appellants' own first, third and fifth witnesses shows that he was successful, and induced his creditors thereby to give up their claims to large sums of money. It seems to us to be clear that the deceased could not, if now alive, come into Court and claim to have his own fraudulent acts set aside. But it is argued that the appellant, as his widow, is in a better position, and may claim relief against the consequences of her late husband's fraudulent transfers. We are unable to admit that, in the present case the widow is in a better position than her husband

(1) I.L.R., 10 Mad., 17.

(2) I.L.R., 11 Bom., 708.

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would be, if alive. It is argued that the widow has a right to maintenance out of her husband's property, and has, therefore, an interest therein which *ipso facto* gives her a right to impeach its alienation, independently of the interest which she takes as widow and representative of the late owner. The case of *Ramanadan v. Rangammal*(1) is relied on in support of this contention. In regard to this plea, we think it enough to observe that there is no question of maintenance in the present case. We offer no opinion as to whether a widow might successfully maintain a claim for maintenance out of property alienated by her husband without consideration and fraudulently if she herself was no party to the fraud, but that is not the present case. Here she claims to set aside fraudulent transactions by which her husband profited and by which she, as his representative, has also presumably benefited. This the Courts will not assist her to accomplish. The learned Judge has gone fully into the authorities on this question and we entirely concur in the conclusions at which he has arrived. We confirm the decree of the Lower Court and dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

1897.
February 9.
April 7.

YARAMATI KRISHNAYYA (DEFENDANT No. 1), APPELLANT,

v.

CHUNDRU PAPAYYA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

Fraud on creditors—Sham sale-deed to defeat creditors—Collusive decree—Suit to declare title of fraudulent transferor in possession.

A executed a sale-deed of his land to B. An attachment placed on the land was raised at the instance of B as vendee. The attaching creditor sued impeaching the transfer as collusive; but finally consented to a decree upholding the title of B, who then applied to be registered as owner in the place of A. A, who remained in possession throughout, resisted the application, and now sued B for a declaration that he was entitled to remain on the register as owner. It was alleged and proved that the apparent sale-deed was a sham, and had been executed for no consideration with intent to defraud the plaintiff's creditors, and

(1) I.L.R., 12 Mad., 260.

* Second Appeal No. 1455 of 1895.

that the plaintiff had paid the attaching creditor to consent to the abovementioned decree to which both he and B were parties:

Held, that the suit should be dismissed.

SECOND APPEAL against the decree of U. Atchutan Nayar, Additional Subordinate Judge of Rajahmundry, in Appeal Suit No. 43 of 1894, confirming the decree of T. Varadarajulu, District Munsif of Peddapur, in Original Suit No. 379 of 1892.

Suit to declare that the plaintiff was entitled to remain on the Revenue Register as owner of certain land. In 1884 the plaintiff, being heavily indebted, executed, without consideration, a sale-deed of the land in favour of the second defendant, the arrangement being, that the property should be reconveyed to him after his debts had been discharged; subsequently by arrangement between the plaintiff and the second defendant, the latter executed without consideration a sale-deed in favour of the first defendant. The plaintiff had throughout, up to the date of the suit, remained in possession of the lands. In 1887 one Manchina Ammanna, a creditor of the plaintiff, instituted a suit against plaintiff and obtained a decree, and in execution of the decree attached the lands in question. The attachment was resisted and raised. Manchina Ammanna, then, brought a suit—Original Suit No. 345 of 1887—making both plaintiff and first defendant parties to declare that the sale-deeds to the first and second defendants were nominal and were got up to secure the plaintiff's property from his creditors. The Munsif gave a decree in favour of Manchina Ammanna. When the case went up on appeal the parties to that suit entered into a compromise, in consequence of which the decree of the District Munsif was reversed, and the alienation now in question was upheld.

Both the Lower Courts gave plaintiff a decree. The first defendant appealed.

Sivasami Ayyar for appellant.

Sriramulu Sastri for respondents.

SUBRAMANIA AIYAR, J.—Both the Lower Courts found that the lands (to the registry whereof in the Government Revenue accounts the present litigation relates) belonged to the respondent (plaintiff), that they were in his possession before and at the time of the plaint and that the sale relied upon by the appellant (first defendant) as giving him a title to the property was a mere sham transaction under which no interest passed to him. Upon those findings it was held that the appellant had no right to claim that

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the registry of the property be transferred to his own name, and a decree was given to the effect that the respondent was entitled to have his name retained in the register as it had stood hitherto.

One of the contentions urged on behalf of the appellant was that the respondent was precluded from asserting his title to the land by the decision passed in Appeal Suit No. 105 of 1889 on the file of the Cocanada Subordinate Court. This contention, though advanced for the first time in this Court, must prevail, inasmuch as the facts required to support it are either set out in the plaint itself or are otherwise admitted.

They are as follows: One of the respondent's creditors instituted Original Suit No. 345 of 1887 for the purpose of establishing that the transaction purporting to be the sale in favour of the present appellant was but a device intended to defraud the creditors, and therefore the lands in question were really the property of the respondent. Both the parties to the present appeal were made defendants to the suit, and a decree was therein given in favour of the creditor. The respondent however caused the present appellant to prefer an appeal against the said decree No. 105 of 1889 already mentioned. The creditor and the present respondent were made respondents to such appeal. The Appellate Court, with the consent of the parties, including the present respondent himself, reversed the decree and upheld the alienation to the present appellant. The collusive decree thus passed cannot be impeached by the respondent (*Venkatramanna v. Viramma*(1)). On this ground alone and without going into the other points argued I would reverse the decrees of the Lower Courts and dismiss the suit, but without costs.

BENSON, J.—The main question in this second appeal is whether the plaintiff can maintain the suit, based as it is on the allegation that certain sale-deeds executed by the plaintiff were collusive and sham documents, executed for the purpose of protecting his property against creditors.

The facts of the case are briefly as follows: The plaintiff, being heavily involved in debts, executed, without consideration, a sham sale-deed of certain lands in favour of the second defendant, and afterwards caused the latter to execute another sham sale-deed in favour of the first defendant.

Plaintiff, however, remained in possession of the land.

(1) I.L.R., 10 Mad., 17.

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In Original Suit No. 345 of 1887, a creditor of the plaintiff attached the lands in execution of a decree against the plaintiff. The sham sale-deeds were used as a cloak, and the attachment was successfully resisted. The creditor then sued for a declaration that the sale-deeds were collusive, and got a decree in the first Court. In appeal, however, the plaintiff paid him a certain sum and induced him to consent to a decree admitting the title of the first defendant, and a decree was passed accordingly. In 1892 the first defendant applied to the Collector for transfer of revenue registry of the lands to his (first defendant's) name, and the Collector issued a notice that he would alter the register unless plaintiff established his right by a Civil Suit. Plaintiff, therefore, brought the present suit for a declaration that the registry of the lands was not to be altered. Both the Lower Courts decreed in his favour, and first defendant now appeals against these decrees.

I do not think that the plaintiff's suit is maintainable.

The law on the subject is very fully discussed in the case of *Chenvirappa v. Puttappa*(1) in *Rangammal v. Venkatachari*(2) in *Sham Lall Mitra v. Amarendra Nath Bose*(3), and in the recent English case of *Kearley v. Thomson*(4). The general rule is that a man cannot set up an illegal or fraudulent act of his own in order to avoid his own deed (May on Fraudulent Conveyances, 432). But some exceptions or quasi exceptions to this rule have been admitted by the Courts. In *Symes v. Hughes*(5) a fraudulent transfer was set aside in order that effect might be given to a compromise arranged between the transferor and his creditors. Here it will be observed that the Court acted in the interest, and for the protection, of innocent third parties. It may well be doubted whether a decree would have been given in that suit for the benefit of the transferor alone. So if a voluntary deed has been kept in the hands of the grantor, and has never been acted upon, nor the grantee informed of its existence, a Court of Equity will treat it as an imperfect instrument, and, if the grantee surreptitiously gets possession of it, a Court of Equity will relieve against it (*Cecil v. Butcher*(6)).

A third exception was noticed by Parker, J., in *Venkatramanna v. Viramma*(7), viz., where a defendant is allowed to show

(1) I.L.R., 11 Bom., 708. (2) I.L.R., 18 Mad., 378. (3) I.L.R., 23 Cal., 460.
(4) L.R., 24 Q.B.D., 742. (5) L.R., 9 Eq., 475.
(6) 2 Jac. & W., 565. (7) I.L.R., 10 Mad., 17.

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the turpitude of both himself and the plaintiff in order to protect himself against an action by the plaintiff to give effect to a contract or deed entered into for an illegal or immoral purpose. Here an exception is allowed not for the sake of the wrong doer, but on grounds of public policy, since the Court ought not to assist a plaintiff to recover property or enforce a contract in respect of which he has no true title or right. The rule of public policy cannot be applied without allowing the defendant to benefit by it. But the benefit is allowed him by accident as it were and not in order to secure him any right to which he is entitled (*Holman v. Johnson*(1)), per Lord Mansfield, and *Luckmidas Khimji v. Mulji Canji*(2). Even this exception is not allowed, if a decree has been obtained by the fraud and collusion of both the parties. In such a case it is binding on both *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*(3), *Prudham v. Phillips*(4), *Venkatramanna v. Viramma*(5), and *Chenvirappa v. Puttappa*(6).

I think that, broadly speaking, these are the only exceptions which are to be gathered from the English cases, and from the reported cases in this Court and in the Bombay High Court. The Calcutta High Court has gone further *Debia Choudrain v. Bimola Soonduree Debia*(7), *Bykunt Nath Sen v. Goboollah Sikdar*(8), but the rule there laid down has been expressly dissented from by the Bombay High Court *Chenvirappa v. Puttappa*(6), which, as I think, justly remarks: "These decisions go a long way towards enabling a party to a dishonest trick, by which his creditors may have been defrauded, to get himself reinstated when his purpose has been served." They have been dissented from also by this Court (*Rangammal v. Venkatachari*(9)), confirmed in *Rangammal v. Venkatachari*(10). The Calcutta rule has, indeed, notwithstanding these dissents, been affirmed in *Sham Lall Mitra v. Amarendro Nath Bose*(11). In doing so the Court relied on the case of *Symes v. Hughes*(12) already cited by me and on the case of *Taylor v. Bowers*(13). In the former case, however, the interests of third parties were involved, and the latter case has been dissented from in *Kearley v. Thomson*(14). Fry, L. J., in delivering judgment, stated "In that case (*Taylor v. Bowers*(13) Mellish, L. J., in

"delivering judgment, says at p. 300 'If money is paid, or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out.' It is remarkable that this proposition is, as I believe, to be found in no earlier case than *Taylor v. Bowers*(1), which occurred in 1867, and notwithstanding the very high authority of the learned Judge who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this Court, yet in a higher tribunal: and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice." This passage was quoted with approval by this Court in *Rangammal v. Venkatachari*(2). With the exception, then, of the cases to which I have referred, and which have been dissented from, I do not think that any authority will be found for holding that a plaintiff can come into Court alleging his own fraud and ask the Court simply and solely for his own benefit to set aside the fraudulent deed or make a declaration to protect him from the threatened consequences for his own act. In such a case the Court may well decline to move and may answer the plaintiff in the words which are often quoted from Story's 'Equity Jurisprudence' "where the party seeking relief is the sole guilty party, or where he has participated equally and deliberately in the fraud, or where the agreement which he seeks to set aside is founded in illegality, immorality or base and unconscionable conduct on his own part; in such cases Courts of Equity will leave him to the consequences of his own iniquity and will decline to assist him to escape from the toils which he has studiously prepared to entangle others" (section 268). Especially will this be the case if the purpose of the fraud has been effected by defeat of a third person's rights asserted in Court or effected in any other material way *Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy*(3), *Venkatramanna v. Viramma*(4), *Chenvirappa v. Puttappa*(5), *Rangammal v. Venkatachari*(2). I think, then, that the plaintiff, apart from his conduct in Original Suit No. 345 of 1887, has no title to come to a Court of Equity and ask for such a declaration as he now seeks.

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(1) Cowper, 343. (2) I.L.R., 5 Bom., 295. (3) I.L.R., 6 Bom., 703.
(4) 2 Amb. Rep., 763. (5) I.L.R., 10 Mad., 17. (6) I.L.R., 11 Bom., 708.
(7) 21 W.R., 422. (8) 24 W.R., 391. (9) I.L.R., 18 Mad., 378.
(10) I.L.R., 20 Mad., 323. (11) I.L.R., 23 Calc., 460. (12) L.R., 9 Eq., 475.
(13) L.R., 1 Q.B.D., 291. (14) L.R., 24 Q.B.D., 742.

(1) L.R., 1 Q.B.D., 291. (2) I.L.R., 18 Mad., 378. (3) I.L.R., 6 Bom., 703.
(4) I.L.R., 10 Mad., 17. (5) I.L.R., 11 Bom., 708.

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If the defendant were now seeking the assistance of the Court to obtain possession of the land from the plaintiff, it may well be that the Court would allow the plaintiff to plead the true rights of the parties, even though the plea involved a declaration by the plaintiff of his own turpitude. The Court would then allow the plea on grounds of public policy, and in order that it might not itself be made an instrument to aid the defendant in his fraudulent claim to possession contrary to the real agreement with the plaintiff. That, however, is not the case before us. The plaintiff is in possession, and he may be left to rely on it if the defendant seeks to disturb him.

The impropriety of assisting the plaintiff becomes, I think, even more clear, if his conduct in Original Suit No. 345 of 1887 be considered. In that suit the sham sale-deed was successfully used as a cloak to defeat an attaching creditor, and the latter was thus driven to a regular suit. He then succeeded in showing in the Court of First Instance that the sale-deed was a sham, but the present first defendant (then third defendant) in collusion with the plaintiff (then first defendant) appealed against the decree. The appeal was compromised by the present plaintiff paying Rs. 150 to the attaching creditor, and a decree was passed affirming the title of the present first defendant.

Thus the sham sale-deed was successfully used in a Court of Justice for the purpose for which it was concocted, viz., to defeat and delay a creditor, and the plaintiff afterwards acknowledged its validity in a Court of Justice and caused a decree to be passed affirming the same (see present plaint), a decree to which both he and the present defendants were parties (exhibit L).

I think that, in these circumstances, it would be contrary to public policy, and disastrous to public morality, that the Courts should now allow him to plead his own baseness and should actively assist him to undo his own solemn acts, and this even before his possession of the property is actually attacked by the partner of his crime. I would, therefore, set aside the decrees of the Courts below and dismiss the plaintiff's suit, but without costs, in consideration of the defendant's fraudulent conduct.

APPELLATE CIVIL.

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

VARADARAJULU NAIDU (PLAINTIFF), APPELLANT,

v.

SRINIVASULU NAIDU (DEFENDANT), RESPONDENT.*

1897.
February
2, 25.

Collusive decree to defeat rights of a third party—Suit to set aside decree.

The plaintiff was a Hindu, who, in order to prevent his undivided son from obtaining his share of the family property, made and delivered to the defendant certain promissory notes unsupported by consideration, the agreement between them being that the defendant should obtain a decree on the notes and in execution attach and bring to sale and himself purchase the lands of the family and should hold them at the disposal of the present plaintiff. The suit and the subsequent proceedings in Court were carried on by them collusively, the present plaintiff supplying the necessary funds. The son then sued for his share of the property, and having, with the aid of his father (who had meanwhile lost his confidence in the defendant) successfully impeached the sale as collusive, obtained a decree which was executed. It had been agreed that the defendant should hold the land at the disposal of the plaintiff, but he now refused to surrender to him his share. The plaintiff accordingly sued to recover his share of the property and for a declaration that the collusive decree against him and the subsequent proceedings in execution thereof were not binding on him:

Held, that it is not competent to a party to a collusive decree to seek to have it set aside, and that the plaintiff accordingly was not entitled to relief.

APPEAL against the decree of Davies, J., on the Original Side of the High Court in Civil Suit No. 90 of 1895.

This was a suit to declare that a promissory note for Rs. 6,050, executed by the plaintiff in favour of the defendant, was collusive, and not supported by consideration, and that a decree obtained by defendant thereon and execution proceedings taken under that decree were collusive, and that the defendant acquired no right in the properties, belonging to the plaintiff, which were sold in execution of the decree and purchased by the defendant. The facts on which the plaintiff relied were set forth in paragraphs 1—9 of his plaint, which were as follows:—

“That the plaintiff's son, N. Venekatasami Nayudu, a young man, was unruly and disobedient to the plaintiff and became impertinent owing to the chance of his being able, as plaintiff's only son, to acquire the family properties.

* Original Side Appeal No. 32 of 1896.

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"That for the purpose of his (plaintiff's son) being brought to submission to the plaintiff and to be dutiful to him, it was thought necessary to devise some means or contrivance.

"That the defendant was in 1891 living with the plaintiff and in his house and the plaintiff had confidence in him. It was agreed between the plaintiff and the defendant in Madras in 1891 that the plaintiff should execute a promissory note in defendant's favour for a large sum of money, that the defendant was to file a suit against plaintiff thereon and obtain a decree and execute same by attachment and sale of plaintiff's properties, unless in the meanwhile the plaintiff's said son was reclaimed and became submissive, or plaintiff thought fit to stop same or at any time to deal with the properties, that the plaintiff was to supply funds for litigation, that the defendant was not to benefit at all by these various transactions and that the properties or their sale proceeds were always to be the plaintiff's, and that the defendant, at plaintiff's request, was to do everything that the plaintiff might at any time require to deal with the properties as his own, that the defendant was not to do anything prejudicially to the plaintiff or to his interest, the sole object of those transactions being to reduce the plaintiff's son to submission to plaintiff.

"That in pursuance of the said arrangement and for no consideration whatever, five promissory notes were executed on the same date for Rs. 1,500, Rs. 1,200, Rs. 1,600 and Rs. 875, and Rs. 6,050, respectively, but the first four were made respectively to bear different dates, viz., 10th February 1890, 18th October 1890, 2nd January 1891, and 6th March 1891, to give a colour of truth to the transactions and to make it appear that the last was executed in renewal of the earlier ones.

"That, upon the promissory note of Rs. 6,050 bearing date the 1st of August 1891, a suit was filed with funds supplied by plaintiff in this Honorable Court, being Civil Suit No. 241 of 1891, by defendant against plaintiff on or about 5th September 1891, and the defendant admitted execution and claim, and the decree was passed in or about 27th October 1891 for Rs. 6,689-8-7 inclusive of costs or thereabouts.

"That the decree was not executed for some time thereafter to see whether the plaintiff's son would become obedient; that there being no hope of same, the defendant executed the decree with funds supplied by plaintiff against properties more particularly

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"described in the schedule hereto and the same were sold in execution and purchased by defendant.

"That the said promissory note and the decree and the execution proceedings were all show transactions not supported by consideration and brought about for the purposes above mentioned, and defendant acquired no rights thereunder for himself or his benefit, but that he is a trustee for the plaintiff in respect of any property or rights he may have acquired.

"That the plaintiff attempted in or about August 1893 to sell the said properties and asked the defendant to join him and enable him so to do, but he evaded to comply with plaintiff's request and illegally refused to do so, unless the plaintiff paid him some money and thus broke the agreements with the plaintiff and acted fraudulently and dishonestly.

"That the plaintiff's said son filed a suit against the defendant, being Civil Suit No. 174 of 1893, in this Honorable Court, setting out these facts and claiming the properties, and obtained a decree against the defendant to the extent of his interest therein, and the plaintiff supported his son in making out the true state of things as the defendant became fraudulent and deceitful.

"The defendant asserted that the promissory note for Rs. 6,050 was executed for consideration and denied that the decree and execution proceedings were collusive.

"In the suit brought by plaintiff's son, Civil Suit No. 174 of 1893, both the plaintiff and the defendant were made parties, and a decree was passed declaring that the proceedings in execution and the sale were void and had no effect whatever against the interest of the plaintiff's son in the property."

The suit was tried by Davies, J., who delivered the following judgment:—

DAVIES, J.—The plaintiff entered into an agreement with the defendant by which the defendant first sued the plaintiff on a promissory note for Rs. 6,050 executed by plaintiff and having got a decree (exhibit B) by consent thereon (exhibit III), then executed it against plaintiff's property selling up and buying his lands in discharge thereof. The plaintiff now alleges that these were all sham transactions gone through for the purpose of reducing his son to obedience, and he prays for a decree setting aside the decree B passed on the promissory note, and the execution proceedings taken thereupon as null and void, and for a declaration that the defendant has acquired no right or interest in the plaintiff's properties, or in lieu of these reliefs a decree, for Rs. 6,689 odd, as damages

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for defendant's breach of contract in not re-conveying to him the plaintiff lands as was originally agreed to between the parties, after the object of the transactions had been served.

Now the plaintiff's son has had his right declared to half the plaintiff properties in Original Suit No. 174 of 1893 on the file of this Court in which he sued his father, the present plaintiff, and the present defendant as first and second defendants for the fraud that had been practised on him and the findings in that suit are admittedly binding on the parties to this suit. It was then found that the transactions, the subject of the present suit, were merely colourable, and there was no consideration for the promissory note and also that the properties in question were not the self-acquired property of the present plaintiff as was alleged, but family property in which the plaintiff's son, had a half share (*vide* issues and judgment in that suit marked C and D). The real question I have to determine in this suit is whether the plaintiff acted as he did with a fraudulent intent upon his son's rights, and I think there can be no doubt about it on the facts shown. Not only did the plaintiff claim the plaintiff properties or at least some of them as his self-acquisition (see his affidavit, exhibit I), but he placed those properties by the action he took beyond the reach of his son, who was compelled to bring a suit to recover his rights thereon. It is all very well for the plaintiff to say it was done with the object of bringing his son to submission, but as it appears that the son was claiming his rights against his father at the time, the father's intention clearly was to defraud his son of his rights by divesting himself of the whole of the family property. The steps taken by the plaintiff went far beyond the necessities of the case, if it was only to bring a recalcitrant son to order. The fact was there was a dispute between father and son as to the family property, and the father thought to settle the matter by depriving the son entirely of his half share, by disposing of the whole property as if it was his self-acquisition with the power to get it back for himself when it suited his convenience. This was clearly a fraud upon the son, and it has been so found in the suit brought by the son (exhibit D). Finding, then, that there was not only a fraudulent intent on the part of the plaintiff against his son, but that the fraud was actually effected in so much as it necessitated the bringing of a suit by the son to get the fraud done away with, the question remains whether the plaintiff is now entitled to relief against the other conspirator in the fraud. Considering that the arrangement between them culminated in a decree of Court and execution proceedings solemnly

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conducted thereafter, the law is clear that the plaintiff is entitled to no relief—*vide* Venkatramanna v. Viramma(1), Ahmedbhoy Hubibhoy v. Vulleebhoy Cassumbhoy(2), Chenvirappa v. Puttappa(3), and Rangammal v. Venkatachari(4), the case of Param Singh v. Lalji Mal(5) on which plaintiff relies—notwithstanding. This latter case was relied on by plaintiff, perhaps, more to support his claim for damages under the agreement of defendant marked A to recover the property, but that letter does not contain any fresh agreement made by defendant after the fraud was completed. It is only an acknowledgment of the original and collateral agreement made when the fraud was contemplated. Having its inception in fraud it is not valid, but even treating it as a new agreement it would be void under section 23 of the Contract Act as its object would be to defeat a provision of law, namely, the incapacity of the plaintiff to obtaining any relief by giving him indirectly the relief that he cannot obtain directly. The plaintiff's prayer for setting aside the decree on his promissory note and for a declaration against defendant's interest in the property, cannot be granted on the ground that he was a party to the fraud by which those things were brought about and his prayer for damages in lieu of those reliefs, must also be refused on the ground that it is based on the breach of an agreement which is invalid, as being part and parcel of the fraudulent scheme. The plaintiff has joined another cause of action in this case, namely, a claim for damages for his being arrested and imprisoned by the defendant under warrant—(exhibit II) for a balance due under the fraudulent decree. That cause of action arises clearly in tort and not in breach of contract, and must be rejected as a misjoinder, as it was not permissible to combine it in a suit to obtain a declaration of title to immovable property (section 44, Code of Civil Procedure).

The result is that the plaintiff's suit is dismissed with costs.

Plaintiff appealed.

Mr. K. Brown for appellant.

Srinivasulu Naidu for respondent.

JUDGMENT.—We agree with the learned Judge in holding that the plaintiff must have intended to defeat his son's claim to the property and that, therefore, the arrangement made between him and the defendant was contrived in fraud of his son. But it was

(1) I.L.R., 10 Mad., 17. (2) I.L.R., 6 Bom., 703. (3) 11 Bom., 708.
(4) I.L.R., 18 Mad., 378. (5) I.L.R., 1 All., 403.

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argued that since the plaintiff had repented of his conduct before any harm was done to his son or any effect given to the transaction, it was competent to him to repudiate it and have the property restored to him.

The case of *Symes v. Hughes*(1) cited by the appellant's counsel does not really support the proposition for which it was cited, for there, as the Master of the Rolls observes, the suit was prosecuted for the purpose of enabling the creditors to recover something. Here it is the party himself who, in his own interest, seeks to have the transaction annulled. It is very doubtful whether, in a case in which the maxim *in pari delicto* would otherwise apply, any exception arises by reason that the illegal purpose has not been carried out (*Kearley v. Thomson*(2) and *Sham Lal Mitra v. Amarendra Nath Bose*(3)). In the present case the transfer of the property to the defendant had been completed, nothing remained to be done by the plaintiff, and it was only by means of a suit that his son vindicated his rights. Under these circumstances, we do not think it is possible to say that the plaintiff's fraudulent purpose had not been carried into effect.

There is, however, another ground on which we may base our judgment and that is that it is not competent to a party to a collusive decree to seek to have it set aside. Strangers, no doubt, may falsify a decree by charging collusion, but a party to a decree not complaining of any fraud practised upon himself cannot be allowed to question it.

There is ample authority for his proposition beginning with the dictum in *Prudham v. Phillips*(4) (cited in argument in the *Duchess of Kingston Case*(5)).

The distinction between fraud and collusion lies in this that a party alleging fraud in the obtaining of a decree against him is alleging matter which he could not have alleged in answer to the suit, whereas a party charging collusion is not alleging new matter. He is endeavouring to set up a defence which might have been used in answer to the suit, and that he cannot be allowed to do consistently with the principle of *res judicata*.

The appeal is dismissed.

Rencontre, attorney, for appellant.

(1) L.R., 9 Eq., 475. (2) 24 Q.B.D., 742. (3) I.L.R., 23 Calc., 460.
(4) 2 Ambler, 768. (5) 20 State Trials, 479.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

MOTHA.*

1897.
September
8, 16.

Criminal Procedure Code—Act X of 1882, s. 195—Sanction to prosecute—Power of Court to go outside record.

A Magistrate in deciding whether to sanction under Criminal Procedure Code, section 195, a prosecution for giving false evidence has power to hold an enquiry and record other evidence besides that in the case before him, in the course of which the offence is supposed to have been committed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the judgment of the Joint Magistrate of Tinnevely in Criminal Appeal No. 45 of 1897, confirming the order of the Sub-Magistrate of Tuticorin in Criminal Petition No. 230 of 1896 sanctioning the prosecution of the petitioner for making false statements in Criminal Case No. 399 of 1896 on his file.

The facts appear sufficiently from the judgment of the High Court.

Rangachariar for petitioner.

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

Mr. *Adam* for complainant.

JUDGMENT.—In this case one *Motha* was said to have committed an offence punishable under section 193, Indian Penal Code, in a case before a Magistrate, and the Magistrate, in giving sanction under section 195, Criminal Procedure Code, for his prosecution, held an enquiry and recorded other evidence besides that in the case before him to show that there was *prima facie* ground for the prosecution. It is contended for the petitioner before us that the original case before the Magistrate disclosed no foundation for the charge under section 193, Indian Penal Code, and that, therefore, the Magistrate had no power to make any enquiry or grant the sanction. In support of this argument reliance is placed on the decisions in *Zemindar of Siragiri v. The Queen*(1) and *Abdul Khadar*

* Criminal Revision Case No. 169 of 1897.

(1) I.L.R., 6 Mad., 29.

v. *Meera Saheb*(1). We are unable to accede to the petitioner's contention. The decision in *Zemindar of Sivagiri v. The Queen*(2) was based on the language of section 463 of the Criminal Procedure Code then in force (Act X of 1872), and on certain remarks of Garth, C.J., in *Kasi Chunder Mozumdar in re*(3) under the same Code. In neither of these cases did the learned Judges refer to the effect of section 471 of the then Criminal Procedure Code though the section appears to have been mentioned in the course of the argument in the Madras case. We find it difficult to reconcile the decisions with the provisions of that section; but since those cases were decided, the provisions of the Code of Criminal Procedure upon the point under consideration have been altered and enlarged. Section 463 of Act X of 1872 provided that "a complaint of an offence against public justice" described in certain sections of the Indian Penal Code, "when such offence is committed before or against a Civil or Criminal Court shall not be entertained in the Criminal Courts except with the sanction of the Court before or against which the offence was committed, or of some other Court to which such Court is subordinate." Section 195 of Act X of 1882 provides that "no Court shall take cognizance of any offence punishable under" the same sections "when such offence is committed in, or in relation to, any proceeding in any Court except with the previous sanction or on the complaint of such Court or of some other Court to which such Court is subordinate." Then section 476 of Act X of 1882 provides that "when any Civil, Criminal or Revenue Court, is of opinion that there is ground for inquiring into any offence referred to in section 195 and committed before it, or brought under its notice in the course of a Judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class and may send the accused in custody, or take sufficient security for his appearance, before such Magistrate, and may bind over any person to appear and give evidence on such inquiry or trial." The powers conferred by this section are much more extensive than those conferred by section 471 of Act X of 1872, and we have no doubt but that it is now open to a Magistrate when a person is accused of having committed before him an offence punishable

under section 193 of the Indian Penal Code to inquire into the truth of the accusation, and then, if it seems proper in the interests of public justice, to give sanction for the prosecution, even though the original record did not, on its face, disclose that the offence had been committed.

The words of the sections contain no limitation to an offence appearing on the face of the record though nothing would have been easier than to have expressed such limitation if it was intended to have effect. To admit the petitioner's contention would be by an artificial rule to screen from prosecution men who might have committed the grossest offences against public justice and offences perfectly capable of being proved, merely because owing to surprise, accident, oversight, or unavoidable circumstances, evidence of the offence was not, or could not be, produced before the Court at the same time that the offence was committed.

It is, however, argued for the petitioner that the decision in *Zemindar of Sivagiri v. The Queen*(1) was followed in *Abdul Khadar v. Meera Saheb*(2). The former case is no doubt referred to in the latter, but without any reference to the fact that in the interval the law had been materially altered, nor was it necessary for the decision in *Abdul Khadar v. Meera Saheb*(2) to follow the decision in *Zemindar of Sivagiri v. The Queen*(1).

The report in *Abdul Khadar v. Meera Saheb*(2) is very brief and imperfect, but there the sanction was revoked, because the document "had not been given in evidence in the case," and, therefore, no offence under sections 403 and 471, Indian Penal Code, had been committed. The approval of the decision in *Sivagiri Zamindar v. The Queen*(1) (if it was approved) was a mere *obiter dictum*. It was not necessary for the decision of the case then before the Court, nor was it, in fact, the ground of that decision and no reference was made to the change in the law made by Act X of 1882.

We must, therefore, hold that that decision does not support the petitioner's contention.

In the recent case of *Shashi Kumar Dey v. Shashi Kumar Dey*(3) the view we have taken was expressly maintained with reference to the language of the present Criminal Procedure Code.

We dismiss the petition.

Ordered accordingly.

(1) I.L.R., 15 Mad., 224. (2) I.L.R., 6 Mad., 29. (3) I.L.R., 6 Cal., 440.

(1) I.L.R., 6 Mad., 29. (2) I.L.R., 15 Mad., 224. (3) I.L.R., 19 Cal., 345.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

1897.
February 5, 8.
July 20.

BALUSAMI PANDITHAR (DEFENDANT NO. 3), APPELLANT,

v.

NARAYANA RAU (PLAINTIFF), RESPONDENT.*

Hindu law—Succession—Reversionary rights—Sister's grandson—Maternal uncle's son.

The plaintiff sued as the nearest reversionary heir of one Vasudeva deceased to obtain a declaration that certain alienations made by the widow (who was defendant No. 1) in favour of defendant No. 2 was not binding on the reversion. Defendant No. 3 was the son of Vasudeva's sister's son, and was joined in the suit, because he claimed to be a nearer heir than the plaintiff who was the son of Vasudeva's maternal uncle.

Held, that both the plaintiff and defendant No. 3 were athma bandhus of the deceased, but defendant No. 3 was the nearer reversionary heir.

APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in Original Suit No. 56 of 1894.

This was a suit brought for declarations that the plaintiff was the nearest reversionary heir to the properties of Vasudeva Pandithar, late husband of the first defendant; and that the alienation of certain properties by the first to the second defendant under a document dated the 18th February 1893, was invalid as against the plaintiff.

The third defendant was added as a defendant, because he had asserted an interest in the properties of Vasudeva in Original Suit No. 47 of 1893 claiming to be Vasudeva's sister's son's son. The plaintiff denied that the third defendant was so related to Vasudeva, and contended that, even if this relationship be true, his right was superior to that of the third defendant.

The relationship of defendant No. 3 to the deceased Vasudeva was found to be as stated above and the plaintiff was found to be the son of Vasudeva's maternal uncle. The main question therefore in the suit was which of them was the nearer heir. As to this the Subordinate Judge said:—"They both fall under the class of 'bandhus and are also the athma bandhus of Vasudeva Pandithar. Plaintiff being also expressly named as one's own bandhu

* Appeal No. 44 of 1896.

"in the text of 'Vijnaneswara' quoted in Chapter II, section 6, 'verse 1 of the Mitakshara. The contention of the plaintiff is that, 'though the third defendant is a bandhu of his grandmother's brother, the latter was not the third defendant's bandhu; and 'that, as they are thus not related as bandhus to each other and 'that as he and Vasudeva Pandithar were related as such, he is 'the superior heir. That such a condition should exist, admits 'of no doubt (*Babu Lal v. Nanku Ram*(1)), and I find that the 'third defendant also fulfils it, Vasudeva being the pitru bandhu 'of the third defendant, he was a cognate of the third defendant's 'father. The son of a daughter of a sister was held in *Umaid Bahadur v. Udoi Chand*(2) to be a bandhu of his grandmother's 'brother; and there can, therefore, be no doubt regarding the 'position of a sister's son's son.

"Both plaintiff and the third defendant are, therefore, the bandhus 'of late Vasudeva as the latter was of them, and they are therefore 'properly qualified to inherit. But the difficulty is, which of them 'should be preferred. The Vakil for the third defendant relied 'on the order of succession among cognates according to the Mitakshara published in a recent work on the Hindu Law by J. U. Battacharya, a native Hindu Lawyer of Bengal, in which a 'grandson of a sister is ranked No. 7 as an athma bandhu *ex parte maternal* to whom the *propositus* is pitru bandhu, while the son 'of a maternal uncle comes under No. 16. But if the test of the 'last rule propounded in *Muttusami v. Muttukumarasami*(3), viz., 'that, as between bandhus of the same class, the spiritual benefits 'they confer upon the *propositus* is, as stated in 'Viramitrodaya,' 'a ground of preference; if this test be applied to the present 'case, the plaintiff appears to me to be the preferable heir. 'According to the evidence of two priest Brahmans of the class to 'which these parties belong, who have been examined as the plaintiff's fourth witness and third defendant's second witness, it is 'found that the plaintiff offers tarpanams to his paternal aunt and 'her son when he makes his daily Brahma Yeggams and also on 'Mahaliyam tarpanam occasions, while a sister's grandson offers 'none to his father's or mother's maternal uncle on those or any 'other occasions. Again, the son of a maternal uncle offers funeral oblations to the maternal grandfather and great-grandfather

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(1) I.L.R., 22 Cal., 339.

(2) I.L.R., 6 Cal., 119.

(3) I.L.R., 16 Mad., 23.

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"of the *propositus*, to whom the *propositus* himself offers similar oblations; and the sister's grandson offers nothing to any common ancestors of himself and the *propositus*.

"It was said that, according to a text of the 'Nirnaya Sindhu,' a work on the Hindu Law of rituals, which admittedly governs the class of Brahmans to which these parties belong, a sister's son's son is entitled to perform the funeral ceremonies of his grandmother's brother, while the son of a maternal uncle had no place given him for such performance in any text quoted in that work.

"Examining this work, which had not been translated, with the aid of a Sanskrit pundit, I find that neither the son of a maternal uncle nor the grandson of a sister have been named as persons entitled to perform such funeral obsequies. In the chapter relating to *Srardah* *Prakaranam*, 15 persons have been named as persons entitled to perform these ceremonies; and of them, the sister's son is the last: a grandson of a sister is not named in it. In page 309 of this work (I refer to the one published in Devanagiri character in 1892 by Sridhara Sivalala) a text of 'Katyayana' in *Madana Ratnam* is quoted, which is as follows:—A sister should be preferred to her sons. One who may be senior or junior should perform *samascaram* to her brother. In their absence, a step-sister should do it. In the same way their sons should do.

"In page 305 of the same work, this rule is further emphasised in a text of 'Yajanavalkya' therein quoted, which runs thus:—son, son's son, son's grandson *putrikaputran*, wife, brother, his son, father, mother, daughter-in-law, sister, her son, *sapindas*, *samanodakan*,—these in their order, in the absence of those who are named above them, are qualified to offer *pindam*.

"A quotation from 'Kala Dharisam' is made in page 310 of the same work which substantially adopts the aforesaid rule with the addition that it introduces a daughter's son after the *putrikaputran* and one who takes the heritage. But a little above in the page is given a text as follows: a daughter-in-law, son of a sister, his son, *gnathi*, *sammandhis* and *bandhus* should perform ceremonies to one dying sonless.

"It is this passage and this alone introduced the name of a sister's son's son and omitted that of the sister after the daughter's son. It also adds after *samanodakan*, *matha sapindan*, *matha samanodakan*, *sishia*, *ruthwick*, *aqharian*, son-in-law and a fellow

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"student. It also puts the wife after *matha samanodakan* instead of before the brother. If this passage be correct and it is on this that the third defendant relies, it is some authority for the third defendant. But, having regard to the other texts quoted already, it rather appears that there is some mistake in the reading of this passage. How the sister's descendants come in even without their mother is not clear. Her name was expressly mentioned in all the slokas quoted above, and even a step-sister is given her place after the uterine sister.

"If the term *tat-putra* should follow 'swasa' with a 'cha' also following it (i.e., *swasacha tat-putra*) the whole sloka becomes then consistent with the other passages already quoted, and it will then give the sister and her son alone the right to perform the ceremonies and not the son's son also. This appears to agree also with a sloka quoted in the 'Dharma Sindhu,' which is an abstract of the bigger work called the 'Nirnaya Sindhu' (see page 261 of 'Dharma Sindhu' edited by Kristnajeo Ramachendra Sastri Nanare in 1888).

"I hold for these reasons that this work is no authority either for one or the other party. But, upon other considerations already cited, I think I may be justified in holding that the plaintiff has some preferential right in him, and that, at all events, his rights are not inferior to those of the third defendant."

In the result the Subordinate Judge passed a decree declaring that the alienations in question were not operative after the lifetime of defendant No. 1.

Defendant No. 3 preferred this appeal.

Sivasami Ayyar for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—This is a suit for a declaration that certain alienations made by the first defendant, the widow of one Vasudeva Pandithar, are not binding upon the plaintiff (respondent) as the nearest reversionary heir of Vasudeva. The third defendant (appellant) also claims to be Vasudeva's nearest reversionary heir. There is no dispute in this Court as to the actual relationship of these parties to Vasudeva. The plaintiff is the son of the maternal uncle of Vasudeva, and the third defendant is his sister's adopted son's son.

As to the plaintiff, it is not denied that he belongs to the first of the three classes into which *bandhus*, or cognate kindred entitled

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to inherit the estate of a deceased man, are divided, viz., his own or athma bandhus, his father's or pitru bandhus and his mother's or matru bandhus, inasmuch as the plaintiff is a relation of the exact description specifically mentioned by 'Vijnaneswara' as an athma bandhu (Mitakshara, Chapter II, section VI, v. 1). As to the third defendant, the learned Vakil for the plaintiff urges that he is not Vasudeva's athma bandhu. But that he is such a bandhu seems to be necessarily implied by the passage of the Mitakshara cited above. For it lays down that the father's sister's son, that is, a descendant of even the paternal grandfather, is an athma bandhu. How then can a bandhu, like the third defendant, who is able to trace his relationship to the deceased owner through a nearer ancestor, viz., the father, be held to be other than an athma bandhu? The plaintiff's objection on this point is, consequently, untenable.

The substantial question for determination is which of the two athma bandhus (whose rights are admittedly not equal) has the preferential title to the estate of Vasudeva?

The plaintiff's claim to such title was sought to be supported by two arguments. The first argument was this:—Vasudeva was the athma bandhu of the plaintiff while he was only the pitru bandhu of the third defendant; and the plaintiff's propinquity to Vasudeva should, therefore, be held to be greater than that which subsisted between Vasudeva and the third defendant. No decision or authoritative text was, however, cited in support of this argument. Since the question here is as to the title of the plaintiff to come in as the heir of Vasudeva, not as to Vasudeva's title to take the estate of the plaintiff, had the former been the survivor, the fact so much relied on on behalf of the plaintiff must be treated as irrelevant to the exact point in issue, and, consequently, cannot be held to confer on the plaintiff a right to succeed in preference to the third defendant.

The second argument on behalf of the plaintiff was that the third defendant could not, and did not, confer any religious benefit on Vasudeva, while the plaintiff could, and did, confer such benefit, and therefore the plaintiff had the better claim.

In the argument this was discussed with reference to Vasudeva's participation in the offerings of cake and water made periodically by the plaintiff to two of his paternal ancestors and also with reference to the question whether either party or both were competent to perform the obsequies of Vasudeva in the absence of nearer relations.

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Now, with reference to the first of the abovementioned matters, the plaintiff's paternal grandfather and great grandfather, to whom he has to present cake and water at stated times, being Vasudevas' maternal grandfather and great grandfather, respectively, were, as such, entitled to similar oblations from Vasudeva also, who consequently participated in the offerings made by the plaintiff to those common ancestors. But on the other hand as between the third defendant and Vasudeva, there was no possibility of similar participation, since none of the persons to whom the third defendant has to make offerings were entitled to like dues from Vasudeva.

Next, with reference to the second matter, viz., eligibility to perform the obsequies of Vasudeva, on behalf of the plaintiff no text expressly mentioning the son of the maternal uncle of a man as among those competent to celebrate that man's funeral rites was cited. But on behalf of the third defendant, a text quoted in Kamalakara's work on ceremonial law—the *Nirnaya Sindhu*—to the effect that a man's sister's son's son is eligible to perform the exequial rites of that man was relied on. The Subordinate Judge suggested that there was some mistake in the reading of the quotation in question. This view, however, seems to be scarcely well founded inasmuch as the principal circumstance relied on by the Subordinate Judge in favour of that view, viz., that no other known text refers similarly to the competency of a sister's grandson, is rather a slender foundation for the suggestion.

In these circumstances it is not on the whole easy to lay down positively that, in a spiritual point of view, the difference between the two claimants is of a very pronounced character and that the plaintiff's capacity to confer religious benefits upon Vasudeva decidedly preponderates. But granting, as the Subordinate Judge seemed disposed to hold, though not very confidently, that the plaintiff's capacity is superior, does that give him a better title? Now, though the doctrine of religious benefit has exercised very much influence upon many of the great writers on Hindu Law, yet it is now rightly recognized that Vijnaneswara as well as most of his followers put their system on a radically different basis. (See 'Mayne's Hindu Law,' Sections 9 and 468 to 478 and *Suba Singh v. Sarafraz Kumwar*(1).)

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At the same time it must be admitted that a high authority of the same school—the Viramitrodaya—has given countenance to the view that the doctrine of religious benefit is not without its applicability even under the Mitakshara system (Chapter II, Part I, Section 2, page 158). ('Golap Chander Sircar's Translation.') In the Allahabad case just referred to, Knox, J., seemed inclined to hold that the doctrine of the Viramitrodaya is not entitled to any weight (pages 226—7), but Bannerji, J., is not inclined to go that length (page 229). In this Court the doctrine was not long ago referred to, and relied on, in support of the proposition that, as between bandhus of the same class, a rule of preference may be found in the spiritual benefit which they confer (*Muttusami v. Muttu Kumarasami*(1)). It may, therefore, perhaps be unsafe to hold that the doctrine in question can never be resorted to in dealing with difficult questions arising under the Mitakshara Law and for the solution of which no definite rule is stated expressly or by implication in the leading treatises of that school. But be this as it may, there need be no hesitation whatever in saying that the doctrine ought not to be resorted to in derogation of the great principles pervading the Law of Inheritance under the Mitakshara system. The first of such principles is that the nearer line excludes the more remote. Applying it here, the plaintiff must doubtless fail, since he traces his right as a bandhu through Vasudeva's grandfather (maternal), while the third defendant makes out his right through a nearer ancestor of Vasudeva, viz., his father. The learned Vakil for the plaintiff laid considerable stress on the fact that the plaintiff is the grandson of Vasudeva's maternal grandfather, whereas the third defendant is the great grandson of Vasudeva's father. But it is not easy to see how this difference in the respective relationship affects the question under consideration. For, the competition here is not between persons descended from the same man, but between those who are seeking to establish their right through different persons, one of whom is unquestionably a nearer ancestor of the *propositus* than the other and whose line consequently must take precedence. If a more familiar illustration in support of so elementary a proposition were necessary, it is sufficient to refer to the case of a man dying leaving a divided nephew and a divided uncle. The nephew excludes the uncle though the

(1) I.L.R., 16 Mad., 23, in P.C., I.L.R., 19 Mad., 405.

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former is more removed from the father than the latter is from the grandfather of the *propositus*, the father and the grandfather being, of course, the respective common ancestors through whom the nephew and the uncle must respectively trace their right to inherit.

Another fundamental principle of the law in favour of the third defendant's preferable right is that among bandhus of a class those who are *ex parte paterna* take before bandhus *ex parte materna*. It is scarcely necessary to point out that though the mother's propinquity to her son is under the Mitakshara greater than that of the father, yet in the language of the Saraswathi Vilasa "the greater eligibility belongs to the mother alone, and not to the mother's bhandhavas" (Paragraph 598, 'Foulkes's Translation') and this Court's ruling on the point in *Sundrammal v. Rangasami Mudaliar*(1) renders it superfluous to cite other authorities respecting it.

On both the above grounds, therefore, it is perfectly clear that the third defendant is a nearer reversionary heir of Vasudeva than the plaintiff; and as there was no allegation or proof of the existence of any circumstances which would entitle the plaintiff to maintain the declaratory suit as a remote reversioner, the suit must fail on this preliminary ground.

The appeal is accordingly allowed, the decree of the Subordinate Judge is therefore reversed, and the suit dismissed with costs of the third defendant in this and in the Lower Court.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

MINAKSHI AMMAL (DEFENDANT No. 6), APPELLANT,

v.

KALIANARAMA RAYER (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 317, 244—Purchase by a benamidar with funds belonging to a joint Hindu family—Right of member of family not being a party to benami transaction to sue for his share.

A Hindu sued for partition of his share of the family property and obtained a decree which he partially executed. He then died without issue, leaving

1897.
March 9.

(1) I.L.R., 18 Mad., 193.

* Appeal No. 95 of 1896.

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a widow. The rest of the family remained undivided, and the plaintiff was born into it after the decree was passed. Some of the members of the family arranged for the purchase of the late decree-holder's property with their money *benami* for them and for a similar purchase of other portions of the family property at Court-sales held a further execution of the decree. The plaintiff now sued for partition of *inter alia* those portions of the family property which had been the subject of the *benami* transactions:

Held, that the plaintiff was entitled to share therein and was not precluded from asserting his right by Civil Procedure Code, section 244, or section 317.

APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in Original Suit No. 13 of 1894.

The plaintiff, a minor, sued by his next friend to recover one-fourth share of the properties belonging to a joint Hindu family, consisting of himself, his three brothers, defendants Nos. 1 to 3, and the infant sons of defendants Nos. 2 and 3.

The only question between the parties necessary to be mentioned for the purposes of this report was the question between the plaintiff and the sixth defendant, which was raised on the following facts:—

Another brother (Krishna Row) of the plaintiff and defendants Nos. 1 to 3 had instituted a suit for partition against his father (now dead) and defendants Nos. 1 to 3, the present plaintiff at that time not having been born, and obtained a decree for one-fifth share in the family properties. Krishna Row obtained possession of certain properties under this decree, but, before the decree was fully satisfied, he died without issue, leaving a widow. The widow entered upon the properties which her husband had obtained under the decree. Some time after, the widow conveyed to the sixth defendant the properties obtained by her husband and all her interest in the decree in favour of her husband. The purchase by the sixth defendant was *benami* and the purchase money was provided by the first and second defendants out of family funds. Subsequently the sixth defendant took out further execution of the partition decree in favour of Krishna Row, and caused certain family properties to be sold in Court-sale and purchased them *benami* with money provided by first and second defendants out of family funds. The plaintiff was not a party to the *benami* transactions.

The sixth defendant denied that the transactions were *benami*, and as to the purchases in Court-sale relied on section 317, Civil Procedure Code, and contended that the question raised by plaintiff

ought to have been raised in execution proceedings under the decree in favour of Krishna Row.

The Subordinate Judge then dealt with issues as follows:—

“Is the plaintiff entitled to a share in the disputed properties, —I mean such as were bought in Court auction,—or is he barred from claiming it either by section 317 or section 244 of the Civil Procedure Code? These are the questions raised in the last two additional issues and they were raised on behalf of the sixth defendant. It seems to me that, so far as the present plaintiff is concerned, neither of these sections apply to shut him out and bar him from recovering his share of the lands bought in this Court's auction in the sixth defendant's name. Though he was a party to the decree, he was no party to the arrangement by which this sham purchase was made in the sixth defendant's name, and his object is not to set it aside as made in fraud of his rights as a member of the family to whom the purchase money belonged. *Natesa v. Venkatramayyan*(1) is on all fours with the facts of these cases, and it was there held that section 317 would not operate as a bar.

“The Privy Council case in *Bodh Sing Doodhooria v. Gunes Chunder Sen*(2), on which the sixth defendant's vakil relies, was considered in the Madras case above quoted, and was distinguished, and I cannot find it to apply to the present case.

“In *Monappa v. Surappa*(3) the facts were that a purchaser in a Court-sale acknowledged he was a *benami* purchaser and gave up possession and after some time went to eject the true owner, when the true owner next sued, he sought to defend his possession by relying on section 317.

“In such a case too, the Court held that that section was no bar and what do we find the facts here established? The sixth defendant did not claim any right as purchaser, though proceedings were had in her name, and she was only given possession not under the process of Court, but by the second defendant in fraud of plaintiff's rights long after the sale. She cannot plead that the possession thus given her was had under her rights as Court purchaser and seek the protection afforded by section 317 as against the plaintiff.

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(1) I.L.R., 6 Mad., 135.

(2) 19 W.R., 356.

(3) I.L.R., 11 Mad., 235.

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"The cases of *Kanizak Sukina v. Monohur Das*(1) and *Subha Bibi v. Hari Lal Das*(2) also support the plaintiff, and although the former case was dissented from by his Lordship the Chief Justice and Mr. Justice Handley in *Rama Kurup v. Sridevi*(3); "it was said that so far as it related to section 317, it was an *obiter dictum*, whether it was so or not, their Lordships did not consider the two earlier Madras cases reported in the sixth and eleventh volumes and did not dissent from them.

"Section 244 of the Civil Procedure Code too cannot bar the present suit. It was contended that as the minor plaintiff was a party to the decree in execution of which these properties were sold; if the sale was brought about improperly, he ought to apply under section 244 to have the sale set aside and not bring a separate suit. Reliance was placed on *Prosunno Kumar Sanyal v. Kali Das Sanyal*(4), *Mohendro Narain Chaturaj v. Gopal Mondul*(5), and *Krishnan v. Arunachalam*(6). It seems to me that the object of the present suit is not to set aside the sale but to have it declared that the purchase made was *benami*, with the aid of family funds and also that all proceedings had under that decree were sham and colorable, inasmuch as that decree had been discharged by payment made from family funds. The Madras ruling quoted is not in point. The question considered and decided in it was one which arose in relation to the execution of a decree whether some properties, in the hands of a representative of a judgment-debtor were or were not liable for the same.

"In *Mohendro Narain Chaturaj v. Gopal Mondul*(5) it was certainly held that 'when circumstances affecting the validity of a sale in execution have been brought about by the fraud of one of the parties to the suit and give rise to a question between these parties such as, apart from fraud, would lie within the provisions of section 244, a suit will not be to impeach the validity of the sale on the ground of such fraud' and 'that in such a case, the judgment-debtor is entitled, whether the sale has been confirmed or not, to make against the person guilty of the fraud or accessory thereto, such application, if any, under section 311 as he may be entitled to make, his time for

(1) I.L.R., 12 Calc., 204.

(2) I.L.R., 21 Calc., 519.

(3) I.L.R., 16 Mad., 290.

(4) I.L.R., 19 Calc., 683.

(5) I.L.R., 17 Calc., 769.

(6) I.L.R., 16 Mad., 447.

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"making it being computed from the time when the fraud first became known to him.' It was also held in the same case that 'in cases in which the decree of the purchase is made *'benami*,' section 244 did not apply and a suit might be brought to set aside the sale.

"The present case falls under this last rule. Though the decree was not passed *benami* the transfer of it and all proceedings had under that transfer have been alleged and found to be *benami*.

"The Privy Council ruling in *Prosunno Kumar Sanyal v. Kali Das Sanyal*(1) does not further limit this rule. It simply held that even the rights of a stranger purchaser must be enquired into under section 244 whenever that section applied."

Defendant No. 6 preferred this appeal.

Pattabhirama Ayyar and *Mahadeva Ayyar* for appellant.

Krishnasami Ayyar for respondent.

JUDGMENT.—The Subordinate Judge has given excellent reasons founded on clear documentary and oral evidence, for his conclusion that the transfers to the sixth defendant were *benami* for the family of the plaintiff and defendants Nos. 1 to 3. These reasons have not been shown to be incorrect in the argument before us. We concur in the finding of the Subordinate Judge on this issue. As to the effect of section 317 of the Civil Procedure Code with regard to the plaintiff's right to maintain the present suit to recover his share of the family property, we observe that the present case is governed by the decision in *Natesa v. Venkatramayyan*(2). That case is exactly on all fours with the present case, and has not been overruled or dissented from in the cases referred to by the appellant's *vakil* *Rama Kurup v. Sridevi*(3), *Sankunni Nayar v. Narayanan Nambudri*(4), *Kumbalinga Pillai v. Ariaputra Padiachi*(5).

Lastly, on the finding that the sixth defendant was not the real transferee of the decree, no question as to the effect of section 244, Civil Procedure Code, on the plaintiff's right to maintain this suit can arise. We must, therefore, confirm the decree of the Subordinate Judge and dismiss this appeal with costs.

(1) I.L.R., 19 Calc., 683. (2) I.L.R., 6 Mad., 135. (3) I.L.R., 16 Mad., 290.

(4) I.L.R., 17 Mad., 282.

(5) I.L.R., 18 Mad., 436.

APPELLATE CIVIL.

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

1897.
July 28, 29.

PONNAMBALA PILLAI (PLAINTIFF), APPELLANT,

v.

SUNDARAPPAYYAR (DEFENDANT), RESPONDENT.*

*Hindu Law—Conditional contract to sell family lands—Birth of vendor's son
before fulfilment of condition.*

A Hindu entered into a contract to sell certain land, being family property of which he was not in possession, as soon as possession should be obtained. Before possession was obtained a son was born to him. A decree for specific performance was passed and executed against him, the son not being brought on to the record. In a suit by the son for partition of the property in question :

Held, that the plaintiff had an existing right in the property which was not bound by the decree and the subsequent proceedings, and that he was entitled to the relief sought.

Seemle : That a contract for sale of land made by a Hindu before a son is born to him is not binding on the son born before the transfer of the property takes place.

SECOND APPEAL against the decree of T. M. Horsfall, District Judge of Tanjore, in Appeal Suit No. 255 of 1895, confirming the decree of T. Venkataramayya, District Munsiff of Kumbakonam, in Original Suit No. 422 of 1893.

The plaintiff sued for partition and possession of a moiety of certain land together with mesne profits. The property in question had belonged to the family of the plaintiff. He however was not born until 1874, before which date certain transactions had been entered into between his father and uncle, since deceased, and the present defendant. In 1872 the father and uncle agreed to sell to defendant their family lands in a certain village including the property now in question, and later on in the same year they executed a conveyance of so much of the property as was then in their possession, and therein expressed their willingness to execute a sale-deed in respect of the rest of the land, of which they expected to get possession, as soon as that should happen. Possession was obtained in 1877, but the plaintiff's father refused to convey, and a suit for specific performance

* Second Appeal No. 754 of 1896.

was brought against him. In this suit to which the present plaintiff was not a party, a decree was passed as prayed, and in the result the land of which partition is now sought was conveyed to defendant.

It was not found that the sale was justified by circumstances of family necessity, but both the Lower Courts held that the plaintiff was not entitled to recover. The District Judge expressed the view that the transaction based on the contract of 1877 was inseparable from that of 1872 and was therefore binding on the plaintiff who was not born at the last-mentioned date.

The plaintiff preferred this appeal.

The *Acting Advocate-General* (Hon'ble V. Bhashyam Ayyangar) and *Kristnasami Ayyar* for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—The facts of this case lie in a small compass and there was so little dispute about them that no issues of fact were raised in the Court of First Instance. In 1872 before the birth of the plaintiff, his father together with his brother Saminada having certain debts to pay off entered into an oral contract with the defendant to sell to him their family lands in the village of Anakudi and their share of the palace in the same place for the sum of Rs. 29,000. On the 10th May 1872 the vendors wrote to the defendant the letter marked XVIII. In it they say that three velies and odd have not yet been delivered into their possession under the Court decree and they ask the defendant to let the matter stand over and take a sale-deed in respect of the remaining properties for Rs. 25,000, expressing their willingness to execute a sale "in respect of the said maniam punjah, &c., lands for a sum of Rs. 3,500 as soon as we get possession of the same." To this request the defendant acceded, and accordingly a conveyance in his favour was executed on the 12th May 1872, comprising the other lands included in the contract and expressed to be in consideration of the sum of Rs. 25,500, details of which are given in the document. The proceedings in the partition suit referred to in the letter XVIII are not before us. But it appears from the exhibits put in by the defendant (XIV and XV) that it was in May 1872 uncertain what share of the punjah lands would fall to the vendors, and that, in the result, they did not get the lands which they expected to get. This did not happen till February 1877 before which date the plaintiff had been born and his father's brother

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had died. By that time the plaintiff's father had repented of his bargain and accordingly he refused to convey to the defendant the punjah lands of which he came into possession. The result of this conduct was a suit for specific performance brought by the present defendant. This litigation went on during 1880 and 1881 and ended in a decree against the plaintiff's father. The plaintiff himself was not joined in this suit, and it is quite impossible to hold, as was argued by the respondent's wakil, that the plaintiff was in any way represented in the suit by his father. Now, in this suit instituted soon after the plaintiff came of age, he claims a moiety of the property conveyed to the defendant in pursuance of the decree for specific performance made against his father. The plaintiff's case is that, inasmuch as he was born before the decree was passed or the conveyance executed, and the sale of the property was not necessitated by the exigency of any debt pressing on his father, he being by birth a coparcener with his father is entitled to repudiate the sale so far as his moiety is concerned. The District Judge appears to have based his judgment in the defendant's favour on the ground that the sale was made under the original contract and that as the plaintiff was bound by the sale made on the 12th May 1872, so he must be bound by the further sale made in pursuance of the same contract. It has not been found by either Court that there was any necessity for the sale impeached by the plaintiff. The defendant's case must therefore be rested on the ground that a contract for sale made by a Hindu before a son is born to him is binding on the son notwithstanding that the latter is born before the transfer of the property takes place. No authority was cited for this position, and we do not think it can be maintained. The son of a Hindu on his birth becomes a coparcener with his father in respect of family property. This right of the son may be defeated, or rather is prevented from coming into existence, by an alienation of the property made before the son's birth. We are asked now to hold that a mere contract for sale operates as an alienation, and that in the suit which may be brought on that contract by the purchaser the son has no other defence than the father would have. In support of the argument reference is made to the doctrine of equity according to which the purchaser under a contract for sale is for certain purposes regarded as the owner of the property. If otherwise this doctrine has any application we do not see how it can avail the defendant and alter the

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fact that his vendor's interest in the property was liable to be diminished by the birth of a son. It is not as if the son claimed through the father. A purchaser in the position of the defendant before actual transfer of the property is in no worse position than the purchaser from a coparcener of an undefined share. As the latter takes subject to the chance of the vendor's share being diminished before partition takes place, so a purchaser in the defendant's position, contracting with one whose interest is liable to diminution, must take subject to that liability.

But the whole argument for the defendant rests on the assumption that the contract enforced by the suit of 1880 was the original contract of 1872. We think this is a complete mistake. On the acceptance of the offer made in the letter already mentioned a new contract with new incidents was effected with regard to the lands which the plaintiff's father was not then in a position to deliver. In that new contract there was a condition which was not fulfilled until long after the plaintiff's birth. It is impossible, therefore, to hold that at the date of his birth there was no property in existence to which the plaintiff's right could attach. On the ground that the property of which partition has now been claimed had not passed from the family when the plaintiff was born, we must hold that the plaintiff is entitled to the decree for which he asks. It is suggested that he ought to be put upon terms and that it should be assumed that his share of the purchase money came to his hands. This, however, is a point which ought to have been taken in the Court of First Instance and made the subject of an issue. It cannot be assumed that the plaintiff has become possessed of any part of the purchase money, and there is admittedly no evidence to support the observation made on the point by the District Judge.

The decree must be reversed and a decree passed in favour of the plaintiff; and the respondent must pay the costs in all the Courts.

APPELLATE CIVIL.

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

1896.
October 26.

SESHAMMAL (PLAINTIFF), PETITIONER,

vs.

MUNUSAMI MUDALI (DEFENDANT), RESPONDENT.*

Presidency Small Cause Courts Act—Act XV of 1882, ss. 37, 38, 69—Stating case on application for a new trial.

When, upon an application to the Presidency Small Cause Court for a new trial, the Judges differ in their opinion as to any question of law and the majority without ordering a new trial reverse the decree of the Judge who tried the suit, the Court is bound to state a case for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act.

PETITION under section 622 of the Code of Civil Procedure praying the High Court to revise the decree of the Presidency Court of Small Causes, Madras, in suit No. 19335 of 1892.

The plaintiff, the wife of the defendant, sued in the Presidency Small Cause Court to recover Rs. 310 expended by her on the marriage of their daughter. The case was tried by the Chief Judge who gave the plaintiff a decree. The defendant on 30th November 1894 applied to the Full Court for a new trial. The Chief Judge adhered to his view that the plaintiff was entitled to sue for the money expended, but the other Judges of the Court held that the suit was not maintainable. In the result the Court reversed the decree of the Chief Judge.

The plaintiff preferred this petition.

Kothandaramayyar for petitioner.

Pattabhirama Ayyar for respondent.

JUDGMENT.—The plaintiff sued in the Presidency Small Cause Court, and her claim was decreed by the Chief Judge. Under section 37 of the Act the defendant made an application for a new trial, and the Small Cause Court, consisting of the Chief Judge and two other Judges, heard the application, and in doing so went into the merits of the case. The Chief Judge differed from his colleagues on a point of law, and still maintained that the claim should be decreed, but his colleagues taking a different view on

the point of law, the Court reversed the decree passed by the Chief Judge and gave judgment for defendant with costs.

Plaintiff now puts in this revision petition under section 622, Civil Procedure Code, on the ground that, as the Judges differed on a point of law, they were bound, under section 69 of the Presidency Small Cause Courts Act, to refer the case for the opinion of the High Court and either to reserve judgment or deliver a judgment contingent upon such opinion.

We think the petition must be allowed. The provision of section 69 is imperative, it says "If two or more Judges sit together in any suit . . . and differ in their opinion as to any question of law . . . the Small Cause Court shall draw up a statement of the facts of the case, and refer such statement . . . for the opinion of the High Court, and shall either reserve judgment or give judgment contingent upon such opinion."

It is contended for the counter-petitioner that the difference of opinion now in question did not arise "in any suit," so as to come within the purview of section 69, but only on an application under section 37, and it is pointed out that it has been held in the cases of *Oakshott v. The British India Steam Navigation Company*(1), *Nusserwanjee v. Pursutum Doss*(2), and *Hall v. Joachim*(3), that the Small Cause Court cannot state a case for the opinion of the High Court on an application for a new trial under section 37 of the Act. The fallacy in this argument lies in not observing that in the present case the full Small Cause Court did more than consider the application for a new trial. No doubt the cases quoted are an authority for holding that, while the Court is considering whether a new trial shall be granted or not, section 69 has no application, but, in our opinion, when the Court goes further and proceeds to deal afresh with the merits of the case, it must be held that the new trial has been granted, and that the Court is thenceforward engaged in trying the suit. In all the above-quoted cases the application was rejected, so that section 69 could not, in any way, apply; but in the present case though no separate order formally granting a new trial was made, yet such new trial was, by necessary implication, granted before the Court proceeded to re-hear the suit. The cases quoted are,

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v.
MUNUSAMI
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* Civil Revision Petition No. 784 of 1895.

(1) I.L.R., 15 Mad., 170. (2) I.L.R., 11 Cal., 208. (3) 12 B.L.R., 34.

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therefore, no authority for the counter-petitioner's contention. Indeed in every one of them it is assumed that, of a new trial had been granted, the reference to the High Court could properly have been raised, and we have no doubt, but that that assumption is correct.

We must, therefore, set aside the revised decree of the Small Cause Court with costs, and direct that the suit be restored to its file, and be dealt with in accordance with law as laid down in section 69 of the Presidency Small Cause Courts Act. As the Chief Judge who was a party to the decree now set aside is absent on leave, but will shortly return, it is desirable that the case should not be taken up for reference until his return.

APPELLATE CIVIL.

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

SINGA REDDI OBALA REDDI (PLAINTIFF), APPELLANT,

v.

MADAVA RAU (DEFENDANT No. 1), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 32, 45, 46—Dismissal of suit against one defendant without trial after first hearing.

The plaintiff sued for damages for the infringement of certain hereditary rights claimed by him in connection with a temple. The first defendant was a magistrate and it was alleged as the cause of action against him that he had disobeyed the instructions of his superiors and played into the hands of the other defendants by passing an illegal order. After issues had been framed the Judge without trial dismissed the suit with costs against the first defendant:

Held, that the order was illegal.

APPEAL against the order of W. G. Underwood, District Judge of Cuddapah, in Original Suit No. 4 of 1895.

The plaintiff claimed that he had hereditary rights connected with the festivals of a certain temple, and he sued for damages for the infringement of those rights.

Paragraphs 2, 3, 4 and 5 of the plaint were as follows:—

"The second and third defendants who are Komatis induced the fourth defendant to acquiesce in their attempts to break the abovementioned time-honoured custom and invented, after their

"recent accession to the office of Dharmakartaship of the temple, SINGA REDDI
"frivolous and flimsy pretexts for disgracing the plaintiff."

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"The first defendant, who was directed by the Deputy Magistrate of Jammalmadugu Division to hold the scales evenly in this contentious state, disobeyed the plain instructions issued to him on 21st May 1894 and played himself into the hands of the other defendants by passing an illegal order on 25th May 1894 authorising the conduct of the festivals interdicted in spite of the fact that no reconciliation had taken place."

"When the minor plaintiff and his next friend appeared on the night of the abovesaid 25th May 1894 at the Papagni river-bed on the occasion of Garudotsavam and claimed the customary honours of Tomalai, the first defendant abused his official authority and had them dragged by sheer force and thereby disgraced and lowered them immensely in the eyes of the assembled multitude besides wounding their feelings.

"The wanton, malicious and vindictive refusal on the part of all defendants to render the customary honours to the plaintiff, was further aggravated by the high-handed, arbitrary and illegal proceedings of the first defendant and has resulted in the extreme disgrace to the highly respectable and wealthy family of the plaintiff."

Defendant No. 1 filed a written statement denying the plaintiff's allegations as far as they affected him, and the District Judge, after issues were framed between the plaintiff and all the defendants, made the order now appealed against by which the suit was dismissed against the first defendant in the following terms:—

"I think I am right in dismissing K. Madava Rau from this suit with costs. I do so accordingly. If he violated his powers as a magistrate, a case will undoubtedly lie against him. But that has nothing to do with the present cause of action. The suit is wholly on the rights in the ceremonies, and it remains for the Court to decide if the dispute is wholly religious or a matter in which a secular Court can take cognizance and decide the issues raised or whether the matter should be settled in the caste."

The plaintiff preferred this appeal.

Tiagarajayyar, for appellant.

Mr. J. G. Smith for respondent.

JUDGMENT.—We do not understand under what provision of law the District Judge passed the order appealed against. Section

* Appeal against Order No. 34 of 1896.

SINGA REDDI 32, Civil Procedure Code, gives the Court power to strike out the name of any defendant who has been improperly joined as a party, but that must be done on or before the first hearing. In the present case the order was not made until some time after the issues were settled. Again if it appeared to the Court that the cause of action alleged against first defendant alone, and that alleged against him jointly with the other defendants, could not be conveniently tried together, the Court might have proceeded under section 45, Civil Procedure Code, and have ordered the several causes of action to be tried separately; but (unless the parties otherwise agreed, which was not alleged in the present case) this power also could only be exercised before the first hearing.

Lastly the first defendant might have applied under section 46, Civil Procedure Code, to confine the suit to such cause or causes of action as could be conveniently tried together. The District Judge does not appear to have acted under this section; for he has not confined the suit as contemplated by that section, but has dismissed it all together with costs as against the first defendant.

The District Judge has assigned no legal grounds for making such an order, and we can discover none in the papers before us.

We must, therefore, set aside the order of the District Judge and direct him to restore the suit as against this first defendant to his file, and proceed to dispose of it in accordance with law. Costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Subramaniam Ayyar and Mr. Justice Benson.

KOLLANTAVIDA MANIKOTH ONAKKAN (PLAINTIFF),
APPELLANT,

v.

TIRUVALIL KALANDAN ALIYAMMA AND OTHERS
(DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 317—Execution sale—Right to prove purchase benami.

Certain property was mortgaged in 1881 and again in 1882. In 1883 the interest of one of the mortgagors in the property was brought to sale subject

* Second Appeal No. 1731 of 1895.

to the mortgages in execution of a decree against him, and was purchased by the assignor of defendant No. 6. In 1884 a decree for sale was obtained on the mortgage of 1882, neither defendant No. 6 nor his assignor having been brought on to the record. In execution of that decree the property now in question was purchased by the predecessor in title of the plaintiff who now brought this suit for redemption, averring that the purchase of 1883 was *benami* for the mortgagors:

Held, that the plaintiff was not debarred by Civil Procedure Code, section 317, from proving this averment.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 467 of 1894, affirming the decree of A. Annasami Ayyar, District Munsif of Panur, in Original Suit No. 17 of 1894.

Suit to redeem a *kanom*, dated 22nd March 1881, and executed in favour of defendant No. 1. In February 1882 the mortgagors hypothecated certain property including the property now in suit to one Kunju Narayanan Nambiar, who obtained a decree for sale in 1884. In July 1885 in execution of that decree the property was brought to sale, and that portion of it which was now in question was purchased by defendant No. 5, who in October 1888 transferred his rights therein to the plaintiff's sister. The plaintiff's sister subsequently died and this suit was brought by the plaintiff as her representative and as the *karnavan* of the *tarwad*. Meanwhile, viz., in 1883, in execution of a decree against one of the mortgagors, his interest in the property now in question was brought to sale subject to the mortgages of 1881 and 1882, and was purchased by one Rama Kurup who assigned his right in 1888 to the present defendant No. 6, but he was not made a party to the suit in which the decree for sale was passed. The plaintiff now averred that Rama Kurup had purchased *benami* for the two mortgagors. This averment the District Munsif held could not be entertained with reference to Civil Procedure Code, section 317; and as the plaintiff objected to opportunity being given to defendant No. 6 of redeeming the mortgage of 1882, he dismissed the suit. His decree was affirmed on appeal by the District Judge. The plaintiff preferred this second appeal.

Mr. Krishnan and Vaithinatha Ayyar for appellant.

Ryru Nambiar for respondent No. 6.

ORDER.—The plaintiff is the assignee of the rights of a purchaser in a Court-sale held in 1885, under a decree obtained in 1884 upon the hypothecation (exhibit C, dated 23rd February 1882). The sixth defendant (respondent) purchased the right, title

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and interest of apparently one of the mortgagors (in exhibit C) in execution of a Small Cause Court decree in 1883, but was not made a party to the suit on exhibit C. The question is whether the plaintiff is entitled to show that the sixth defendant purchased *benami* for the mortgagors in C. Both the Lower Courts have held that he is not so entitled. Under the purchase in the suit or exhibit C, the plaintiff has acquired the rights not only of the mortgagors, whatever they were in 1885, but also the rights of the mortgagee under exhibit C, as they stood on its date, viz., 23rd February 1882. It is contended for the respondent that under section 317, Civil Procedure Code, as interpreted in *Rama Kurup v. Sridevi*(1), no person, under any circumstances, may prove that the certified auction purchaser was not the real purchaser; but this is opposed to the conclusions arrived at in *Natesa v. Venkatramayyan*(2), and *Ramakrishnappa v. Adinarayana*(3). In the former it was held that section 317 does not bar the son of a Hindu father from proving in a suit for partition that the certified purchaser was acting *benami* for the father. In the latter it was held that a person who did not claim under the *benami* purchaser was not precluded by section 317 from showing the real character of the purchase. There can be no doubt but that the mortgagee under exhibit C, as a person not claiming under either of the parties to the *benami* purchase, was entitled in the suit instituted by him on the mortgage to show, if necessary, the true nature of the purchase.

Consequently, the present plaintiff, as occupying his place, is equally so entitled.

We must, therefore, ask the District Judge to find whether the purchase by the sixth defendant was *benami* for the mortgagors as alleged on behalf of plaintiff. If the finding on the above issue is in favour of the sixth defendant, we will ask the District Judge to find further whether the sixth defendant acquired by his purchase the right of both the mortgagors (Nambiaris) or only of one of them against whom the decree was passed.

Fresh evidence may be taken on these issues on both sides. Finding is to be returned within two months of receipt of this order, and seven days will be allowed for filing objections after notice of the receipt of the finding has been posted up in this Court.

(1) I.L.R., 16 Mad., 290. (2) I.L.R., 6 Mad., 135. (3) I.L.R., 8 Mad., 511.

APPELLATE CIVIL.

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

NARASIMMA CHARIAR (PLAINTIFF), PETITIONER,

v.

SINNAVAN (DEFENDANT), RESPONDENT.*

1896.
November 6.

Legal Practitioners Act—Act XVIII of 1879, s. 28—Oral agreement for pleader's remuneration—Criminal Proceedings—“Quantum meruit.”

A pleader was retained by an accused person to conduct his defence. The accused did not pay the agreed fee and the plaintiff whereupon declined to conduct his defence. The defendant who was one of the accused, then undertook orally to pay the fee, but failed to do so after the plaintiff had conducted the defence of both accused persons. The plaintiff now sued the defendant to recover the agreed amount:

Held, that, under Legal Practitioners Act, section 28, the plaintiff was not entitled to recover on the contract, but that he was entitled to recover reasonable remuneration for the services rendered by him.

PETITION under section 25 of the Provincial Small Cause Courts Act praying the High Court to revise the decree of K. Krishnama-chariar, District Munsif of Madura, in Small Cause Suit No. 1480 of 1895.

The plaintiff was a First-grade Pleader, and he sued to recover Rs. 25 under the following circumstances. One Mathuranayagam Pillai retained the plaintiff to defend him in a criminal case, but failed to pay his fee whereupon the plaintiff refused to appear for him. Thereupon the defendant, who was also on his trial in the same case, undertook to pay the plaintiff Rs. 25, the fee agreed to be paid by Mathuranayagam Pillai. Relying upon this undertaking the plaintiff conducted the defence, but the defendant failed to pay the amount for which this suit was accordingly brought.

The District Munsif dismissed the suit; holding, with reference to Legal Practitioners Act, sections 28 and 29, and *Sundararaja Ayyangar v. Pattanathusami Tevar*(1), that the claim could not be supported on the oral contract alleged by him; and he expressing the opinion that, under the circumstances, the plaintiff was not entitled to bring this suit to recover *quantum meruit*, and declined to consider the plaintiff's claim on that footing.

The plaintiff preferred this petition.

* Civil Revision Petition No. 73 of 1896.

(1) I.L.R., 17 Mad., 306.

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SINNAVAN.

Mahadeva Ayyar for petitioner.

Srirangachariar for respondent.

JUDGMENT.—We agree with the District Munsif that section 28 of the Legal Practitioners Act is applicable. The plaintiff may, however, recover reasonable remuneration for the work done by him for the benefit of the client on the principle *quantum meruit*, *Krishnasami v. Kesava*(1).

The District Munsif refused to go into this question on the ground that the person benefited, viz., the second defendant, in the criminal case, was no party to the present suit. We observe, however, that the plaintiff would not have gone into Court at all but for the guarantee given by the first defendant, and the latter would have been in that case undefended. The first defendant then derived benefit from the plaintiff going into Court to defend him and the second defendant jointly. We think, therefore, that the plaintiff may recover reasonable remuneration for the services he rendered. We therefore set aside the decree of the District Munsif with costs and direct him to restore the suit to his file and dispose of it on the merits.

APPELLATE CIVIL.

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

LINGUM KRISHNABHUPATI DEVU (PETITIONER),
APPELLANT,

v.

KANDULA SIVARAMAYYA (COUNTER-PETITIONER),
RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 243, 588—Stay of execution pending suit between decree-holder and judgment-debtor—Stay of execution refused—Appeal.

An appeal lies from an order refusing stay of execution under Civil Procedure Code, section 243, pending a suit between a decree-holder and his judgment-debtor.

APPEAL against the order of H. R. Farmer, District Judge of Vizagapatam, in Miscellaneous Petition No. 78 of 1896.

This was a petition under section 243 of the Code of Civil Procedure preferred by the judgment-debtor in Original Suit No. 11

(1) I.L.R., 14 Mad., 63.

* Appeal against Order No. 52 of 1896.

of 1883, praying that the execution of the decree in that suit be stayed pending disposal of a suit instituted by him against the decree-holder.

The District Judge in his order said: "Under the circumstances I resolve to refuse to stay execution absolutely under section 243, but, at the request of counter-petitioner's pleader, a month's time will be given him to apply to the High Court . . . If no orders staying execution are received from the High Court within a month and if no further time be granted execution will proceed."

The judgment-debtor preferred this appeal.

Mr. Adam and *R. Subramania Ayyar* for appellant.

Ramachandra Rau Saheb for respondent.

JUDGMENT.—A preliminary objection is taken on the ground that the order appealed against was passed under section 243 of the Civil Procedure Code, and that no appeal lies against such an order. We do not think that this contention can be upheld. Following the reasoning and the rulings in the cases of *Ghazidin v. Fakir Bakhsh*(1), *Kassa Mal v. Gopi*(2), *Steel & Co. v. Ichchamoyi Chowdhraim*(3), we hold that an appeal lies. We therefore disallow the preliminary objection.

As to the merits, the District Judge states that he does not consider that the appellant will have difficulty in recovering any sum that may now be paid over to the respondent in execution of the decree. The decree was passed as long ago as 1883. We dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

RANGAYYA APPA RAU (PLAINTIFF), APPELLANT,

v.

KAMESWARA RAU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Registration Act—Act III of 1877, s. 17—Deed of relinquishment by tenant to land-holder.

An instrument by which a tenant in a zamindari, in consideration of the zamindar waiving his right to arrears of rent accrued due, relinquishes the land

(1) I.L.R., 7 All., 73. (2) I.L.R., 10 All., 389. (3) I.L.R., 13 Cal., 111.

* Second Appeal No. 925 of 1895.

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KRISHNA-
BHUPATI
DEVU

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KANDULA
SIVA-
RAMAYYA.

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1896.
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to him, is not admissible in evidence, unless it is registered in accordance with law, although it may have been drawn up and delivered to the servants of the zamindar before he had signified his consent to waive his right to the arrears.

SECOND APPEAL against the decree of E. A. Elwin, Acting District Judge of Kistna, in Appeal Suit No. 1567 of 1893, affirming the decree of M. Venkataratnam, Acting District Munsif of Gudivada, in Original Suit No. 160 of 1892.

Plaintiff was a zamindar and he sued for a declaration of his title to, and for possession of, certain land forming part of the zamindari, of which defendant No. 1 had been in possession as tenant. It appeared that the tenant, having fallen into difficulties, executed a document on the 20th June 1888 addressed to the plaintiff in the following terms:—"To the zamindar, &c., relinquishment report put in by Govindarazulu Kameswara Rau, cultivator of Gurazada. Being unable to cultivate the 16 acres 84 cents of dry land and 7 acres and 87 cents of wet land, 24 acres and 72 cents in all, which I have been cultivating in the village of Gurazada, and, finding it inconvenient to pay the arrears on it, I have relinquished the right to the Sirkar (i.e., the zamindar). I agree to the removal of that land from the village accounts in my name for fasli 1298 and to your disposing of the same at your pleasure without my having anything to do with the arrears of Rs. 600 and odd due thereon. This relinquishment report is put in with consent." Subsequently defendant No. 1 executed in favour of defendant No. 2 a mortgage of the land in question upon which a decree was obtained by the mortgagee in Original Suit No. 176 of 1889, and in execution of the decree the land was brought to sale and part of it was purchased by the decree-holder.

The plaintiff's case was that the instrument of mortgage did not represent a real transaction and that the proceedings in the previous suit were collusive. The instrument of 1888 was unregistered. On that ground the District Munsif declined to receive it in evidence and dismissed the suit. His decision was upheld on appeal by the District Judge.

The plaintiff preferred this second appeal.

Sundara Ayyar and *Ramasubba Ayyar* for appellants.

Pattabhirama Ayyar for respondents.

JUDGMENT.—If the document in question was nothing more than a mere relinquishment presented by a tenant, the first defendant, to his landlord, the plaintiff, under section 12 of Act VIII of 1865, which authorises the former to relinquish his holding at the

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RAU.

end of any revenue year by a writing signed in the presence of witnesses irrespective of the wishes of the landlord in the matter, there can be no doubt that the document did not require to be registered under section 17 of the Indian Registration Act. But that the document was one given for a consideration which moved from the plaintiff to the first defendant, viz., the waiver by the former of his right to the arrears of rent amounting to Rs. 600 due at the time of the relinquishment is clear from the terms of the instrument itself. It is true that the passage in the plaint, upon which stress was laid on behalf of the plaintiff, suggests that the paper in question had been delivered to the servants of the plaintiff before he signified his consent to forego his claim to the 600 rupees. But neither the fact that the plaintiff accepted the first defendant's offer only after the paper, which was to operate as evidence of the relinquishment, had been put into the hands of his servants, nor the circumstance that the acceptance was not in writing is at all material. The moment the offer was accepted the paper which had been parted with by the first defendant conditionally, as it were, became fully operative between the parties to the arrangement and extinguished the interests which the first defendant had as a tenant. Therefore the conclusion of the Lower Courts that the relinquishment was not a mere abandonment under section 12 of the Rent Recovery Act by the first defendant of his right to occupy the land, but a contract between him and the plaintiff, which fell within section 17 of the Registration Act, and which was, therefore, inadmissible for want of registration, appears to us to be correct.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

KRISHNASAMI AYYANGAR (PLAINTIFF), APPELLANT,

v.

RANGA AYYANGAR (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 158—Adjustment of decree out of Court—Agreement not certified to Court—Action for damages.

A decree for partition of family property was passed in favour of two plaintiffs. One of the plaintiffs having died before execution, a question arose between the

1896.
December 4.

* Appeal No. 220 of 1895.

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 v.
 RANGA
 AYYANGAR.

survivor and one of the defendants as to the devolution of his interest, and the decision was in favour of the surviving plaintiff. The contending parties made an arrangement according to which some of the land representing the share of the deceased plaintiff should be given to the defendant. This agreement was not certified to the Court and the decree was executed at the instance of the surviving plaintiff who subsequently refused to give effect to the arrangement. The then defendant now sued in the alternative for possession of the land awarded to him or for damages:

Held, (1) that the plaintiff's claim for the land was not maintainable;
 (2) that the claim for damages for breach of the agreement was maintainable.

APPEAL against the decree of V. Srinivasacharlu, Subordinate Judge of Kumbakonam, in Original Suit No. 56 of 1893.

The plaintiff was the brother of defendant No. 1, and it appeared that their father and defendant No. 1 brought Original Suit No. 22 of 1884 for partition of the family property against the present plaintiff and another coparcener, and the plaintiffs therein obtained a decree for a two-sixth share. Before the decree was executed, the father died, and a question arose as to whether the surviving plaintiff was entitled to the whole of the two-sixth share, and this question was decided in his favour. The present plaintiff unsuccessfully appealed to the High Court. Afterwards, the decision of the Lower Court having been affirmed by the High Court the present plaintiff and his brother agreed to submit the matter to the arbitration of one Virasami Ayyangar, under whose award given on 23rd June 1888, the plaintiff's present claim arose. This transaction was not certified to the Court, but it was brought to its notice with a view of procuring a stay of execution. Execution however took place notwithstanding, as there was a contest as to the nature of the agreement; and the present defendant since failed to give effect to the arrangement. The Subordinate Judge dismissed the suit now brought by the plaintiff for the land awarded to him and in the alternative for damages.

The plaintiff preferred this appeal.

Ramachandra Rau Sahib for appellant.

Sankaran Nayar and *Sankaranarayana Sastri* for respondent.

JUDGMENT.—In so far as the plaintiff's claim is made for lands adjudged to the defendant in Original Suit No. 22 of 1884, it is not sustainable in the face of that adjudication.

But as to the claim for damages for breach of the alleged agreement, the suit is not barred (*Viraraghava v. Subbakka*(1))

(1) I.L.R., 5 Mad., 397.

and *Mallamma v. Venkappa*(1)). If the Subordinate Judge in his orders in execution of the decree in the previous suit had decided that there was no agreement as alleged, that decision would no doubt have operated as a bar by *res judicata* to this suit which is based upon that agreement. We find, however, that there was no such decision. The agreement was set up simply for the purpose of staying execution until the arrangements under the agreement were ripe for being certified to the Court in adjustment of the decree. The Subordinate Judge proceeded with the execution of the decree, not because he found that there was no agreement, but, on the other hand, because there were disputes as to the nature of the agreement. Neither party applied under section 258 of the Code of Civil Procedure to have an agreement certified, and there was no order under that section. The case of *Gururayya v. Vudayappa*(2) does not therefore apply.

We must accordingly reverse the decree of the Lower Court and remand the suit for trial according to law in so far as the claim for damages is concerned. The suit as a suit for delivery of lands is dismissed. Costs to abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

NITYANANDA PATNAYUDU AND OTHERS (PLAINTIFFS),
 APPELLANTS,

v.

SRI RADHA CHERANA DEO AND OTHERS (DEFENDANTS),
 RESPONDENTS.*

Mortgage—Interest 'post diem'—Limitation.

A mortgagee is entitled to interest *post diem*, if there is nothing in the document to indicate that the parties did not intend that interest should be paid after the due date.

APPEAL against the decree of R. H. Shipley, Acting District Judge of Ganjam, in Original Suit No. 40 of 1894.

Suit to recover principal and interest due on a mortgage bond, dated 16th April 1880, and executed by defendants Nos. 1 and 2

(1) I.L.R., 8 Mad., 277.

(2) I.L.R., 18 Mad., 26.

* Appeal No. 61 of 1896.

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in favour of plaintiffs Nos. 1 and 2, and the father deceased of plaintiff No. 3. The mortgage, omitting parties and parcels, was in the following terms:—

“On an adjustment of account made this day in respect of the registered deed executed by us and in favour of your father, late Raghunadha Patnayudu Garu, on 26th March 1875, and also the deed executed by us both in favour of Nityananda Patnayudu Garu and Brajuvasi Patnayudu Garu, among you, on 14th June 1879, the amount found due is Rs. 2,453-9-0. This day we have borrowed from you in cash Rs. 46-7-0 on account of our household expenses. For the total Rs. 2,500 (two thousand five hundred rupees) we have executed and given this deed. With interest at Re. 0-12-0 per cent. per mensem, we will pay off the principal and the interest in eight years from this date, in accordance with the terms shown herein below. The interest amount due up to the 15th of Palguna Suddham of each year, we will pay on that full moon date alone.

“That, and also, if we pay Rs. 300 or any amount less than that on that same date, this we will cause to be credited on the schedule of boundaries hereto annexed. We will not demand counter-interest for the amount we pay for the principal and interest. We will not contend that we have made any payments vouched in any other manner than by having the payment noted on the schedule of boundaries referred to above. If we fail to pay the interest amount due up to the 15th of Palguna Suddham of each year as mentioned above and commit default in respect of the instalment, then, setting aside the interest settled of Re. 0-12-0 per cent. per mensem, we will pay interest on the principal from the date of default at the rate of Rs. 1-8-0 per cent. per mensem. The amount of principal and interest, which shall be found to be due at the end of the eight years' term of this deed, will be paid fully on that fixed date alone by either of us, by means of the mortgaged property and our other property, and the payment will be caused to be entered on the list of boundaries annexed hereto and this deed will be taken back. As security herefor have been mortgaged to you and put in your possession together with their appurtenances the dry land about acres 5-0, and wet lands acres 100-0, total acres 105-0. So until the amount of this deed is discharged, we will not mortgage whether simply or with possession, or sell or do any such thing to any

“other person. We as well as our heirs shall be responsible in this regard. Excepting to you the mortgaged property is not already under mortgage to others for money borrowed from them.”

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The following issues were among others raised in the case:—

Is plaintiff's claim time-barred in whole or in part?

Are plaintiffs entitled to interest after the due date as damages or otherwise?

Did defendants make a valid tender to plaintiffs of any sum or sums of money under the suit bond? If so, of how much and under what circumstances?

To what relief are plaintiffs entitled?

The District Judge held that the claim for interest under the document was barred by the three years' rule. He also held that the plaintiffs were entitled apart from the law of limitation to no interest *post diem*. As to this he made *inter alia* the following observations:—

“The plaintiffs' claim *post diem* interest, first as of right, and, secondly, they plead that it is an indulgence which the Court should grant them. So far as the latter point is concerned, I would refuse to allow them any interest between the due date and the date of the plaint. They have waited six years before suing the defendants, they refused to give them any statement of accounts, and I think it is sufficiently clear that they have let the debt run on as long as they dared, merely with a view to harassing the defendants and getting good interest on their money. I am strongly of opinion that they should have immediately, on the expiry of the due date, given defendants notice that as the debt was not paid, the property would be attached. It does not lie with them to plead that they are entitled to damages for money lying idle when it is through their own default that it has lain so long idle.

“As regards the legality of such a claim, there are two cases quoted:—*Badi Bibi Sahibal v. Sami Pillai*(1) and *Gopaludu v. Venkataratnam*(2). From these two rulings, I gather that unless there is a stipulation to pay interest after due date, it cannot be claimed except as damages, and that such stipulation may be express or implied. In the present case I hold that there is no such stipulation. On the contrary, there is a distinct

(1) I.L.R., 18 Mad., 261.

(2) I.L.R., 18 Mad., 175.

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"agreement that the interest and the principal are to be repaid on a certain date by means of the mortgaged, and, if necessary, other property. That is to say, that if the money is not paid on the due date, the mortgagees are to foreclose and recover the debt out of the sale-proceeds of the property. I do not hold it possible to read into this agreement any stipulation regarding *post diem* interest. The *terminus ad quem* is distinctly expressed and no other construction can be put upon the words of the bond. The plaintiff's claim that the bond makes provision for *post diem* interest is therefore rejected, and as the due date was in the year 1888, any claim for *post diem* interest as damages is barred. I therefore decide the third issue against the plaintiff.

"I distinguish between principal and interest, I find that the principal, i.e., Rs. 2,500 is not barred. The time bar is 12 years and the suit was brought within time. As to interest, it is a different matter. The last instalment of interest fell due on the 17th April 1888, and the question is whether the time bar is 12 years or 3 years.

"The pleader for the plaintiff argues that when the due date arrived and neither the balance of interest nor the principal was paid, the two sums principal and interest were merged and became one homogeneous debt. But from this view I dissent. I hold that, for the purpose of considering what the time bar is, the two sums must be kept quite distinct, and this view is corroborated by the plaint itself. In the statement of claim the last item is Rs. 1,429-11 for interest at 9 per cent. per annum from 16th April 1888 to 24th August 1894. This is calculated as the principal of Rs. 2,500, but, if the interest had merged in the principal in the due date, the sum on which *post diem* interest would be calculated would be Rs. 2,500 + Rs. 211-4 + Rs. 3,187-8.

"The limit within which a suit lies for money payable for interest upon money due is 3 years—Schedule II, article 63, Limitation Act."

In the result the District Judge passed a decree for the principal only without the interest with the ordinary directions for sale in default of payment.

Plaintiffs preferred this appeal.

Pattabhirama Ayyar for appellants.

Mr. Subramanyam for respondents.

JUDGMENT.—There is nothing in the document to indicate that the parties did not intend that interest should be paid after the expiration of the eight years, within which the principal was to be repaid, and we must, therefore, hold, having regard to the ordinary expectations of parties who enter into transactions of this kind, that it was the intention of the parties in this case that interest should continue to be paid until the liquidation of the debt. This is in accordance, with the principles laid down in the recent Privy Council Case *Mathura Das v. Raja Narindar Bahadur Pal*(1) which is now the authoritative guide on the question of *post diem* interest.

We must allow the appeal with costs in both Courts and modify the decree by allowing interest at the rate of 18 per cent. from the date of default up to 16th April 1888, and thereafter at 9 per cent. per annum up to the date of the Lower Court's decree, and further interest on the whole amount at the rate of 6 per cent. till payment. Credit should be given for the amount paid towards interest by the defendants as found by the District Judge. There will be the usual order for sale in default of payment within six months from this date.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

SANKARAN NARAYANAN (DEFENDANT No. 11), APPELLANT,

v.

ANANTHANARAYANAYYAN AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 TO 9), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 32—Joinder of parties—Change in character of suit.

In an ejectment suit by a landlord against his tenant, the Court should not bring on to the record the person from whom the plaintiff holds the land, nor persons claiming to hold it from a third party, nor such third party.

(1) L.R., 23 I.A., 138.

* Second Appeal No. 1737 of 1891.

In Second Appeals Nos. 658 and 1403 of 1895 preferred against the decree of the Subordinate Judge of Calicut in Appeal Suit No. 417 of 1893 judgment was delivered by DAVIES and BODDAM, JJ., which was as follows:—

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SECOND APPEAL against the decree of V. P. DeRozario, Subordinate Judge of South Malabar, in Appeal Suit No. 1052 of 1890, affirming the decree of V. Ramasastry, District Munsif of Palghat, in Original Suit No. 419 of 1888.

Plaintiff sued to recover possession of certain land with arrears of rent on the defendants removing the improvements effected by them.

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

Paragraph No. 18 of the District Munsif's judgment referred to by Wilkinosn, J., was as follows:—

"In the first written statement the defendants Nos. 2 to 6 and 9 set up their own right over the plaint property. But in the second petition put in by them, they stated holding under the eleventh defendant's family, but without specifying on what right they held under him. Plaintiffs' twenty-eighth witness, who is the first defendant in the cognate suit No. 425 of 1888, admits that, after consulting with the eleventh defendant, he put in a similar petition in that suit relinquishing his own right and setting up holding under the eleventh defendant without specifying the nature of the right (*vide* M. P. No. 3177 of 1888). This fact shows that at the time that petition was put in, that defendant and the eleventh defendant had not made up their minds as to the nature of the right which the former was to set up. Exhibits A-90 and A-91 are decree and judgment in a suit similar to the present one brought to recover a Kudiyirup included in the Saswathom deed. Vella, the second defendant, in that suit is the demisee under exhibit 16. But he set up his own right and made no mention whatever of holding on Janom under the eleventh defendant. These facts are strong enough to disprove the genuineness of exhibits 15 and 16. Exhibit 8, the alleged Marupattam of 1014, relates to a house different from those of these two suits. Velu Nair, plaintiffs' seventeenth witness, the alleged demisee under exhibit 8, disowns the kanom and claims the property as his own jenm. The lands forming the eastern and northern

JUDGMENT.—These second appeals are only on questions of fact, and must, therefore, be dismissed with costs.

This case is another illustration of the objectionable practice in Malabar condemned by Mr. Justice Wilkinson in his judgment, with which we thoroughly agree in Second Appeal No. 1737 of 1891. In order that the practice may be put a stop to, that judgment will be reported.

"boundary in exhibit 8 are described to be the eleventh defendant's jenm. But plaintiffs' twenty-sixth witness' wakil Sankunni Nair claims them as his own."

The further facts of the case appear sufficiently for the purposes of this report from the judgment of Mr. Justice Wilkinson.

Sundara Ayyar for appellant.

Pattabhirama Ayyar for respondents.

WILKINSON, J.—I reserved judgment in this case not on account of any point of law which required further consideration, for upon the facts found the second appeal must fail; but because the case seemed to me at the hearing to be a typical instance of a class of cases which are too common in Malabar in which an ordinary suit between landlord and tenant valued at a few rupees, is allowed to be converted into a suit in which the title to extensive properties is determined. On further examination I find that the present is a remarkable case of that nature. The value of the suit was Rs. 20 and the stamp duty paid Rs. 1-8-0. The first plaintiff instituted the suit in 1888 to recover, with arrears of rent from 1882, a paramba leased by first plaintiff's deceased brother in February 1874 under a registered Pattam chit to the first and eighth defendants. These, viz., first plaintiff and first and eighth defendants were the only necessary parties to the suit, but for some reason or other the sons and grandsons of defendants Nos. 1 8 and were also made parties with the usual result. The lessees did not appear, but their sons and grandsons did, and they denied the letting and plaintiff's right to the paramba, and claimed the property as their own. It appears, however (*vide* paragraph 18 of Munsiff's judgment), that subsequently these defendants were got at by the eleventh defendant, and at his instigation they put in a petition stating that they held under him, but carefully omitted to specify under what right they held. The first plaintiff proved the letting sued upon, and the District Munsiff granted him a decree. The Appellate Court, however, remanded the suit with directions to make the jenmi under whom plaintiff held on Saswathom tenure and the jenmi set up by the lessees' sons and grandsons, parties and to try the question of title. This was done, and, after a protracted litigation, the plaintiff's title has been declared. I cannot imagine a more monstrous case. A question of title to property of very considerable value has been decided in a suit by a lessor against a lessee under a registered deed, the execution of

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which was not denied by the lessees, and which was proved beyond all doubt by the lessor. The sons and grandsons of the lessees were improperly made parties in the first instance, and still more improperly, were allowed to change their defence in the course of the suit, and to set up a person who is now shown to have no sort of right, and whose lease-deed is found to be a forgery. The suit is one of 1888. It has occupied the time and attention of three Courts and has been pending for four years. The eleventh defendant has been allowed to obtain a decision as to his title at a cost of eight annas or so, and the stamp revenue has been ruthlessly defrauded. The case ought not to have been converted from a suit of one character into a suit of an entirely different character. The sons and grandsons and their spurious landlord should have been referred to a separate suit for a decision of the question of title. It is nothing less than a scandal that cases should be tried in the manner in which this has been.

Both Courts have found that the lease sued on was granted, that the land is held under it, that second plaintiff under whom first plaintiff holds on Saswathom right is the jenmi, and that the Marupattam on which appellant relies is a recent fabrication. There are no grounds for this second appeal, which is dismissed with costs.

MUTTUSAMI AYYAR, J.—I am also of opinion that upon the facts found, the decision of the Judge is right, and that there are no grounds for interference in second appeal.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

PARAMANANDA DAS AND ANOTHER (COUNTER-PETITIONERS),
APPELLANTS.

v.

MAHABEER DOSSJI (PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 244, 257 (a)—Representative of judgment-debtor—Agreement for satisfaction of judgment-debt.

A money decree was passed against a zamindar by the High Court in 1883, and it was transferred to the District Court for execution. The decree-holder

* Appeal against Order No. 33 of 1896.

attached and prepared to bring to sale certain villages of the judgment-debtor. These villages were included in a mortgage subsequently executed by the judgment-debtor in favour of third parties. Both before and after the mortgage the decree-holder received from the zamindar certain sums in consideration of his agreeing to postponements of the sale; also it was agreed between them at a date subsequent to the mortgage that interest should be computed at a higher rate than that provided by the decree. Subsequently the decree-holder sought to bring the land to sale, and in computing the amount then due gave credit for none of the sums so received and calculated interest at the enhanced rate. The mortgagee objected that the computation was erroneous in both these respects and the District Judge upheld his objection. The judgment-debtor took no part in the contest:

Held, (1) that the mortgagee was a representative of the judgment-debtor within the meaning of Civil Procedure Code, section 244, and that an appeal lay against the order of District Judge;

(2) that the District Court not being the Court which passed the decree had no power to sanction the agreements under section 257 (a), and the decision was right.

APPEAL against the order of E. J. Sewell, Acting District Judge of North Arcot, passed on Miscellaneous Petition No. 93 of 1894.

This was an application in execution of the decree of the High Court on its original side in Civil Suit No. 194 of 1883 which had been transferred to the District Court of North Arcot for execution.

The decree in question was a money decree passed on 20th September 1883 against the Zamindar of Carvetnagaram and his eldest son; and in execution, the decree-holder obtained a warrant of attachment of certain villages, and a notice of sale was given. The order for sale was made on 8th September 1884. On the 2nd December of the same year the judgment-debtor mortgaged with possession the land in question to the present petitioners, and the sale in execution was repeatedly postponed by arrangement between the decree-holder and the judgment-debtor. Finally the sale was fixed for the 15th February 1894. On the previous day, the present petition was preferred by the mortgagee, who alleged that, in the interval, the decree had been discharged, and he prayed that the attachment be raised or that the sale should only be made subject to his rights under the mortgage. The petition was put in under Civil Procedure Code, sections 275 and 278. The District Judge held that section 278 was inapplicable for the reason that the petitioner had no interest in the property at the date of attachment which was in April 1884. As to section 275 he expressed the opinion that action should be taken under it only

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before the proclamation of sale was issued; but he decided that the Court should issue a fresh proclamation of sale under section 287 and that, before doing so, it should ascertain the amount remaining due under the decree, on the information available, whether from the mortgagee or from any one else. He accordingly proceeded to make that inquiry. The amount asserted by the decree-holder to be due was arrived at by computing interest on the principal sum at the rate of 12 per cent. in accordance with an agreement made with the judgment-debtor in July 1885 instead of at the rate of 6 per cent. as provided in the decree. Moreover, credit was not given for certain sums paid by the judgment-debtor to procure the consent of the decree-holder to the various adjournments of the sale above referred to. None of these arrangements having, as it was alleged, been sanctioned by the Court, the petitioner contended that all the amounts received in accordance therewith should be credited in discharge of the claim under the decree. As to this the Judge said:—

“The Zamindar (defendant) and the plaintiff put in a joint application on the 13th July 1885 (Miscellaneous Petition No. 135 of 1885), stating that the defendant had paid Rs. 2,000 towards the amount due, that Rs. 19,961 remained due, which defendant undertook to pay to plaintiff before July 29th 1885 with interest at 12 per cent. per annum and that in default the attached property should be put up to auction without fresh sale notice, and the petition asked that the sale should be adjourned to July 29th. The order on the petition is not signed, but consists of the word ‘ordered’ and the date July 15th, 1885. The writing is that of Mr. H. T. Knox, who was then District Judge, and the office order book bears the same order with his initials. I am of opinion that this cannot be taken to be a sanction of an agreement to pay interest at 12 per cent. instead of the 6 per cent. ordered in the decree. There is not the smallest mention of the fact that the rate agreed upon is a different rate to that in the decree, nor was there anything whatever to attract the attention of the Judge (Mr. Knox) to the fact so as to lead him to call for and look at the decree. There is no request for sanction of the arrangement, nor is any section at all quoted for the application as required by the Rules of Practice. The sole request is for an adjournment of the sale to July 29th, the agreement being recited as a reason for the grant of

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“the adjournment. It seems to me quite clear that there was no sanction of the agreement at all. Even if it were held that it was indirectly approved, the approval only extended up to July 29th, the agreement being only for adjournment until then and it being expressly stated that no further time is to be given beyond July 29th. On July 29th, another application was put in (Miscellaneous Petition 160 of 1885). This time, section 291, Civil Procedure Code, was quoted, the petition is distinctly for adjournment of sale and for that only, and no further reference is made to the rate of interest to be charged. But thenceforward interest at 1 per cent. is claimed in all the execution applications. The next question is whether the District Court of North Arcot could sanction any such agreement. It is necessary to consider this question in connection with the sums paid from time to time for postponement. The question of fact, in connection with them, is not quite so clear. In some of them, the payment is not alleged to be in consideration of postponement. Whether it ever was would be a question of fact on which evidence might have to be taken. But if the District Court had no power to sanction such payments for postponement, it is not necessary to inquire whether in fact it did so or not. Now, the Court which passed the decree was the High Court; the decree was transferred for execution to the District Court of North Arcot. The High Court certainly did not sanction these agreements. Petitioner contends that the District Court had no power to sanction them. The counter-petitioner contends that the Court had power under section 228, Civil Procedure Code. The petitioner contends that the sanction of the arrangement did, in fact, alter the decree, and that a decree can only be altered under section 206 or 210, Civil Procedure Code. The contention is no doubt right, and it seems to me that to enforce, under the decree, the provisions as to 12 per cent. interest, instead of the 6 per cent. allowed under the decree, was not executing, but altering the decree. The case as to any sums agreed to be paid for adjournment is different. To recover such sums in execution of the decree would no doubt be to alter the decree. If that is proposed to be done, I have no doubt that it is wrong. But the petitioner goes further and contends that all such sums must be credited in satisfaction of the decree. It is not contended that they were so paid by

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"the Zamindar, but it is contended that, under the last clause of section 257 (a), they must be so applied, because paid in contravention of the terms of the section; and they are in contravention, because the agreement to pay them was not sanctioned by the proper Court. Everything turns, therefore, upon the question whether the phrase 'Court which passed the decree,' in section 257 (a) is to be strictly interpreted and confined to its literal meaning, or whether section 228 may be held to give such powers to the Court to which the decree is transferred for execution."

In conclusion he said:—"I am of opinion that the District Court had no authority to grant time under section 257 (a). It follows, therefore, that any amounts paid in consideration of such postponements must, under the second and third clauses of section 257 (a), be applied in satisfaction of the judgment-debt."

The result was that the decree-holder was found to have been overpaid, and it was ordered that no sale proclamation be issued.

The decree-holder preferred this appeal.

The Advocate-General (Hon. Mr. Spring Branson) Ranga Rau and Ramanuja Chariar for appellants.

Bhashyam Ayyangar and Gopalasami Ayyangar for respondent.

JUDGMENT.—No doubt in *Jagat Narain v. Jag Rup*(1) Oldfield, J., observed that the word representative in section 244, Civil Procedure Code, has no more extended meaning than heir, devisee or executor. But, in *Badri Narain v. Jai Kishen Das*(2), Edge, C. J., and Banerji, J., give strong reasons for holding that the term in question has in the context a wider signification. Accordingly when a person purchased mortgaged property from the mortgagor after a decree had been obtained against him by the mortgagee for the enforcement of the latter's right such purchaser was held by the Calcutta and Allahabad Courts to be within the meaning of section 244 (a) 'representative' of the mortgagor, defendant (*Gour Sundar Lahiri v. HemChunder Chowdhury*(3) and *Janki Prasad v. Ulfat Ali*(4)).

This being so, it is difficult to distinguish on principle the case of the respondent here from the decisions just cited. For, though, in the present instance, the appellants' decree against the Raja, in

(1) I.L.R., 5 All., 452.
(3) I.L.R., 16 Cal., 355.

(2) I.L.R., 16 All., 483.
(4) I.L.R., 16 All., 284.

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execution of which the questions in dispute have arisen, was for money only, yet as at the time the respondent obtained from the Raja the taluk on mortgage, the property had been attached on account of the appellants' decree; the respondent who holds the mortgage which is subject to the said lien, must be held to stand in a position substantially similar to that occupied by the purchasers of the equity of redemption after the mortgage decrees in the Calcutta and Allahabad cases referred to above.

The contention, therefore, that the respondent is not a representative of the judgment-debtor, the Raja, within the meaning of section 244 and the preliminary objection founded thereon that no appeal lies are, in our opinion, unsustainable.

The next question argued is whether the North Arcot District Court had power to sanction agreements of the kind referred to in section 257 (a) of the Civil Procedure Code. Clearly it had not, inasmuch as it was not the Court which passed the decree. The words of the section absolutely confine the power to grant the sanction to Courts which pass the decree.

The view taken by the District Judge on this point is right.

The appeal fails and is dismissed with costs.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

SESHADRI AYYANGAR.*

Criminal Procedure Code—Act X of 1892, s. 487—Judicial proceedings.

A Magistrate, who has refused to set aside an order sanctioning a prosecution on the charge of perjury, has no jurisdiction under Criminal Procedure Code, section 487, to try the case himself.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed in Criminal Appeal No. 9 of 1896.

* Criminal Appeal No. 370 of 1896.

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The accused was charged under section 193, Indian Penal Code, for giving false evidence in a judicial proceeding.

The Joint Magistrate of North Arcot, having previously rejected an application preferred to him for the revocation of the sanction, given under Criminal Procedure Code, section 195, by the Magistrate before whom the offence was alleged to have been committed, tried the case and convicted the accused, who thereupon appealed to the Sessions Court. The Sessions Judge held with reference to section 487 of the Code of Criminal Procedure and *In re Madhub Chunder Mozumdar v. Novodeep Chunder Pundit*(1) that the Joint Magistrate under the circumstances had no jurisdiction to try the case. He accordingly set aside the conviction and acquitted the accused.

This appeal was preferred on behalf of Government.

The Acting Public Prosecutor (Mr. N. Subramanyam) for the Crown.

Seshagiri Ayyar for accused.

JUDGMENT.—The order of the High Court, dated 28th January 1896, on which the appellant relies, was passed mainly on the ground that there had been undue delay in making the application for transfer. Section 487, Criminal Procedure Code, was not referred to in the petition then before the High Court, nor in the order of the High Court, and was apparently not considered.

On the merits we think that it is impossible to say that an order whether original or appellate granting or refusing or revoking sanction under section 195, Criminal Procedure Code, is not a "Judicial proceeding" as defined in section 4 of the Act, and looking to the wide terms "brought under his notice" used in section 487, we are of opinion that the Magistrate who declined to revoke the sanction was precluded from himself trying the case.

The Sessions Judge was, therefore, right in ordering a new trial. We dismiss this appeal.

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

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

SUBRAMANIA AYYAR.*

1897.
January 14.

*Railway Act—Act IX of 1890, s. 113—Excess charge and fare recoverable as a fine
—Magistrate not competent to impose imprisonment in default—Fine—Imprisonment.*

Section 113, subsection (4), (1) of the Indian Railway Act (IX of 1890), which directs that, on failure to pay on demand excess charge and fare when due, the amount shall, on application, be recovered by a Magistrate as if it were a fine, does not authorise the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure by A. E. C. Stuart, District Magistrate of South Arcot.

The case was stated as follows: "A passenger named Subramania Ayyar was found in a third-class Railway carriage of the South Indian Railway train, No. 14, at the Chidambaram Railway Station on the night of the 12th July last. The Station master forwarded the passenger to the Station-house Officer of the place with a letter requesting the latter to collect the Railway fare from the passenger and send the amount to him. The Station-house Officer sent the passenger with the letter of the Stationmaster to the Stationary Sub-Magistrate of Chidambaram. The Sub-Magistrate took up the case under section 113 of the Railway Act 9 of 1890, and examined the passenger who represented that he had purchased a ticket at Mayavaram for Chidambaram, and that on his way he was robbed of his bag containing money and the ticket, and that he knew nobody who would stand surety for him at Chidambaram where he was a stranger. The Sub-Magistrate believed the passenger, and having obtained his alleged address released him on his own bond for Rs. 20

* Criminal Revision Case No. 537 of 1896.

QUEEN-
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"conditional on his appearance at Chidambaram on 18th July 1896. The passenger, however, failed to appear again. A distress warrant was issued by the Sub-Magistrate to collect the amount due, but the warrant was returned with an endorsement that the passenger was not to be found in the place mentioned. The Sub-Magistrate reported the facts to the authorities of the South Indian Railway Company, who represented to me that the Sub-Magistrate's procedure was irregular. When the Sub-Magistrate was called upon to explain, he seeks to justify his procedure by saying that sections 64 to 67 of the Indian Penal Code do not apply to the cases contemplated by section 113 of the Railway Act, and that he had no power to award imprisonment in default of payment of the amount. His view of the case is apparently supported by the rulings of the Bombay High Court in *Queen-Empress v. Kutrapa*(1). That ruling appears to have been arrived at by their Lordships with some hesitation, and as the point is one of considerable general importance, it seems desirable that an authoritative ruling of the Madras High Court for the guidance of the Magistracy of this Presidency should be obtained. Should it be definitely settled that imprisonment cannot be awarded in default of the payment of the excess charge and fare though the law expressly enacts that this sum shall be recovered 'as if it were a fine imposed,' the commission of frauds upon Railway Companies, as in the present case, will be greatly facilitated."

The Public Prosecutor (Mr. Powell) for the Crown.

Rama Rau for the accused.

ORDER.—We agree with the decision in the Bombay case, *Queen-Empress v. Kutrapa*(1). We decline to interfere.

(1) I.L.R., 18 Bom., 440.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

KANAPPA PILLAI.*

1897.
April 8.

Criminal Procedure Code—Act X of 1882, s. 202—Reference of cases to the Police for enquiry.

A Magistrate can send a case for enquiry by the Police under Criminal Procedure Code, section 202, only when for reasons stated by him he distrusts the truth of the complaint. In cases where the accused is a member of the Police force, it is generally better that the enquiry should be prosecuted by a Magistrate.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of A. W. B. Higgins, District Magistrate of Tinnevely, in Calendar Case No. 11 of 1897.

The accused was an Inspector of Police and the District Magistrate, in the proceedings sought to be revised, sent the case for enquiry to the Superintendent of Police without himself expressing any opinion as to the truth of the complaint. This procedure was in accordance with a rule which had previously been issued by the District Magistrate for the guidance of the magistracy of the district in like cases.

The complainant preferred this petition.

Mr. Wedderburn for petitioner.

JUDGMENT.—The District Magistrate does not appear to have given any reasons for distrusting the truth of the complaint and sending the case for enquiry to the Superintendent of Police. We infer that he acted upon the view expressed in paragraph 4 of his own circular No. 557, dated 18th April 1895. We are of opinion that the rule there laid down is illegal, as section 202 of the Code directs the Magistrate to send a case for enquiry by the Police only when he distrusts the truth of the complaint, and it requires the Magistrate to give his reasons. The terms of the fourth paragraph of the District Magistrate's circular actually override the provisions of the Criminal Procedure Code, section 202.

* Criminal Revision Case No. 115 of 1897.

QUEEN-
EMPRESS
v.
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PILLAI.

The orders of the Police are not binding on the magistracy.

We are further of opinion that great caution should be shown in sending, for investigation by the Police, charges against members of that force. In such cases it would generally be better that the enquiry should be prosecuted by a Magistrate.

The District Magistrate is directed to proceed with the case according to law.

Ordered accordingly.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

QUEEN-EMPRESS

v.

SINNAI GOUNDAN AND OTHERS.*

Criminal Procedure Code—Act X of 1882, s. 203—Duty of Magistrate to examine witnesses for the complainant.

When a case has not been disposed of under Criminal Procedure Code, section 203, and the complainant's witnesses have been summoned, the Magistrate is bound to examine the witnesses tendered by the complainant, and is not entitled to acquit the accused on a consideration of the complainant's statement alone.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure by H. Bradley, District Magistrate of Coimbatore.

In this case the accused were charged before the Sub-Magistrate of Palladam with the offences of forcible rescue of cattle being taken to the pound, assault, and criminal intimidation. The Sub-Magistrate summoned the witnesses named by the complainant, but examined the complainant alone and then acquitted the accused.

The Public Prosecutor (Mr. Powell) for the Crown.

Venkatasubbayyar for accused.

ORDER.—Inasmuch as the case was not disposed of under section 203, Criminal Procedure Code, but summonses were issued to the complainant's witnesses, the Magistrate was not at liberty, as he

assumes, to "stop the case whenever he liked." He was bound to examine the witnesses tendered by the complainant before acquitting the accused. This the Magistrate admits he did not do.

We must, therefore, set aside the acquittal and order a re-trial.

We observe that the Magistrate, though he issued summonses to the complainant's witnesses, did not examine them, but acquitted the accused on a consideration of the complainant's statement alone. It is not clear why this unusual and illegal procedure was followed. Having regard to it and to the fact that the Magistrate has formed a decided opinion in the case before hearing the evidence for the prosecution, we direct that the District Magistrate do transfer the case for trial to some other Magistrate.

QUEEN-
EMPRESS
v.
SINNAI
GOUNDAN.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

PALANIANDI TEVAN AND OTHERS (DEFENDANTS), APPELLANTS,

v.

PUTHIRANGONDA NADAN AND OTHERS (PLAINTIFFS Nos. 2 TO 5),
RESPONDENTS.*

Easements Act—Act V of 1882, s. 2 (b)—Easement over a well—Customary right to use the well.

No fixed period of enjoyment is laid down by law as necessary to establish a customary right, and a customary right to use a well may exist apart from a dominant heritage.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in Appeal Suit No. 422 of 1895, reversing the decree of K. Krishnamachariar, District Munsif of Madura, in Original Suit No. 566 of 1894.

The plaintiffs having obtained leave under Civil Procedure Code, section 30, sued on behalf of themselves and other members of the Shanar caste for a declaration of their right to draw water from a certain well, and for an injunction to restrain the defendants from interfering with their exercise of that right.

The defendants Nos. 1 to 3 claimed that the well belonged to them, and defendants Nos. 4 and 5 stated that they had been

1897.
March 30, 31.
September
27.

* Second Appeal No. 213 of 1896.

* Criminal Revision Case No. 16 of 1897.

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v.
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GONDA
NADAN.

drawing water from it with the consent of the other defendants. The District Munsif held that the well was on the land of defendants Nos. 1 to 3 and not on poramboke land as alleged by plaintiffs, and that the plaintiffs had no right to make use of it. He accordingly dismissed the suit. The Subordinate Judge reversed his decree and passed a decree in favour of the plaintiffs. He held it to be established, that people of all castes in the village including Shanars had openly and without any obstruction for upwards of thirty years made use of the well in question, and held that the plaintiffs, having in common with other residents of the village enjoyed the well, had acquired a right of customary easement.

The plaintiffs preferred this second appeal.

Desikachariar for appellants.

Mr. J. Satya Nadar and Sundara Ayyar for respondents.

ORDER.—The case set up in the plaint is that the well was not the private property of the defendants, but was situated in poramboke land and was used by the plaintiffs, and those on whose behalf they sue, as a matter of right for the past ninety years. This would indicate that the plaintiffs claimed what is called a “customary right” such as is referred to in section 2 (b) of the “Indian Easements Act, 1882,” and in *Channanam Pillay v. Manu Puttur*(1). The Subordinate Judge found that the well belonged to the defendants, but that it had been used by the plaintiffs and those on whose behalf they sued, openly and without obstruction, for upwards of thirty years, and he, therefore, held that they had established a customary easement over the well. The plaintiffs’ claim was not put forward in the plaint as one of easement, and there is no allegation or issue or clear finding as to their possession of a dominant heritage entitling them to the easement.

Without a dominant heritage there can be no easement.

We fear that the Subordinate Judge has not clearly distinguished in his mind a customary right from a customary easement.

No fixed period of enjoyment is laid down by law as necessary to establish a customary right. The character and length of enjoyment which are necessary for such purpose have been, in our opinion, correctly laid down in *Kuar Sen v. Mamman*(2).

We must, therefore, ask the Subordinate Judge to submit findings on the evidence on record on the following issues, viz. :—

(1) 1 Mad., L.J., 47.

(2) I.L.R., 17 All., 87.

(1) Whether the plaintiffs and those whom they represent have a customary right to use the water of the well as claimed in the plaint.

(2) If not, whether the plaintiffs and those whom they represent are the holders of a dominant heritage in the village and as such have a customary easement (section 18, Easements Act) to use the water of the well as claimed in the plaint.

The Subordinate Judge is requested to submit his findings within a month from the date of the receipt of this order. Seven days will be allowed for filing memorandum of objections after the findings have been posted up in this Court.

[The Subordinate Judge made his return as follows :—

Plaintiffs’ vakil gave up the first issue and confined himself to the second issue. He contends that the dominant tenement to which the customary right of easement is attached is the possession of residence by the plaintiffs and those whom they represent. I think the contention must prevail. Since it appears from the evidence of the plaintiffs’ witnesses that all the residents of Kokilapuram, except Neechars or Pariahs and Pallars, have been using the water of the well, plaintiffs by possessing houses and becoming residents of Kokilapuram have acquired the right of easement to use the water of the well.

I therefore find the first issue in the negative and the second issue in the affirmative.]

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

JUDGMENT.—We accept the finding and dismiss the second appeal with costs.

PALANIANDI
TEVAN
v.
PUTHIRAN-
GONDA
NADAN.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Boddam.

RANGAYYA APPA RAU (PLAINTIFF), APPELLANT,

v.

RATNAM AND OTHERS (DEFENDANTS), RESPONDENTS IN SECOND APPEAL No. 906.

SRIRAMULU (DEFENDANT), RESPONDENT IN SECOND APPEAL No. 907.

KRISHNAMMA AND OTHERS (DEFENDANTS), RESPONDENTS IN SECOND APPEAL No. 908.

PENDALA BHUPATI (DEFENDANT), RESPONDENT IN SECOND APPEAL No. 909.

LAKSHMIPATI (DEFENDANT), RESPONDENT IN SECOND APPEAL No. 910.

KOTAYYA (DEFENDANT), RESPONDENT IN SECOND APPEAL No. 911.

LAKSHMINARAYANA AND ANOTHER (DEFENDANTS), RESPONDENTS IN SECOND APPEAL No. 989.

ACHAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS IN SECOND APPEAL No. 990.*

'Res judicata'—Civil Procedure Code—Act XIV of 1882, s. 13—Decision of Revenue Court.

A zamindar distrained for rent under the Rent Recovery Act of 1865. Thereupon the tenant filed a summary suit under that Act in a Revenue Court, and the distraint was annulled on the ground that the zamindar had not tendered a proper patta as required by section 7. The zamindar now sued in the Court of the District Munsif to recover the arrears of rent:

Held, that the question of the propriety of the patta tendered was not *res judicata*.

SECOND APPEALS against the decrees of E. A. Elwin, Acting District Judge of Kistna, in Appeal Suits Nos. 2155, 2156, 2216, 2217, 2218, 2219, 2133, and 2134 of 1893, affirming the decrees of C. Rama Rau, District Munsif of Bezwada, in Original Suits Nos. 88, 82, 84, 85, 86, 83, 87, and 89 of 1893, respectively.

The plaintiff in all these suits was the Zamindar of Nuzvid and the defendants were his tenants, and he sued them to recover

* Second Appeals Nos. 906 to 911, 989 and 990 of 1895.

arrears of rent. The two questions which arose in each suit were (1) whether the plaintiff had tendered a proper patta as required by the Act; (2) whether the claim was barred by limitation. On the first point the lower Courts held against the plaintiff on the ground that the pattas tendered had been held to be improper in the course of summary proceedings under the Rent Recovery Act. The second question was also decided against the plaintiff.

The suits were accordingly dismissed.

The plaintiff preferred these second appeals.

Sundara Ayyar for appellant in all cases.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) for appellant in Second Appeal No. 989 of 1895.

Mr. *Krishnan* for respondents in all cases.

ORDER.—In Second Appeal No. 906.—The facts of the case, so far as the question raised with reference to the claim for the rent for fasli 1299 is concerned, appear to be these: Before the present suit was instituted the appellant (plaintiff) had distrained for that rent under the Rent Recovery Act VIII of 1865. Thereupon the respondents (defendants) filed a summary suit before the Collector under the provisions of that Act to set aside the distraint. The distraint was set aside on the ground, it would seem, that the appellant had not tendered a proper patta as required by section 7 of the Act. This finding of the Collector has now been held, by the District Munsif as well as by the District Judge, to conclude the appellant from showing, in the present suit, that there was such a tender. The question is whether this decision is right.

We think it is not. *Ragava v. Rajagopal*(1) relied upon on behalf of the respondents, no doubt supports the view taken by the lower Courts. But that case is in conflict with the earlier decision in *Rama v. Tirtasami*(2) and was dissented from in *Gangaraju v. Kondireddiswami*(3) by Muttusami Ayyar and Best, JJ., who followed the case of *Rama v. Tirtasami*(2). The same learned Judges held in *Oliver v. Markandayyan*(4) also, that decisions of Revenue Courts do not operate as *res judicata* when the same question arises between the parties in a Civil Court. Moreover, inasmuch as the Revenue Courts cannot entertain suits for rent like the present, those tribunals are not, within the meaning of

(1) I.L.R., 9 Mad., 39. (2) I.L.R., 7 Mad., 61. (3) I.L.R., 17 Mad., 106.

(4) Second Appeals Nos. 750 to 754 of 1892 unreported.

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OTHERS.

section 13 of the Code of Civil Procedure, Courts of competent jurisdiction entitled to adjudicate so as to bar the Civil Courts from trying, in such suits, a question already decided by the former tribunals. This being so, the fact that section 13 is not exhaustive on the subject with which it deals, cannot render applicable here, the reasoning adopted by Burkitt, J., in *Har Charan Singh v. Har Shanker Singh*(1) which would be legitimate only if the case is one falling outside the terms of the section. For, the present case is not one of the latter description, but is covered by the express language of the section; the words therein "competent to try such "subsequent suit" absolutely precluding the decision of the Revenue Courts from operating as *res judicata*. To hold otherwise, under these circumstances, would clearly be in direct contravention of the legislative provision and would not be an application of the general principle of *res judicata* to a case not provided for by statute.

As to the claim for the rents for faslis 1296, 1297 and 1298 held to have been barred by limitation on the authority of the decision in *Sriramulu v. Sobhanadri Appa Rau*(2) which overruled that of Muttusami Ayyar, J., in *Sobhanadri Appa Rau v. Chalamanna*(3), the appellant, we think, is entitled to prove, as he was permitted to do in *Ramakrishnamma v. Rangayya Appa Rau*(4), that his right was acknowledged or that the bar of limitation was in some other way removed.

We must therefore call for fresh findings on the following issues on the evidence on record as well as upon any other evidence which the parties might adduce at the enquiry :—

1. Is the plaintiff's suit for faslis previous to 1299 time-barred?
2. Whether proper pattas were tendered in the suit faslis?

The findings are to be submitted within one month of the receipt of this order. Seven days will be allowed for filing objections after the findings have been posted up in this Court.

In Second Appeal Nos. 907 to 911, 989 and 990 of 1895.—For the reasons given in our judgment in Second Appeal No. 906 of 1895, we call for a finding on the issue, whether the claim is barred by limitation.

Fresh evidence may be taken. The finding is to be submitted within one month after the receipt of this order. Seven days will

(1) I.L.R., 16 All., 464. (2) I.L.R., 19 Mad., 21. (3) I.L.R., 17 Mad., 225
(4) Civil Revision Petitions Nos. 29 to 117 and 198 to 205 of 1895 unreported.

be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order, the District Judge returned his finding in the second issue which was as follows:—

I find on this issue that pattas were tendered in faslis 1299 and 1300, but that the pattas were not proper or such as the defendant was bound to accept in that they imposed improper conditions as to buildings and raised the rent without the Collector's sanction.

The District Judge reported that the second appeals with reference to which the first issue was framed, had been compromised. In the result the second appeal having been posted again for disposal, some of them were withdrawn, and the High Court delivered judgment dismissing the rest.]

PRIVY COUNCIL.

RAJA RAO VENKATA SURIYA MAHIPATI RAM KRISHNA
RAO BAHADUR (PLAINTIFF), APPELLANT,

RANGAYYA
APPA RAU
v.
RATNAM
AND OTHERS.

P.C.*
1897.
July 31.

v.

THE COURT OF WARDS AND ANOTHER (DEFENDANTS),
[RESPONDENTS.

[On petition from the High Court at Madras.]

Preparation of the copy of the record—Papers to be omitted.

In a suit in which the Original Court had framed and decided several issues, the High Court on appeal confined their decision to the questions which, in their opinion, governed the case, leaving other issues undecided as not affecting the result after the decision to which they had come.

Afterwards the suit was admitted to appeal in conformity with section 603, Code of Civil Procedure.

In the preparation of the printed copy of the record the question arose whether the copy should be made of the whole record, or of only so much of it as was material to the correctness of the High Court's decision.

Their Lordships directed that only so much of the original record as bore upon, and was material to the questions decided by the High Court, and the subject of the appeal, should be printed in the copy.

* Present: Lord MACNAGHTEN, Lord MORRIS, Mr. WAY, Sir HENRY DE VILLIERS and Sir HENRY STRONG.

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MAHIPATI
RAM KRISHNA
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ANOTHER.

PETITION for an order amending directions (30th April 1897) of the High Court as to the preparation of the copy of the record of an appeal.

The petitioner was the plaintiff in a suit which had been admitted to appeal in conformity with section 603, Code of Civil Procedure. He asked for a direction, reversing that made on petition to the High Court, as to the course to be followed in preparing the copy of the record for the hearing an appeal by the Judicial Committee. The direction asked for was that a copy of only so much of the original record should be printed for transmission to the Registrar as was material to the questions decided by the High Court in the judgment under appeal.

The petition stated that the suit to which it had reference was filed in 1891 in the District Court of Godavari for a declaration that the minor defendant was not the legitimate son of the late Raja of Pittapur; that a will, dated the 7th March 1890, whereby that Raja had bequeathed the whole of his property to the minor defendant, was invalid as against the plaintiff; and that the latter, as the adopted son of the late Raja, was entitled to succeed to the entire estate.

The Court of Wards, as defendant on behalf of the minor, admitted the adoption of the plaintiff, but asserted that the minor defendant was the legitimate son of the late Raja, and that the will, whereby this son had become entitled, was valid and effectual.

The most important of the several issues framed by the District Court questioned the validity of the will, and the legitimate birth of the minor. The District Judge, upon the issues, decided that the minor was not the son of the Raja, and that the plaintiff had been given to be adopted by the Raja on the clear understanding between the Raja and the child's natural father that upon the adopted son the inheritance should devolve. The decision, therefore, was that the plaintiff's title prevailed; and from this judgment, in 1895, the defendants appealed to the High Court.

There was no dispute in the Appellate Court that the estate was an impartible one. That Court, having found that there was no proof that the estate was not subject to be alienated by the last owner, held that the will of 1890 was not invalid, or imperative, by reason of any settlement having been made by the Raja in the plaintiff's favour. Thus the High Court decided that the will was a valid one, and this involved the dismissal of the suit, and they

held that it was unnecessary to inquire into the matter of the legitimacy of the minor, or to hear the appeal on any further issue (*See Court of Wards v. Venkata Surya Mahipati Ramakrishna Row*(1)).

On the 27th January 1897, an appeal against this judgment was admitted in conformity with section 603, Code of Civil Procedure. On the 19th February following, the Deputy Registrar of the High Court forwarded to the pleaders, on each side in the above appeal, a list of the papers on the record for them to select which should be printed for the copy to be transmitted.

The petitioner's vakil submitted a list limited to papers which, in his opinion, were material to the question decided by the High Court. But the pleader for the defendants proposed what would have been, practically, the printing of the entire record. The reasons given by the latter were that the Judicial Committee, according to what was believed to be their practice, would go into the whole case, if they should reverse the decree of the High Court, and would not remit the suit to be heard in India. For this it would be necessary that the whole record should be before them. On the other hand, on behalf of the plaintiff, it was contended that a copy of the whole record would, at this stage, be unnecessary in whatever way the appeal might be disposed of. If the High Court's judgment should be affirmed there would be an end. If that judgment should be reversed, the suit would be remitted to India, each party being entitled to have the High Court's decision upon the whole of the facts.

On the 30th April 1897, the High Court ordered that the Registrar should take the usual course, and have the whole record transcribed; and that he should decide, after consulting the parties, what paper was part of the record.

Against this order the present petition was filed.

Mr. J. D. Mayne, for the petitioner, submitted that to carry out the order of the High Court would cause unnecessary delay and expense. The evidence of as many as seventy-five witnesses for the plaintiff had been recorded, and of one hundred and twenty-five for the defendants. One hundred and eighty-six documents had been filed for the plaintiff, and more than four hundred for the defendants. Next to nothing of the oral evidence, very few

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(1) I.L.R., 20 Mad., 167.

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of the documents, and probably only the deed of adoption, and the testamentary papers of the late Raja, had any bearing in the questions decided by the High Court which were of law. If the record should be limited to what was material to the only issues to which the appeal related, the appeal could be heard in a few months. If the whole record had to be transmitted, it would be some years before the appeal could be heard.

There was no appearance for the respondents.

Their Lordships were of opinion that the direction asked for should be given. The order of Her Majesty in Council upon their report was that the order of the High Court be reversed, and that the Registrar of the High Court be directed to transmit only so much printed copy of the original record as properly bears upon, and may be material for, the decision of the questions of law which were decided by the High Court and form the subject of the present appeal.

Solicitors for the petitioner — *Messrs. Frank Richardson & Sadler.*

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

RANGA PAI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

BABA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1896.
January 21,
23, 24, 30.
September 1.
1897.
August 6.

*Limitation Act—Act XV of 1877, s. 10—Suit between Co-trustees—Breach of trust—
Court Fees Act—Act VII of 1870, s. 5—Objection as to Court fee paid on appeal.*

The plaintiffs and defendants together with one Subbaraya Pai who died in 1884, were trustees of a temple, having been appointed by the committee under Act XX of 1863. For some years before his death Subbaraya Pai was left in exclusive management. Subsequently the defendants were in sole management of the temple until 1891, when the plaintiffs brought the present suit charging that the defendants had excluded them from the right of management, and claiming that they should make good sums lost to the institution by reason of breaches of trust alleged to have been committed by them. Some of the breaches of trust took place before 1884. Of the others, which took place subsequently, some consisted in improper dealings with the temple property to the detriment of the temple and to the advantage of certain relatives of the defendants. The

plaintiffs also asked for an injunction to restrain the defendants from excluding them from management: RANGA PAI
v.
BABA.

Held (1) that, in the absence of evidence of an absolute denial by the defendants of the plaintiffs' right to act as trustees, the suit for an injunction was not barred by limitation;

(2) that the suit could not be regarded as a suit by the beneficiaries and was not within the operation of Limitation Act, section 10;

(3) that the suit was not maintainable in respect of breaches of trust committed in the lifetime of the deceased manager, as being to that extent barred by limitation, and also for the reason that such breaches were not more imputable to the defendants than to the plaintiffs;

(4) that even if it had been proved that the community interested in the temple had sanctioned the acts of the defendants now complained of, that circumstance would not suffice to excuse the defendants;

(5) that the defendants were liable to make good the loss occasioned by any breach of trust committed within six years of the date when the suit was instituted even in the absence of fraud, and that in estimating such loss prospective loss should be assessed.

Held further, that an objection taken on behalf of respondents at the hearing of an appeal as to the amount of Court-fee stamp affixed to the petition of appeal to the High Court, cannot be entertained.

APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in Original Suit No. 13 of 1891.

The plaint set out that the plaintiffs and defendants were trustees of the Venkatramana temple at Mangalore, that the defendants and Subbaraya Pai, a trustee who died in 1884, spent temple funds for other than temple purposes and acted injuriously to the interests of the temple, that since Subbaraya Pai's death, the defendants acted injuriously to the interests of the temple and caused loss to the temple, that the defendants acted independently of the plaintiffs in temple affairs; and it prayed for a decree (1) ordering an account to be taken of the temple management from 1876-77 to date, and ordering the defendants to make good the loss which was estimated at Rs. 2,600, and (2) prohibiting the defendants by an injunction from conducting the temple affairs except in conjunction with the plaintiffs. The defendants filed a joint statement to the effect that the plaintiffs were appointed trustees of the temple in 1875, but did not enter on the duties of the office, that the plaintiffs took the side of certain out-caste Bhandaries in 1876 and were refused all interference in the temple affairs, that the temple affairs had always been managed by a single trustee chosen by the community, that till his death in 1884 Subbaraya Pai was the sole manager, that since then the second

* Appeal No. 156 of 1894.

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defendant was the sole manager, that the plaintiffs had no right to join in the management against the will of the managing mottessor, that the allegations as to the improper management of the temple were not true, that Subbaraya Pai was solely responsible for any mismanagement during his term of office, that the plaintiffs were not entitled to an account nor to join in the management of the temple, and that the suit was barred by limitation.

It appeared that the parties were appointed trustees of the temple in question by the committee under the Religious Endowments Act, 1863. Up to the date of Subbaraya Pai's death he had been in exclusive management; and it is unnecessary for the purposes of this report to state the nature of the breaches of trust alleged to have been committed in his lifetime. The breaches of trust dealt with in the fourteenth and following issues were alleged to have taken place subsequently, and they consisted in omissions by the defendants to collect debts due to the institution, and their remission of certain debts due to it by relatives of the defendants and leases and mortgages of the trust property in favour of the defendants' relatives and detrimental to the institution. Some of these acts had been, it was said, sanctioned by the community interested in the temple.

The District Judge decreed to the plaintiffs the injunction sought but otherwise dismissed the suit.

The plaintiffs preferred this appeal.

Pattabhirama Ayyar and *Madhava Rau* for appellants.

Ramachandra Rau Saheb and *Narayana Rau* for respondents.

JUDGMENT.—In this case objection is taken by the respondents' vakil to the amount of the Court-fee stamp affixed by the appellants to their petition of appeal. In our opinion the objection taken at the hearing of the appeal cannot be entertained. The mode in which any question as to the amount of any fee payable in the High Court should be determined is prescribed in Chapter II of the Court Fees Act. The 5th section provides that any such question arising between the officer whose duty it is to see that any fee is paid and any suitor or attorney shall be referred to the taxing officer whose decision shall be final, except in case of a reference being made by him to the Chief Justice when the decision of the Chief Justice shall be final. In the present instance there was no reference to the Chief Justice. It is suggested that the provision as to the finality of the taxing officer's decision is

intended to apply only as between the appellant and the officer mentioned in the section and that it does not prevent a respondent from questioning the decision. If this were the right construction of the section with reference to the taxing officer's decision, it must also hold good with regard to the decision of the Chief Justice. Neither decision can, in this view, be regarded as final except as regards the party who has filed the petition of appeal or other document. We can find nothing in the language of the section to justify this conclusion. Had it been intended to give finality of such a restricted kind to either decision, the term 'suitor' would not have been used. We must hold therefore that the taxing officer's decision cannot be questioned by the respondents' vakil. The cases to which we were referred are not really in point, for the Act makes a distinction between the High Court and other Courts and in those cases it was not in the High Court that the appeal out of which the dispute regarding the stamp arose had to be filed.

The appeal is against so much of the decree of the District Judge as dismisses the plaintiffs' suit, and objection is taken by the respondents to the remaining part of the decree which is in favour of the plaintiffs.

It will be convenient to deal first with the point of limitation raised by the respondents in answer to the whole suit. The plaintiffs' claim is of a twofold character. There is first the charge of breach of trust against the respondents and a prayer for an account, and secondly the allegation "that the defendants behave independently of the plaintiffs in respect of temple affairs" and a prayer for an injunction restraining the defendants from conducting the temple affairs without the co-operation of the plaintiffs. With regard to this latter head of claim the plaint is unfortunately vague, and no date is assigned to the alleged exclusion of the plaintiffs. In their written statement the defendants allege that the plaintiffs "have been refused all interference in the temple affairs and its management" since 1876, and on this they found their plea of limitation.

We agree with the District Judge in his conclusion on this point. It is clear from the evidence that, although the plaintiffs did not take any active part in the management of the temple, there was no absolute denial by the defendants of their right to act as trustees. On the contrary they were on occasions, for

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instance in 1884 after the death of Subbaraya Pai, when an acquittance had to be given to his widow, and in 1887 when a suit was being brought, associated as trustees with the defendants. As the present suit was brought in August 1890, there can be no doubt that the suit is not barred by the law of limitation, so far as the second head of claim is concerned, and no other ground was urged by the respondents' vakil for impeaching the decree granting relief in respect of this claim. As regards the other claim laid against the defendants, it is contended on behalf of the plaintiffs that the suit is one for which they are entitled to claim the benefit of the 10th section of the Limitation Act and that accordingly the defendants can be made liable in respect of breaches of trust occurring at any time since they were appointed trustees. To support this contention it is necessary for the plaintiffs to make out that they are suing as representatives of the temple in order to recover for its benefit the property which belongs to it, and it was argued by the plaintiffs' vakil that that was in fact the nature of the suit. In the view we take it is unnecessary to decide the somewhat doubtful question whether section 10 of the Act applies to a suit like the present charging breaches of trust and claiming an account. (See *Saroda Pershad Chattopadhyaya v. Brojo Nauth Bhattacharjee*(1) and *Thackersey Dewraj v. Hurbhum Nursey*(2).) For in our opinion the suit is really brought to vindicate the rights of the plaintiffs as co-trustees with the defendants and to protect their interest, and not, except indirectly, the interests of the temple. That this is the character of the suit appears from the very prayer for an injunction already mentioned. In respect of that prayer at least the plaintiffs cannot say that they represent the beneficiaries. We do not overlook the language of the plaint on which the plaintiffs' vakil relies. The allegation that there has been a loss to the temple and the prayer that the money due to the temple may be paid by the defendants are not inconsistent with a suit instituted by the plaintiffs on their own behalf, for it is to their own interest to rescue and preserve the property of the temple. The matter may be tested by asking whether the plaintiffs are entitled to charge against the temple the costs of this litigation. How could this possibly be allowed when it is seen that, but for the supineness

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of the plaintiffs, no breach of trust would have occurred and no litigation would have been necessary? It would be obviously unjust to allow the plaintiffs to figure in one character for one purpose and in another for another purpose. It might possibly be different if the defendants were not, as well as the plaintiffs, trustees of the temple—but as against the plaintiffs their co-trustees the defendants have defences open to them which would not be available against third parties representing the temple. It has been urged in this case that a trustee is not at liberty to sue his fellow trustee except under special circumstances. This is a defence which is open to the defendants as against the plaintiffs, but would of course not be open to them if they were called to account by strangers suing solely in the interest of the devasam. That one trustee may bring a suit against another charging him with breach of trust is not denied. There are precedents for such a suit, but what the plaintiffs' vakil has been unable to cite is a case in which a suit such as would ordinarily be brought by a *cestui que trust* has been maintained against a trustee by a fellow trustee. We are of opinion that the present suit cannot be regarded as a suit brought by the *cestui que trust*. It is a suit arising out of differences between the four trustees which in an incidental way only can benefit the temple. Such a suit we do not think can be regarded as within the operation of section 10. Applying then the ordinary law of limitation we have to see whether the plaintiffs' claim founded on alleged breaches of trust is barred in whole or in part.

Some of the charges relate to acts done and moneys expended before the death of Subbaraya Pai; others relate to matters occurring after that date and within six years of the time when the suit was brought. The suit is in our judgment barred so far as it relates to the former charges, for Subbaraya Pai died in July 1884 more than six years before the suit was brought. Independently of the bar of limitation, the defendants have another answer to the charges relating to the management of the temple affairs in Subbaraya's life-time. As we have already said it is not in every case of breach of trust that one trustee is enabled to sue another (see *Bahin v. Hughes*(1) and section 27 of the Indian Trusts Act). When the breach of trust is equally imputable to two trustees, obviously no such suit can lie. And where there are

(1) L.R., 31 Ch. D., 390.

(1) I.L.R., 5 Cal., 910.

(2) I.L.R., 8 Bom., 432.

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It remains for us to deal with the other charges which form the subject of the fourteenth and following issues. The facts for the most part are admitted. Except in certain instances specially mentioned below, there is evidence to show that the defendants are responsible for the other acts and defaults of which the plaintiffs complain. On the other hand, there is no evidence to implicate the plaintiffs. The only question therefore is whether these acts constitute breaches of trust on the part of the defendants. The District Judge has considered that it is sufficient answer for the defendants to make to these charges to say that they acted with the consent of the community. He refers to this ground of defence in connection with almost all the charges laid against the defendants. In our opinion this defence cannot be allowed to prevail for two reasons. In the first place it is not proved satisfactorily that the community did sanction the several acts of the defendants, and secondly, if such sanction was given, it would not excuse the defendants, if otherwise they had been guilty of breach of trust. This must clearly be so, for the trustees of the temple were not appointed by the community. They were all appointed under the Act of 1863 by the committee, and to the committee they are responsible for their conduct. The fact that the community have approved the acts of the trustees may be evidence that

such acts were not improper—but we fail to see how in any other way their approbation or consent can qualify the character of the defendants' acts.

The first act charged against the defendants is the remission of Rs. 200 arrears of rent due by a relative of the two defendants. There is then a remission of Rs. 183-5-4 and further a remission of Rs. 539 on a document executed by one of the defendants, Raghunatha Kini. These acts of the defendants, especially when regard is had to the persons who were benefited by them, are so clearly detrimental to the interests of the temple that it would be difficult to justify them. No attempt, however, has been made to prove any special circumstances; there is the alleged approval of the community and that is considered by the District Judge sufficient justification. Apparently he was under the impression that actual fraud must be proved against the defendants to make them liable. Clearer evidence of breach of trust than is given with regard to the charges embraced in the fourteenth issue can hardly be conceived.

The charges embraced in the fifteenth issue are similar in kind and the observations just made apply to them. Here again one of the persons benefited by the remission is a relative of the defendants. These charges we must also hold to be established. The sixteenth issue relates to matters which happened in Subbaraya's time. The plaintiffs must therefore fail in respect of that issue. The seventeenth issue relates to debts due to the temple and not collected by the defendants. The findings on this issue are not very clear, but we cannot say that the Judge has erred with regard to it. As to many of the debts it is not shown that the defendants are to blame for the non-collection. The eighteenth issue embraces three matters. The first is a remission of Rs. 280 in favour of a cousin of one of the defendants. No justification is offered. This charge must be allowed. The second is a matter which occurred in Subbaraya's time. This charge must be disallowed. As to the third we must confess that we do not understand the charge. Nor do the observations of the Judge upon it give us any definite information. No particulars of these alleged breaches of trust were given by the plaintiffs, and it is only from the issue that we gather the nature of them. We are referred to the answers to the interrogatories but the interrogatories

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themselves are not before us. Failing any definite evidence we must disallow this charge.

In the result we must allow the appeal in respect of the items as to which we have found the defendants chargeable. There will be a decree for the sums named by the Judge and allowed by this judgment with interest at six per cent. from the date when the remission in each case was made. The appellants are entitled to costs in this and in the Court below proportionate to the sums which will be decreed to them. The memorandum of objections is dismissed with costs.

Before drawing up the decree we must ask the District Judge to find on evidence now on record with regard to the fifteenth issue, what is the amount lost to the temple by the breaches of trust mentioned in that issue? The finding must 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.

[The District Judge having submitted his finding in compliance with the above order objections were taken by the parties and the Court called for a further finding making, *inter alia*, the following observation "with reference to the time as to which the loss has to be calculated, it is to be observed that prospective loss as well as past has to be provided for, for no second suit can be brought."

This appeal coming on for final hearing, the Court delivered the following judgment:—

JUDGMENT.—In addition to the amount mentioned in the original judgment the plaintiffs are entitled to the sum of Rs. 64 and also to the sum of Rs. 2,770-5-6 representing the loss of interest on the sum of Rs. 10,250 at 2½ per cent. from 11th September 1886 to the 3rd July 1897. That disposes of the case.]

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and
Mr. Justice Benson.

VASUDEVA UPADYAYA (DEFENDANT No. 2), APPELLANT,

v.

VISVARAJA THIRTHASAMI AND ANOTHER (PLAINTIFF AND
DEFENDANT No. 1), RESPONDENTS. *

Letters Patent, s. 15—Civil Procedure Code—Act XIV of 1882, s. 588.

A District Munsif having dismissed a suit on a preliminary point the District Court on appeal made an order remanding it to him to be disposed of on the merits. Against this order an appeal was preferred to the High Court, which came on for disposal before a single Judge, who delivered judgment dismissing it:

Held, that no appeal lay under Letters Patent, section 15, against his judgment.

APPEAL under Letters Patent, section 15, against an order of Mr. Justice Shephard reported as *Vasudeva Upadyaya v. Visvaraja Thirthasami*(1) where the facts are stated.

The effect of His Lordship's order was to dismiss an appeal against an order of the District Judge by which a suit dismissed by a District Munsif on a preliminary point was remanded to be disposed of on the merits. This appeal was preferred by defendant No. 2.

Narayana Rau for appellant.

Ramachandra Rau Saheb for respondents.

BENSON, J.—This is an appeal under section 15 of the Letters Patent against an order of Mr. Justice Shephard, dismissing an appeal against an order of the District Judge of South Canara in Appeal Suit No. 279 of 1893, remanding a suit to the Court of First Instance under section 562, Code of Civil Procedure, for disposal on the merits.

A preliminary objection is raised that no appeal lies inasmuch as the order of Mr. Justice Shephard was passed in an appeal under section 588, Code of Civil Procedure, and the last paragraph of that section provides that "orders passed in appeals under this section shall be final." In reply it is contended that the section does not apply to a case like the present where a Judge of the High Court sitting alone makes the order, and that, by

* Letters Patent Appeal No. 79 of 1896. (1) I.L.R., 19 Mad., 331.

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virtue of section 15 of the Letters Patent, an appeal does lie notwithstanding the provisions in section 588. In a word, the question is whether the right of appeal given by section 15 of the Letters Patent against an order of a single Judge is, or is not, subject to the limitations on appeals prescribed by the Code of Civil Procedure. That the right is subject to such limitations was decided in *Achaya v. Ratnavelu*(1) which was followed in the cases of *Rajagopal in re*(2) and in *Sankaran v. Raman Kutti*(3), but the correctness of those decisions was recently doubted mainly in consequence of a remark of the Privy Council in the case of *Hurriah Chunder Chowdhry v. Kalisunderi Debi*(4), and the question was referred by a Division Court of which I was a member for the decision of the Full Bench. The present appeal was allowed to stand over pending the decision of the Full Bench. The case was ably argued before the Full Bench, but no judgment was delivered, as the case was otherwise disposed of.

The appellant's Vakil, therefore, now desires that in the present case the same question may be referred to a Full Bench, but the arguments used before the Full Bench and the consideration, which I have since been able to give the matter, have satisfied me that the decisions of this Court are right, and that there is no ground for referring the question.

Much of the discussion which has centred round the meaning of section 15 of the Letters Patent considered by itself, and also with regard to its effect when read in conjunction with section 588, Code of Civil Procedure, has concerned itself with the meaning of the word 'judgment' in section 15. It is admitted on all hands that if an order made by a single Judge of this Court does not fall within the meaning of the word 'judgment' as used in section 15 no appeal will lie under the Letters Patent from that order. This Court has, however, in the reported cases, given a very wide meaning to the word 'judgment' in that section, and I will assume that the order of Mr. Justice Shephard in the present case is a 'judgment' within the meaning of section 15.

In order to apprehend the subject clearly it is necessary to refer briefly to the statutes and Letters Patent by which the High Court was constituted, and from which it derives its powers. The

(1) I.L.R., 9 Mad., 253.

(3) I.L.R., 20 Mad., 152.

(2) I.L.R., 9 Mad., 447.

(4) I.L.R., 9 Calc., 482.

High Court Act, 24 and 25 Vict., Ch. 104, gave Her Majesty authority to establish a High Court at Madras, to consist of a Chief Justice and as many Judges, not exceeding fifteen, as Her Majesty might, from time to time, think fit to appoint. Section 9 of that Act gave the High Court such original and appellate jurisdiction and authority, as Her Majesty by Letters Patent might grant and direct, subject, however and without prejudice, to the legislative powers of the Governor-General of India in Council, which powers were conferred by the Indian Councils Act 24 and 25 Vict., Ch. 67, the 22nd section of which empowers the Governor-General to make laws and regulations for all Courts of Justice whatever in India, thus, of course, including the High Courts. Section 13 of the High Court Act enacts that subject to any laws or regulations which may be made by the Governor-General in Council the High Court may, by its own rules, provide for the exercise of its original or appellate jurisdiction, by one or more Judges, or by Division Courts constituted by two or more Judges.

Such rules have been framed by the High Court, and it is under the rules so framed that a single Judge of the Court passed the order which has given rise to this appeal.

In pursuance of the authority given by section 9 of the High Court Act, Her Majesty issued the amended Letters Patent of 1865, section 36 of which deals with the powers of single Judges and Division Courts. It declares that "any function which is hereby directed to be performed by the said High Court of Judicature at Madras in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division Court thereof, appointed or constituted for such purpose under section 13" of the said High Court Act, and the section further provides for a final decision when a Bench of two or more Judges are divided in opinion.

Section 15 enacts that "an appeal shall lie to the said High Court of Judicature at Madras from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court pursuant to section 13 of the said recited Act; and that an appeal shall also lie to the said High Court from the judgment, not being a sentence or order as aforesaid, of two or more Judges of the said High Court, or of such Division Court,

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"whenever such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being; but that the right of appeal from other judgments of Judges of the said High Court, or of such Division Court, shall be to us, our heirs or successors, in our or their Privy Council, as hereinafter provided."

Section 44 declares that "all the provisions of these our Letters Patent are subject to the legislative powers of the Governor-General in Council exercised at meetings for the purpose of making laws and regulations . . . and may be in all respects amended and altered thereby."

The Code of Civil Procedure was subsequently passed by the Governor-General in Council in the due exercise of his powers in order to regulate the procedure in the Civil Courts, and it cannot be denied that any alterations thereby made in the provisions of the Letters Patent are binding upon this Court. This was expressly held in an elaborate and carefully reasoned judgment of this Court, to which I have already referred in the case of *Achaya v. Ratnavelu*(1), where it was ruled that the right of appeal given by section 15 of the Letters Patent is controlled by section 629, Code of Civil Procedure, which provides that an order of a Civil Court rejecting an application for review of judgment shall be final. That decision was followed in the case of *Rajagopal in re*(2) where it was held that section 15 of the Letters Patent, being governed by section 588, Code of Civil Procedure, no appeal lay from the order of a single Judge of the High Court made under section 592, Code of Civil Procedure, rejecting an application for leave to appeal in *forma pauperis*.

These decisions, it seems to me, are clear and decisive authorities on the question before us. Eleven years have elapsed since those decisions were reported, but they have never, so far as I am aware, been dissented from or questioned either by this or by any other High Court in India. They have been expressly approved and followed by the High Court of Allahabad in the cases of *Banno Bihi v. Mehdi Husain*(3) and *Muhammad Naimullah Khan v. Ihsanullah Khan*(4) (Full Bench), and the main line of reasoning on which they proceed appears to me to be unassailable.

(1) I.L.R., 9 Mad., 253.

(3) I.L.R., 11 All., 375.

(2) I.L.R., 9 Mad., 447.

(4) I.L.R., 14 All., 226.

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It is, however, contended that the remarks of this Court in the cases reported as *R v. R*(1) and *Vanangamudi v. Ramasami*(2) seem to support an opposite view.

I do not think that this is so. In neither of those cases was any reference made to *Achaya v. Ratnavelu*(3) or *Rajagopal in re*(4); and, in fact, both cases were decided on other grounds without any reference to the effect of the Code of Civil Procedure in cutting down the right of appeal given by section 15 of the Letters Patent. The question was, in fact, not at all considered by this Court in those cases.

An observation of their Lordships of the Privy Council in *Hurrish Chunder Chowdhry v. Kalisunderi Debi*(5) is, however, strongly relied upon as definitely deciding that section 588 has no application to appeals from a single Judge of this Court. It is as follows:—"It only remains to observe that their Lordships do not think that section 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the High Court to the Full Court."

I do not think that these words lay down a general rule that section 588 of the Code of Civil Procedure does not apply to any cases in which an appeal is sought to be made to the Full Court under section 15 of the Letters Patent from the order of a single Judge. I am of opinion that the words refer only to the actual case then before the Privy Council. In that case one Judge of the High Court had refused to transmit to the Court of first instance for execution a decree of the Privy Council. His refusal was made the subject of an appeal to the Full Court under the Letters Patent. Though the matter was brought before the Judge by a petition filed under section 610, Code of Civil Procedure, and the order may, therefore, be said to be an order made under that section, still it was none the less an order determining a "question arising between the parties to the suit in which the decree was passed and relating to the execution thereof" (section 244, Code of Civil Procedure).

It was, therefore, an order of the kind expressly declared by section 2 of the Code to fall within the definition of a 'decree,'

(1) I.L.R., 14 Mad., 88.

(3) I.L.R., 9 Mad., 253.

(2) I.L.R., 14 Mad., 406.

(4) I.L.R., 9 Mad., 447.

(5) I.L.R., 9 Calc., 482.

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and, as such, it was obviously an order against which an appeal would lie as against a decree, and independently of the provisions of section 588, which section enumerates the only orders, other than 'decrees' from which an appeal is allowed by the Code. Section 588 of the Code manifestly had no application to such an order in execution as their Lordships were then considering, and, consequently, when such an order was made by a single Judge it was a proper subject of appeal to the Full Court.

It seems to me that this is all that their Lordships intended to say, or did in fact, say. The language used amounts to nothing more than this:—"Section 588, no doubt, has the effect "of restricting appeals in the case of orders which are not decrees, "but it does not apply to such a case as this before us which is an "order in execution and, therefore, 'a decree.' When, therefore, "such an order has been made by a single Judge an appeal lies "to the Full Court." In this observation, then, of their Lordships I find nothing to support the contention that an appeal will lie under section 15 of the Letters Patent from every order of a single Judge without any regard to the restrictions on appeal imposed by various sections of the Civil Procedure Code. The same conclusion, though on somewhat different grounds, was arrived at by the Full Bench of the Allahabad High Court in the case already referred to *Muhammad Naimullah Khan v. Ihsanullah Khan*(1). It is impossible to suppose that their Lordships in a mere observation of four lines, without any explanation or reasoning, laid down a rule of such far-reaching importance, and opposed to what appears to be the plain language and intention of the legislature. Section 588, Code of Civil Procedure and the whole of chapter 43, in which that section occurs, are expressly made applicable to the High Court by section 632 of the Code.

More than this, section 638, Code of Civil Procedure, expressly specifies the various sections of the Code which do not apply to the High Court, as (1) a Court of Original Jurisdiction, and (2) a Court of Appellate Jurisdiction. Section 588 and chapter 43 are not among the sections so excluded. Moreover, in section 638 it is added "nothing in this Code shall extend or apply to "any Judge of the High Court in the exercise of jurisdiction as an Insolvent Court." Thus, the framers of the Code had clearly

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before them the various jurisdictions exercised by the High Court under the Letters Patent, and while excluding the Code from operation in regard to portions of that jurisdiction, it declared that it should apply in regard to other matters. It seems to me impossible to suppose that if the framers of the Code intended to preserve the right of appeal from the orders of a single Judge given by section 15, they would have omitted all reference to that section, when dealing with the very subject of the applicability of the Code of Civil Procedure to the procedure and jurisdiction of the High Court. It is argued that, as section 15 of the Letters Patent is not expressly stated to be repealed or modified by the Code of Civil Procedure, the right of appeal given by it must be taken to remain in force. But this is evidently not so, for section 39 of the Letters Patent is not expressly stated to be repealed or modified by the Code of Civil Procedure; yet section 597 of the latter Code imposes a limitation on appeals to Her Majesty in Council in respect of decrees in suits of a nature cognizable by a Court of Small Causes which limitation finds no place in section 39 of the Letters Patent. Section 597, Code of Civil Procedure, therefore, modifies section 39 of the Letters Patent. I think that it is no less clear that section 588, Code of Civil Procedure, modifies, and was intended to modify, the very wide terms of section 15 of the Letters Patent.

It is, however, argued that a distinction is to be drawn between "the High Court" and a single Judge of the High Court sitting alone. It is argued apparently that a single Judge derives his jurisdiction from, and is a creation of, the Letters Patent, and is inherently subject to the limitation imposed on his powers by section 15 of the Letters Patent, viz., that he cannot give any final judgment, but that all his judgments are subject to an appeal to "the High Court," in other words, that the Court of a single Judge is congenitally affected by this infirmity that its judgments must always be subject to appeal to "the High Court."

It is urged that sections 632 and 638, Code of Civil Procedure, declare that section 588 (and other sections) apply to "the High Court," but are not declared to apply to a single Judge of the High Court, and that consequently the finality which would attach under the Code of Civil Procedure to an order of "the High Court" does not attach to the order of a single Judge. I

(1) I.L.R., 14 All., 226.

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am unable to accept the validity of this argument. As already noticed section 13 of the High Court Act enables the High Court "to frame rules for the exercise of its original or appellate jurisdiction by one or more Judges," and section 36 of the Letters Patent declares that "any function which is hereby directed to be performed by the said High Court in the exercise of its original or appellate jurisdiction may be performed" by a single Judge under the rules framed under section 13 of the High Court Act.

When sections 632 and 638, Code of Civil Procedure, declare that almost the whole Code applies to "the High Court" it is not reasonable to argue that "the High Court" there means the High Court in its strict sense of the Chief Justice and all the Judges. It may be broadly stated that "the High Court" in that sense hardly ever exercises its functions. It exercises its functions ordinarily through a Bench of two Judges, and in certain cases through a single Judge. I have no doubt but that when "the High Court" in these sections is referred to it means the Courts, whether of a single Judge or of a Bench of two Judges, which are, from time to time, exercising the functions of the High Court. If this is not the sense in which "the High Court" is used in these sections, then the Code of Civil Procedure does not apply at all to the Courts of a single Judge or to a Bench of the High Court, and there is no law to regulate their procedure, though there is an elaborate law to regulate the procedure of the Full Court.

This is a *reductio ad absurdum*. It may be admitted that the Letters Patent do, in a number of sections, draw a distinction between "the High Court" and a Judge of that Court exercising one or more of the functions of the Court, and it may also be admitted that, if the Letters Patent stood alone without the Code of Civil Procedure having come into existence, section 15 of the Letters Patent would have given a right of appeal against every judgment of a single Judge, for there is no limitation of the right laid down in the section. But the Code of Civil Procedure was passed for the purpose *inter alia* of defining the cases in which an appeal should be allowed and those in which it should be forbidden.

It distinctly says that against certain orders passed under the Code no appeal shall be allowed, and it, with equal distinctness, declares that the sections in which these restrictions are imposed

apply to the High Courts. It leads, as already stated, to a manifest absurdity to hold that the restrictions do not apply to such orders when passed by a single Judge or by a Bench of two Judges, but only when passed by the Full Court.

Section 44 of the Letters Patent expressly contemplates the Governor-General in Council passing laws which shall have the effect of amending or altering the provisions of the Letters Patent, and declares that "*all the provisions*" of the Letters Patent are subject to such laws "*and may be in all respects amended and altered thereby.*"

When the Governor-General in Council enacted the Code of Civil Procedure he deliberately restricted the right of appeal in regard to certain specified orders, and distinctly declared that those restrictions applied to the High Courts. All argument, therefore, to show that general words in a general Act like the Code of Civil Procedure ought not to be so construed as to repeal specific provisions of a special enactment, like the Letters Patent, is beside the mark; for the Code of Civil Procedure expressly deals with the powers of the High Court, and it does so in pursuance of the express terms of the statute under which the Letters Patent were issued, and in accordance with an express reservation in the Letters Patent themselves. It only remains to notice briefly the argument based on the language of the Code itself in sections 595, 597 and 589.

The argument founded on sections 595 and 597 briefly stated is this:—

Section 595 gives a general right of appeal to Her Majesty in Council against final judgments, decrees and orders of the High Court subject to certain conditions; and section 597 enacts that, notwithstanding anything in section 595, no appeal shall lie to Her Majesty in Council from the judgment or one Judge of a High Court, nor from the judgment of a Bench of two Judges when such Judges are divided in opinion. The reason for this restriction, it is argued, is that the right of appeal and the *forum* in such cases are provided for by section 15 of the Letters Patent which must, therefore, be regarded as still effective and not repealed by the Code of Civil Procedure. That it is not repealed is, of course, true; and it is still effective as regards orders passed under the Code of Civil Procedure and declared by the Code to be open to appeal, as well as regards orders passed under the provisions

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of other laws than the Code of Civil Procedure. But there is nothing in the section to lead to the supposition that it was intended to preserve the right of appeal against *all* judgments of a single Judge including orders of those classes which under the Code are expressly declared to be final. In other words, section 597 is not intended to preserve a right of appeal in cases declared by section 588 not to be subject to appeal. It merely forbids an appeal to Her Majesty in those cases (admittedly many) when an appeal does lie against the order of a single Judge under section 15 of the Letters Patent inasmuch as another *forum*, viz., the High Court is provided for such appeals.

The argument founded on section 589 is this: "The section provides a *forum* for appeals against orders passed by all Courts, original and appellate, other than orders passed by the High Court in the exercise of its appellate jurisdiction. Evidently, then, as no *forum* is provided, this chapter of the Code is not intended to apply at all to such orders of the High Court." The answer to this argument is that section 632 of the Code expressly says that this chapter does apply to the High Court, but there is no need for section 589 to provide a *forum* for appeals against orders made by the High Court in the exercise of its appellate jurisdiction, since that is already provided for by section 15 of the Letters Patent. I cannot find a single sentence or expression in these or in any other sections of the Code of Civil Procedure which indicate that its provisions are to be controlled and limited by the Letters Patent. On the contrary, my conclusion is that the Code of Civil Procedure was intended to modify, and does modify, the Letters Patent in certain particulars. The Code is the general law which defines the cases in which orders passed under it are, and are not, open to appeal, and this general law is equally applicable to all Courts, including the Court of a single Judge of the High Court. When such Court of a single Judge makes an order which the Code of Civil Procedure declares to be an order open to appeal, section 15 of the Letters Patent prescribes the *forum* to which the appeal is to lie and it also gives a right of appeal against all orders passed by a single Judge under other laws than the Code of Civil Procedure, but it does not keep alive any right of appeal which is expressly negatived by the Code of Civil Procedure either in section 588 or in any other section.

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I would, therefore, dismiss this appeal with costs on the ground that under section 588, Code of Civil Procedure, no appeal lies.

SUBRAMANIA AYYAR, J.—There can be no doubt that the order of the learned Judge, against which the present appeal has been preferred, is a 'judgment' within the meaning of section 15 of the Letters Patent. The question to be determined now is whether section 588 of the Code of Civil Procedure applies here and prohibits the present appeal. The cases of *Rajagopal in re*(1) and *Sankaran v. Raman Kutti*(2) are distinct authorities in support of the view that that section applies. But doubts having been recently entertained as to whether those cases lay down the law correctly, the point was submitted for the decision of a Full Bench. The Full Bench before which the point was argued did not, however, settle it one way or the other, and as my learned colleague holds that another reference in the matter to a Full Bench is not called for, I must consider myself bound in this case by the authorities referred to.

Nevertheless I am unable to accept the suggestion that the observations of the Judicial Committee in *Hurrish Chunder Chowdhry v. Kalisunderi Debi*(3) to the effect that section 588 of the Code is inapplicable where the appeal is from one Judge of the High Court to the Full Court are mere *dicta*. The tenor of the observations seems clearly to indicate that they were intended to be a decision on the point, irrespective of the circumstances of the particular case in which the observations were made. For the ground of the opinion of their Lordships refers not to the nature of the order appealed against, *i.e.*, whether it fell within section 244 or under section 588 of the Code, but to the relative position of the Judge who passed the order and the Court to which the appeal against the order was made. No doubt the observations are brief; but the point involved is indeed a plain and simple one. Nay, the single reason, assigned in the concluding part of the observations for holding section 588 to be inapplicable, is really the fundamental reason that can be urged in support of that view, and the reason is, as I apprehend, that the very scheme of the Code as to appeals is that they lie from one Court to another. Consequently section 588, which must be construed with reference

(1) I.L.R., 9 Mad., 447. (2) I.L.R., 20 Mad., 152. (3) I.L.R., 9 Cal., 482

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to this general scheme, has no application to a case where the appeal is from one Judge of a Court to the Full Court.

However, whether the opinion in question of the Judicial Committee is but a *dictum* that can be explained away or a decision that is binding upon this Court can, in the existing circumstances so far as this tribunal is concerned, be satisfactorily answered by a Full Bench ruling only. In the absence of such a ruling I should, as already stated, hold myself bound by this Court's decisions referred to.

On this ground I concur in dismissing the appeal with costs.

APPELLATE CIVIL.

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

RAMALINGA CHETTI (PLAINTIFF), APPELLANT,

v.

RAGUNATHA RAU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 12—Suit for money—Application by defendant for an account of dealings with plaintiff—Defendants' right to bring a separate suit, for an account.

In a suit for money the defendant admitted that there had been money dealings between him and plaintiff, but averred that the taking of an account would show that the plaintiff was indebted to him. The Court dismissed the plaintiff's suit, but declined to take an account against the plaintiff:

Held, that the defendant was not entitled to have an account taken in the suit and that Civil Procedure Code, section 12, would not have precluded him from suing for an account during the pendency of the plaintiff's suit.

MEMORANDUM of objections filed by defendant No. 1, under Civil Procedure Code, section 561, in Appeal No. 29 of 1896, which was preferred by the plaintiff against the decree of V. Srinivasa Chariar, Subordinate Judge of Kumbakonam, in Original Suit No. 3 of 1894.

The plaintiff alleged that the first defendant, together with the other defendants, who were the sons of his brother (deceased), constituted an undivided Hindu family; that the plaintiff, at

the request of the first defendant and his brother, had advanced various sums of money to them for the upkeep of the family charities and for other family purposes, and also that they had from time to time made payments to him; that, according to plaintiff's account, there was due by the family to him on 14th of October 1892 the sum of Rs. 10,704-8-6, and he now sued to recover that sum together with interest. The last paragraph of the plaint was as follows:—

"The plaintiff submits that, though the dealings began more than three years before suit still the suit is not barred inasmuch as the accounts are mutual, open and current, and also because the plaintiff has appropriated the payments by the defendants within three years before this action towards sums advanced to them before the said three years."

Defendant No. 1, among other pleas, stated in his written statement, "the first defendant further submits that nothing is due from him to the plaintiff; on the other hand a large amount exceeding Rs. 5,000 is due to the first defendant by the plaintiff, for which the first defendant will sue the plaintiff in a separate suit."

The Subordinate Judge held that nothing was due to the plaintiff and dismissed the suit declining to take an account between the parties for the purpose of ascertaining what sum was due by the plaintiff to first defendant, who desired that this should be done and with that object applied for leave to amend his written statement.

The plaintiff preferred an appeal against the decree dismissing his suit, and the first defendant preferred a memorandum of objections under Civil Procedure Code, section 561, with the object of having the account taken as above, that a decree for the amount found to be due might be given.

Mr. Norton, Rama Rau, Sivasami Ayyar and Ramanuja Rau for appellant.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar), Pattabhirama Ayyar and Jivaji for respondent No. 1.

The Court having given judgment, whereby the appeal was dismissed with costs, delivered judgment on the memorandum of objections as follows:—

JUDGMENT.—The only point argued in support of the memorandum of objections was that the Subordinate Judge was wrong

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in refusing to direct an account to be taken with a view of ascertaining the sum due to the first defendant and give him a decree therefor. It was argued that the plaintiff's suit was in reality a suit for an account, and that the defendant in such a suit was entitled to the benefit of the account if it turned out to be in his favour; and in support of this view it was contended that the first defendant was precluded by the provisions of section 12 of the Code of Civil Procedure from himself bringing a suit for an account against the plaintiff. The answer to these arguments is, in our opinion, clear. If it were true that the suit was a suit for an account in the proper sense of that term, then it would follow, according to the decision in *Hurrinath Rai v. Krishna Kumar Bakshi*(1), which decision illustrates the English practice, that the first defendant would be entitled to have an account taken with a view to obtain a decree for the sum that might be found due to him. But looking at the plaint in the present case we are clearly of opinion that the suit is not of the supposed character. There is no allegation in the plaint that the first defendant was under an obligation to account to the plaintiff; there is no allegation of a mutual account, that is, an account showing payments and receipts on the one side as well as on the other (*Phillips v. Phillips*(2)); and further there is no prayer for an account. It is true that it was competent to the first defendant to have filed a suit for an account against the plaintiff, but that circumstance cannot alter the character of the suit actually brought by the plaintiff, nor could it entitle the plaintiff to bring a suit for an account if otherwise he was not in a position to do so (*Padwick v. Stanley*(3)). Having regard to the nature of the plaint and to the relations of the parties, we do not think the decision in *Hurrinath Rai v. Krishna Kumar Bakshi*(1) has any application to the present case. These observations practically dispose of the argument derived from section 12, Civil Procedure Code. There is nothing in the provisions of that section to prevent the first defendant from bringing a suit for an account against the plaintiff, notwithstanding the pendency of the present suit. In a suit for an account brought by him (the first defendant) no doubt the matter in issue would have been substantially the matter in issue in the present suit. But the relief claimed in a suit for an account would differ in kind from

(1) I.L.R., 14 Calo., 147.

(2) 9 Hare, 473.

(3) 9 Hare, 627.

the relief claimed in the present suit. For these reasons we think that the Subordinate Judge was right in refusing to allow an amendment of the written statement. Therefore the memorandum of objections is also dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

KALIANA SUNDARAM AYYAR AND OTHERS (DEFENDANTS
Nos. 2, 3, 4, 6, 9, 10 and 19), APPELLANTS,

1897.
August 25.
September
9, 23.

v.

UMAMBA BAYI SAHEB AND OTHERS (PLAINTIFF AND DEFENDANTS
Nos. 13 to 18), RESPONDENTS.*

Religious Endowments—Fort Pagodas at Tanjore—Right of management on death of the senior widow of the late Maharajah of Tanjore.

After the death in 1855 of the late Rajah of Tanjore without male issue, Government assumed charge of the Fort Pagodas, of which he was the hereditary trustee. Subsequently, his senior widow Her Highness Kamakshi Bayi Saheba applied that they should be handed over to her as the head of the family for the time being; and Government in 1863 made an order saying "it is desirable that the connection of Government with the pagodas should cease; they will accordingly be handed over to Her Highness Kamakshi Bayi Saheba." The pagodas and their endowments were handed over in pursuance of that order and were held by the senior widow till her death in 1892. On her death Government ordered that they should be placed under the Devasthanam Committees of the circles in which they were situated. The senior surviving widow now claimed to be entitled to possession and the right of management by succession, and sued accordingly:

Held, that Government intended to make an absolute transfer in 1863 without any reservation of a reversionary right to make a new appointment, and that whether Her Highness Kamakshi Bayi Saheba took the trust property for a widow's estate, or as stridhanam, the plaintiff was entitled to succeed.

APPEAL against the decree of C. Venkobachariar, Subordinate Judge of Tanjore, in Original Suit No. 3 of 1894.

The plaintiff sued as the senior surviving widow of His Highness Sivaji Maharajah Saheb, the last Rajah of Tanjore to recover possession of the Fort devasthanams and their endowments.

* Appeal No. 234 of 1895.

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The seven surviving widows of the late Rajah were joined as defendants, and a question was raised whether the plaintiff was in fact the senior widow and as such the head of the family. This question was answered in the plaintiff's favour in the Subordinate Court and it was not re-agitated on the appeal. The first defendant was the Secretary of State for India. The other defendants were respectively members of the Devastanam Committees of the Tanjore and Kumbakonam Circles. These committees were respectively in possession of the devastanams and other properties to which the suit related, under Proceedings of the Government in the Political Department, dated 22nd September 1892.

The late Rajah died on 27th October 1855 and the Government of Madras by an act of state took possession of his state and his private property. Subsequently under Proceedings of the Madras Government, dated 21st August 1862, the estate was handed over to his senior widow Her Highness Kamakshi Bayi Saheba. These Proceedings contained the following directions:—

“The estate will therefore 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 in question by the other widows, her co-heirs. On the death of the last surviving widow, the daughter of the late Rajah or failing her the next heirs of the late Rajah, if any, will inherit the property.”

Subsequently Her Highness Kamakshi Bayi Saheba in 1862 addressed Government on the subject of the institutions in question in the present suit as to which her memorial, dated 24th December 1862, contained the following passages:—

“Finally your memorialist prays that the pagodas and charitable institutions which have been founded from time to time by members of her family may now be made over to her as the head of the family for the time being. No objection, she submits, can arise from the circumstance of her being a female; for the Ranee of Ramnad is the acknowledged head of all the charities in her zamindari, and has been so judicially declared by the late Court of Sudder Uddalut, nor are there abundant other instances wanting of such trusts vesting in women. The Government has recently avowed the policy of disconnecting itself with the religious endowments of the Hindus. Bills for that purpose, your memorialist is informed, have recently been introduced both in

“your Excellency's Legislative Council and in the Supreme Legislative Council at Calcutta. Indeed, your memorialist is informed on what she believes good authority, that the Government of Madras has long since been anxious to relinquish the charge of these endowments (the care of which was thrust upon it by the measures following on the Rajah's death) in favour of a member of the family. Mr. Phillips, then Commissioner of Tanjore, is understood to have gone so far in 1858, as to have recommended the Government to make them at once over to Suckkaram Saheb, though the Government did not think fit to sanction that proposal. Your memorialist will not open up the unhappy circumstances which would necessarily make such a measure personally repulsive not only to herself but to all the other members of the Rajah's family. The steps which led to Suckkaram Saheb's marriage with the Rajah's surviving daughter, have been more than tacitly condemned by the Supreme authorities in England and India. It is not essential that the charge of these endowments should be vested in a male; and she submits that she is the fit and proper person as the senior widow of her late husband to have the charge of the charitable endowments of the family.”

The then Government Agent at Tanjore in forwarding to the Government of Madras the memorial just referred to wrote *inter alia* as follows:—“With reference to fourth item of claim in the memorial, viz., the management of the charitable and religious institutions which were under the charge of His Highness the late Rajah, the right of Government in a legal point of view to provide in whatever way they might deem fit, for the superintendence of these institutions, has already been placed beyond all question. The only question therefore now for consideration is, whether it would be expedient or beneficial to hand over the superintendence of them to the memorialist.

“As regards the devastanams or the religious institutions, I am of opinion that it is highly desirable that all connection with them on the part of Government should cease. Indeed such ought to have been the case long ago, for Government, in their Order of 21st July 1858, No. 461 (paragraph 11), expressly directed the then Commissioner to take measures for the disposal of the pagodas, and also at the same time threw out a suggestion whether they might not be made over wholly or in part to

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"Suckkaram Saheb, son-in-law of the late Rajah, as sole trustee. "No steps, however, appear to have been taken to give effect to their order on account of the ill-feeling which existed amongst the several immediate members of the Rajah's family, and the difficulty which presented itself in fixing upon a particular individual for the trust contemplated. Now, however, that the memorialist Her Highness Kamakshiamba Bayi Sahiba, has been recognized as the head of the family, and has had the whole of the private property of the late Rajah made over to her, I conceive the Government will be disposed to accede to her request, as far as it relates to the management of the pagodas."

"With respect to the chattrams, I have the honour to state that I am not prepared to support the memorialist's request. If I had any guarantee that they would be properly managed by Her Highness Kamakshiamba Bayi Sahiba, I should be happy to recommend that they should be made over to her, but unfortunately such is not the case. Her Highness is, by reason of her sex and position, positively precluded from exercising anything like a personal control over her affairs, and I am compelled to add that my intercourse during the last few months with those whom she would employ, has not given me any high opinion of their integrity, nor made me think that they would use the chattram property in any other way than as a means for aggrandizing themselves. I hope that I shall not be misunderstood; I do not doubt the good faith of the memorialist herself, but I cannot say as much for her agents. These chattrams are, as the Government are aware possessed of extensive endowments, yielding an annual income of upwards of a lakh and a half of rupees, and as the system sanctioned by Government in their Proceedings of the 15th December 1857, No. 1046, under which the management of these institutions is vested in the Collector under the provisions of Regulation VII of 1817, has been found to work admirably for the last five years, and has given general satisfaction, I beg most earnestly, for the sake of the District of Tanjore and of all those really interested in these chattrams, that they may not be handed over to the memorialist."

On these and certain other documents, the Government on 19th March 1863 made an order which, so far as it related to the present matter, was in the following terms:—

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"The Governor in Council concurs in the opinion of the Officiating Government Agent that it would not be advisable to remove the chattrams belonging to the late Rajah from the control of the Collector. It is desirable that the connection of Government with the pagodas should cease, and they will accordingly be made over to Her Highness Kamakshi Bayi Saheba."

In pursuance of this order the devastanams were handed over to Her Highness Kamakshi Bayi Saheba, and she held possession of them until her death which took place in January 1892. The present plaintiff now claimed that, from the last-mentioned date, she came entitled to their possession and management in succession to the late Rane. After referring to the above circumstances and stating that the trusteeship had long been hereditary in the late Rajah's family the plaint continued:—

"The Government, however, by its Order, dated the 22nd September 1892, No. 537, Political Department, informed her (the plaintiff) that the management thereof had been directed to be transferred to the local Temple Committees; that, on receipt of this order, the Collector and Government Agent at Tanjore in October following unlawfully took possession of the said devastanam records and office as well as its treasury containing cash, jewels and other valuables; further arranged with Nagaraja Punt, who had been appointed by Her Highness Kamakshi Bayi Saheba as devastanam agent under her, and who, after her death, was *de facto* manager, to hold the management under his orders and eventually made over all the properties to the Temple Committee of Tanjore Circle, who in their turn, on the application of the Committee of Kumbakonam Circle, transferred to them such of the pagodas as were lying within their circle together with their endowments and that, in this manner, the pagodas and their endowments described in schedule A to the plaint as well as the properties described in schedule C, which are dedicated for all the plaint pagodas including those in schedule B, both properties being within the jurisdiction of this Court, remain in the possession of the Temple Committee of the Tanjore Circle, represented by defendants Nos. 2 to 5, while the pagodas and their endowments mentioned in schedule B, lying within the jurisdiction of the Kumbakonam Subordinate Court, have passed into the possession of the Committee of Kumbakonam

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"Circle represented by defendants Nos. 6 to 12. Plaintiff further states that the Government had no manner of right to so resume the said devastanams all or any of them, or to transfer their possession and management to the Temple Committee of the Tanjore or Kumbakonam Circle; that the said committees appointed under Act XX of 1863 have no jurisdiction under the provisions of that Act over these devastanams; that the claim, if any, on their part to possession and management or to exercise control over them under the provisions of that Act, has long ago become barred by limitation; that plaintiff gave notice of action to the Secretary of State for India in Council on the 17th May 1893; and that she also served notices upon the Temple Committees demanding possession of the properties in their custody and management but without any effect."

The written statement put in on behalf of the Secretary of State was to the following effect:—"First defendant states that the plaintiff pagodas and their endowments were not the private property of the Rajahs of Tanjore; that under the treaty of the 25th October 1799 by which the province was ceded, no provision was made for the retention by the Rajah of any share in the management of these or any other pagodas or their endowments; that subsequently however, the Government by its Order, dated 5th July 1800, allowed the Rajah to exercise authority and superintendence over the pagodas in the Fort of Tanjore amounting in number to 59 or so, and directed the amount of their endowments to be paid by the Collector to the Resident on his account, and also consented to his appointing an officer for the purpose of ascertaining the appropriation of the revenue of 49 other pagodas, without as the same time allowing such officer to have any control or authority over the expenditure in connection therewith; that it was by virtue of this order and with the sanction of Government, the management of the plaintiff temples and their endowments vested in the Rajah and it was subject to the conditions contained in the order itself; that again when these properties were taken possession of by the Government on the death of His Highness Sivaji along with his other properties, by an act of state as held by the Judicial Committee of the Privy Council, the Government appointed their own officers to manage them, as then there were no existing means of supervision and the Religious Endowments Act, XX

"of 1863, had not been passed into law and it was in fact quite competent for them to do so; that the officers so appointed had been managing the properties until about the 19th March 1863, when Her Highness Kamakshi Bayi Sahiba agreed to have them under her management; that upon her undertaking, those properties were handed over to her, but not 'unconditionally restored' to her as stated in the plaint; that she was then managing the properties until her death, not as of right and by virtue of her being the senior Ranees entitled to succeed to the Rajah's personal properties, but as a person appointed by Government to manage them; and that, after her death, the Government in the exercise of their rights of management of those properties and of appointment of trustees, managers or superintendents thereof, which rights they had all along retained in themselves, transferred them to the local Temple Committees appointed under Act XX of 1863. This defendant contends that, by ordering delivery of these properties to Her Highness Kamakshi Bayi Sahiba, the Government did not divest themselves of their right to make such further or other arrangements as they might think proper with regard to their management and superintendence; that thereby they did not recognise or admit any right thereto on the part of the former Rajahs or in Her Highness Kamakshi Bayi Sahiba or in any senior Ranees of Tanjore; that the order after all was purely an executive one and could be cancelled or varied by them at any time; that again the order transferring the properties to the Temple Committees was also perfectly legal and within the rights of the Government, who did not thereby resume them as alleged by the plaintiff; that the senior Ranees among the widows of the late Rajah and in that capacity the plaintiff has no right to their management; further, that the action of the Collector in taking possession thereof was not unlawful, but in pursuance of the orders of the Government; and that the Temple Committees after the transfer of the properties to them, acquired all the rights conferred and were bound to perform all the duties imposed upon them by Act XX of 1863 in relation to those properties. He further denies that the claim of the Temple Committees is barred by limitation as stated by the plaintiff."

In the written statement of first defendant was raised a further contention that Kamakshi Bayi Sahiba by the delivery of the

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plaint devastanams made to her "did not become a trustee of "the said pagodas and their endowments and liable as such for "maladministration, but was merely a manager during the plea- "sure of Government." This contention, however, was withdrawn before the settlement of issues on first defendant's motion accordingly, and the written statement was amended and paragraph 14 which raised this contention was struck out.

The Devasthanam Committee of the Kumbakonam Circle adopted the defence of the Secretary of State, as also did the Devasthanam Committee of the Tanjore Circle who, however, added that the right of management of the plaint properties, even if it belonged to the family of the widows of the late Rajah, vested jointly in all the surviving Ranees, and the claim of the plaintiff to the exclusion of the other Ranees, was therefore not sustainable; that the plaintiff and other Ranees had been already found by judicial decision incompetent to manage the trusts in question and the suit was unsustainable on this ground also; and lastly, that the assumption by the Government of the possession of the plaint properties and the transfer thereof to the Devasthanam Committees, even if not legal for the reasons set out in the first defendant's written statement, constituted an act of state into the validity, of which the Court had no jurisdiction to inquire.

Various other pleas were raised by certain of the defendants, including that already alluded to, as to the plaintiffs' status as senior widow, and another to the effect that if the right of management vested in the plaintiff at all, it vested in her jointly with her co-widows. These pleas, however, were overruled in the lower Court and subsequently abandoned.

The Subordinate Judge held that the late Maharajah was the hereditary trustee of the temples in question; the Government restored them unconditionally to Her Highness Kamakshi Bayi thereby divesting itself of all rights in them; that by such restoration Her Highness Kamakshi Bayi acquired a heritable interest which passed on her death to the plaintiff as the senior surviving widow, and accordingly that Government acted illegally in taking possession on her death. He consequently passed a decree for the plaintiff.

The members of the Devasthanam Committees of the Tanjore and Kumbakonam Circles preferred this appeal.

Pattabhirama Ayyar for appellants.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and *Jivaji* for respondent No. 1.

K. N. Aiyar for respondents Nos. 2 and 6.

SHEPHARD, J.—The appellants are the members of the two Devasthanam Committees of Tanjore and Kumbakonam. The first respondent is the senior Ranee of the late Maharajah of Tanjore.

The suit relates to certain devastanams known as the Fort or Palace Devasthanams and their endowments, of which the first respondent claims to be hereditary trustee in succession to her co-widow Her Highness Kamakshi Bayi who died in 1892. Numerous questions appear to have been raised at the trial in the Court below, but in this Court the appellants' vakil did not argue the questions involved in the last seven issues and confined himself to the contentions hereinafter mentioned.

Whatever estate or interest the late Kamakshi Bayi did acquire, was undoubtedly acquired by her, under the Order of Government, dated 19th March 1863, which concludes with the words:—"It is "desirable that the connection of Government with the pagodas "should cease, and they will accordingly be made over to Her "Highness Kamakshi Bayi Sahiba." Some attempt was made to show that the late Maharajah who died in 1855 and whose property was thereupon seized by the Government in the exercise of its sovereign power (see *The Secretary of State in Council of India v. Kamachee Boye Sahaba* (1)) was not the trustee of these pagodas, but possessed over them nothing more than the *Melkoima* or sovereign right of superintendence. This point is, in my opinion, sufficiently dealt with by the Subordinate Judge in the 17th and following paragraphs of his judgment. There is a clear distinction made in the documents exhibited between the public and the Fort temples. The latter are spoken of by Commissioner Phillips, in his letter of the 13th June 1857, as "possessions of the Raj, which must "unavoidably remain under management by Government officers "until the final settlement of Tanjore affairs." I think the Subordinate Judge is clearly right in holding that the late Raja was trustee of these pagodas.

That being so, the only question is what was the intention of Government in passing the order abovementioned of the 19th March 1863. It is necessary to consider the circumstances which

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led up to that order. On Mr. Phillips' letter abovementioned, the Government obtained the opinion of the Advocate-General as to the course which they could legally adopt with regard to the pagodas and their revenues, and on the 21st July 1858, an order is passed which concludes with the following words:—"Under these circumstances, the Governor in Council requests that the Commissioner will proceed at once to take measures for the disposal of the pagodas on the principles above indicated and for making them over to trustees, reporting the arrangements which he would propose for the sanction of Government before their being carried out. It has occurred to Government that these devastanams might be made over wholly or in part to Suckkaram Saheb, son-in-law of the late Rajah, as sole trustee, but on this point they would desire to have Mr. Phillips' opinion."

On the 21st August 1862 an order was made by Government to the effect that the private property of the late Rajah should be handed over to the senior Ranee, the late Kamakshi Bayi, on the terms mentioned therein (see *Jijoyiamba Bayi Saiba v. Kamakshi Bayi Saiba*(1)). The nature of these terms was such that the senior Ranee and the other Ranees and the Rajah's daughter were practically placed as between themselves in the position, in which they would have been under Hindu Law, had no confiscation of the property taken place. On the 13th January 1863 the Government Agent sends up to Government a memorial from the senior Ranee with his report upon it. In the memorial occurs this passage:—"Finally, your memorialist prays that the pagodas and charitable institutions, which have been founded from time to time by members of her family may now be made over to her as the head of the family for the time being. No objection, she submits, can arise from the circumstance of her being a female; for the Ranee of Ramnad is the acknowledged head of all the charities in her zemindari, and has been so judicially declared by the late Court of Saddr Addalut." The memorial ends with the submission that the memorialist is "the fit and proper person as the senior widow of her late husband to have the charge of the charitable endowments of the family."

In his report the Government Agent distinguishes between the pagodas and the chattrams. With regard to the former, he writes:

(1) 3 M.H.C.R., 428.

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"Now, however, that the memorialist Her Highness Kamakshi Bayi Sahiba, has been recognized as the head of the family, and has had the whole of the private property of the late Rajah made over to her, I conceive the Government will be disposed to accede to her request as far as it relates to the management of the pagodas." It is on these materials that the Order of the 19th March 1863 was passed in the following language:—"It is desirable that the connection of Government with the pagodas should cease, and they will accordingly be made over to Her Highness Kamakshi Bayi Sahiba."

The extreme contention on the part of the appellants in the Court below seems to have been that the intention of Government was to constitute the senior Ranee, a mere manager removable at pleasure and not to vest any estate in her. That contention was not pressed upon us at the hearing of the appeal; but it was argued that if the senior Ranee took any estate, it was only an estate for life and our attention was called by way of contrast to the terms of the disposition of the Rajah's private property expressed in the Order of the 21st August 1862.

Whatever may have been the intention of Government as to the devolution of the estate on the death of Kamakshi Bayi Sahiba, I think it clear that they intended to make an absolute transfer without any reservation of a reversionary right to make a new appointment. The evidence shows that at the time the Government was anxious to divest itself and its officers of the charge of religious endowments. Only nine days before the order of Government was passed, the Act XX of 1863 received the sanction of the Governor-General. By that Act a distinction was drawn between those temples whose trustees had been appointed by Government and those which had been managed by hereditary trustees. It being competent to the Government to deal with the Fort pagodas in such manner as they thought fit, they treated the pagodas as if they belonged to the latter class dealing with them in accordance with the provisions of section 4 of the Act. There is nothing to show that the resolution so to treat them was intended to be in any way conditional, or that it was intended to leave it an open question whether at some future time the pagodas might be dealt with in some other way.

The question still remains what was the precise nature of the estate intended to be taken by the senior Ranee. It must be taken

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that the estate was in the nature of self-acquired property in the Ranees' hands, in this sense, that her rights were derivative from Government and had no relation back to inheritance on the death of the Rajah. That was the view taken with regard to the private property restored by the Order of 21st August 1862 (see *Jijoytamba Bayi Saibu v. Kamakshi Bayi Saiba*(1)). In the order relating to the pagodas there are no express terms, such as there were in the earlier order, regulating the enjoyment and devolution of the estate. The intention of Government may, however, I think, be gathered from the terms of the memorial and the report on which the order proceeded. In the memorial the senior Ranees prays that the pagodas may be handed over to her "as the head of the family for the time being." The Government Agent supports her claim on the same grounds, saying that, as she has been recognized as the head of the family and has had the private property made over to her, he conceives the Government will be disposed to accede to her request regarding the pagodas. The Government does accede to her request, so recommended by the Agent, and I think it may be fairly inferred that the intention was that she should assume the management of the pagodas in the capacity in which she asked for it, that is to say, as the head of the family for the time being. It cannot be suggested that it was in any other capacity than that of widow of the late Rajah that she was chosen as the person to whom the trust should be made over. And it must be presumed that the Government in making the grant had in view the personal law of the family to which the grantee belonged and intended to create an estate consonant to that law (see *Mahomed Shumsool v. Shevukram*(2), *Kunkacha Umma v. Kutti Mammi Hajee*(3)). This being so, the inference is, I think, irresistible that the intention was to grant a widow's estate, that is, to put Kamakshi Bayi in the position which she would have enjoyed had there been no confiscation on the death of her husband the Rajah.

The Advocate-General put the case in two ways. He argued that it was the intention of Government either to confer on Kamakshi Bayi, a widow's estate or to grant the trust property to her as stridhanam. In either view he contended the plaintiff would, on the death of Kamakshi Bayi, without issue, be the

(1) 3 M.H.C.R., 428. (2) L.R., 2 I.A., 7. (3) I.L.R., 16 Mad., 201.

person entitled to succeed. A consideration of the circumstances under which the grant was made, in my opinion, strongly indicates the intention of Government to adopt the former course, and that view of the grant is further supported by the presumption which exists in favour of the supposition that the estate when re-granted to a member of the original family was intended to possess the qualities which it possessed in the hands of the former holder. For these reasons, I think the Subordinate Judge has come to a right conclusion and I would dismiss the appeal with costs to be paid by the appellants to the first respondent.

DAVIES, J.—I concur throughout.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

VIRAPPA CHETTI.*

1896.
December
10, 17.

*Penal Code—Act XLV of 1860, ss. 268, 283—Encroachment on public highway—
Public nuisance.*

Whoever appropriates any part of a street by building over it infringes the right of the public *quoad* the part built over, and thereby commits an offence punishable under Penal Code, section 290, if not one punishable under section 283.

APPEAL on behalf of Government under section 417 of the Code of Criminal Procedure against the judgment of acquittal pronounced by the Second-class Magistrate of Nannilam in Calendar Case No. 225 of 1896.

The accused was charged with the offence of causing obstruction in a public way punishable under section 283, Indian Penal Code. The accused was the owner of a house in a street in the Nannilam Union. The charge was that, early in 1895, he widened the pials in front of his house by about three feet and thereby encroached upon the street. A notice was served on him under section 98 of the Local Boards Act, directing him to remove the encroachments.

* Criminal Appeal No. 422 of 1896.

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The encroachments not having been removed, he was charged as above under the orders of the Taluk Board. The Magistrate said in his judgment:—"The Union karnam says that the pials as "widened are within the line of the adjoining houses east and "west, and it is clear from his statement and from my personal "inspection that the encroachments in question cause no danger, "obstruction, or annoyance to the public."

On this ground he acquitted the accused, and the present appeal was preferred on behalf of Government against the acquittal.

The Public Prosecutor (Mr. Powell) for the Crown.

Tiagaraja Ayyar for the accused.

JUDGMENT.—The Second-class Magistrate has acquitted the accused in these two cases of an offence under section 283, Indian Penal Code, on the ground that the encroachment, if such there be, does not cause any 'danger, obstruction or annoyance' to the public.

It may be that section 283 is inapplicable in the absence of evidence that danger, obstruction or injury was caused to any particular person, but the acts of the accused clearly fell within the definition of a 'public nuisance' in section 268, Indian Penal Code, and was, therefore, punishable under section 290.

The public is entitled to the use of the full width of the public street, however wide it may be. Whoever appropriates any part of the street by building over it infringes the right of the public *quoad* the part built over. The act must necessarily cause obstruction to persons who may have occasion to use their public right over the part encroached upon.

The Second-class Magistrate has not decided whether the land built over was in fact part of the public street or was their own private land as pleaded by the accused. We, therefore, set aside the acquittals in both cases, and direct that the accused be re-tried and charges against them be disposed of according to law.

Ordered accordingly.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

UTHUNGANAKATH AVUTHALA (PLAINTIFF), APPELLANT,

v.

THAZHATHARAYIL KUNHALI AND OTHERS (DEFENDANTS
Nos. 4 AND 7 TO 10), RESPONDENTS.*

1897.
August 10.
September 7.

Malabar Compensation for Tenants' Improvements Act—Act I of 1887 (Madras), ss. 6 (c), 7—Tenant's agreement in 1890 not to claim compensation for improvements already made—Reduction of rent—Claim to make deduction from the value of improvements on account of reduction of rent.

In an ejectment suit relating to agricultural property in Malabar, it appeared that the tenant was in possession under an agreement executed in 1890, in which it was recited that the tenant's father had been let into possession thirty years previously at a certain rate of rent and had made improvements on the land, and the defendant agreed to hold at a lower rate of rent, and not to demand compensation for the previous improvements. The plaintiff relied on the last mentioned provisions of the agreement which admittedly related to improvement made since January 1886:

Held, that the provisions relied on by the plaintiff were invalid under Malabar Compensation for Tenants' Improvements Act, 1887, s. 12:

Held also per *Subramania Ayyar, J. (Davies, J., diss.)*, that there was no reduction of rent or other advantage given by the landlord to the tenant within the meaning of s. 6 (c), and accordingly that the plaintiff was entitled to evict only on payment of the value of improvements free from any deduction.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 816 of 1895, affirming the decree of T. V. Anantan Nayar, District Munsif of Kutnad, in Original Suit No. 18 of 1895.

The plaintiff sued to recover a paramba in Malabar which he had purchased from defendant No. 6. The father of defendant No. 6 had leased the land in question to defendant No. 1, who had executed on 15th September 1890 an instrument described as a pattam chit which was filed in the suit as exhibit A.

That document so far as is material for the purposes of this report was in the following terms:—

"My father, the deceased Thama, had, in the year 1034, "obtained delivery and possession from you of the item of

* Second Appeal No. 1445 of 1896.

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"property belonging to you mentioned in the subjoined schedule
"in order to effect Kuzhikkur and Chamayam improvements in
"it, and executed to you a rent-chit agreeing to pay you annually
"a rent of 16 paras of paddy measured according to the stand-
"ard 30 Nazhipara, and 4 annas 7 pies for plantain bunch. In
"accordance with this rent-chit the said Thama effected Kuzhik-
"kur and Chamayam improvements in the property and was
"holding it till his death, after which my elder brother Kunjan,
"who died recently, and myself have been holding it. Now
"as I have again obtained delivery and possession from you of
"the said property on the right of former holding, with all the
"right of making Kuzhikkur and Chamayam improvements in it,
"having settled with you all the accounts of rent up to the year
"1066 inclusive, and having paid to you an earnest rent-money of
"Rs. 14-4-7 free of interest, I hereby agree to hold the said
"property and to pay you the annual rent proposed to be paid to
"you of 10 paras of paddy measured according to 30 Nazhipara
"and valued at Rs. 5, and of 4 annas 7 pies for plantain bunch, the
"paddy to be paid within the 5th of Kanni 1067 (19th Sep-
"tember 1891), and plantain bunch on the occasion of the ensuing
"Onam, and to obtain from you receipt for the same. After the
"expiry of 1 year I agree to settle the account of rent with you,
"to receive back from you the earnest rent-money, to have the
"arrears of rent, if any, deducted from the earnest rent, to receive
"from you the value of Kuzhikkur and Chamayam improvements,
"to surrender possession to you of the property, and to receive
"back this rent-chit from you. As from the amount due in
"accordance with the rent-chit executed by Thama, a remission of
"6 paras of paddy has been granted to me also as a consideration
"for reclamation, I hereby agree not to demand any value on
"that score, nor need any value be given to me therefor."

The District Munsif expressed the view that the covenant in the document above recited to the effect that the tenant should not claim any compensation for improvements made by way of reclamation, was repugnant to the principles of the Malabar Compensation for Tenants' Improvements Act, 1887, and could not be upheld as a valid covenant. He accordingly appointed a Commissioner to value the improvements on the land and passed a decree for possession, on payment by the plaintiff of the amount of the value of the improvements together with the costs

of the commission. This decree was upheld on appeal by the Subordinate Judge.

The plaintiff preferred this appeal.

Mr. C. Krishnan for appellant.

Sundara Ayyar for respondents.

SUBRAMANIA AYYAR, J.—Though the amount involved in this case is small, the questions raised are not unimportant.

The facts of the case are briefly as follows:—

The land, for the possession of which the plaintiff (appellant) sued in this case, had, many years ago, been originally demised by the assignor of the plaintiff to the first defendant's father. After the father's death the first defendant succeeded to the possession of the land; but in 1890 he executed to the landlord exhibit A. By that instrument it was provided that the first defendant was to hold the land for one year and to surrender it at the end of the term. The instrument further stated that the landlord having agreed to allow the first defendant to hold the land for the year at a rent which was less (by six *paras* of paddy worth about Rs. 3) than what was payable under the instrument of demise executed when the land was originally let to the first defendant's father, the defendant agreed not to claim compensation for certain improvements made by way of reclamation after Madras Act I of 1887 came into force. The value of those improvements amounting to Rs. 60-14-0 was directed by the lower Courts to be paid by the plaintiff, notwithstanding the provision in exhibit A respecting such compensation.

The first question for decision is whether the last-mentioned provision in exhibit A is invalid under section 7 of the enactment referred to. That section runs as follows:—"Nothing in any contract between a landlord and a tenant made after the 1st day of January 1886 shall take away or limit the right of a tenant to make improvements and claim compensation for them in accordance with the provisions of this Act."

The argument on behalf of the appellant in support of the contention that the lower Courts were wrong in awarding the compensation in question was this. The words "to make improvements and to claim compensation for them" refer only to improvements to be made in the future and to compensation which might become due in respect thereof. A contract, however, relating to compensation for improvements already effected does not fall within the section and the clause in question in exhibit A, which refers to

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such past improvements, is therefore valid. This contention is, no doubt, plausible, but, in my opinion, it is not sound.

The necessity for the Legislature taking the extreme step of depriving Malabar tenants of their power to enter into contracts with their landlords in regard to improvements arose from well-known local causes. A great deal of the land in Malabar, cultivated or waste, belongs to comparatively a very few *jenmis*. The rest of the people who are mostly agriculturists have, to earn their livelihood, to obtain what land they want from these *jenmis*. So long as there was not much demand for land the condition of tenants was not very bad. But with the keen competition for the possession of land which has been for a considerable time prevailing, the state of things altered. Evictions attended with serious crimes became not unusual; the compensation awardable for improvements made by tenants being generally far below the real value of the improvements. Such a state of things required to be checked and the condition of tenants called for amelioration. Act I of 1887 was the first instalment of legislation intended to bring about a salutary change. In these circumstances it is difficult to believe that the Legislature meant to prohibit only contracts relating to improvements to be effected after such contracts. No doubt, the majority of tenants in Malabar, who are ignorant men, may perhaps not be quite as able to realize the value of the right to compensation for improvements to be made as they would be to realize the value of the right to compensation for improvements already made. Very likely also the desire of tenants to secure land for cultivation may, at the time of the creation of tenancies, induce them too readily to disclaim compensation for future improvements. But, on the other hand, it must not be forgotten that the desire to retain land once taken and improved is with these tenants not unnaturally far stronger than even the desire to obtain land for the first time. Consequently, the probability of tenants being improperly induced to enter into improvident contracts with reference to compensation for improvements already made is certainly not less strong than the likelihood of their entering into such contracts with reference to future improvements. Looking, therefore, to the reason of the section in question, there can be little doubt that the Legislature intended to prohibit contracts relating not only to future but to past improvements also. This view is confirmed by the provisions of section 4 of the Act. The effect of the section is that a tenant

shall not, at the time of the eviction, be prejudiced by any custom, which will deprive him of his right to compensation for whatever improvements made during the tenancy, whether by himself or by his predecessors in interest. While thus the Legislature, true to its object, has excluded the operation of custom with regard to improvements made since the creation of the tenancy till the time of the eviction, would it be reasonable to hold that a tenant may, by a contract, prejudice himself in the matter of the improvements made in the course of the tenancy but prior to the contract? To so limit the scope of section 7 would be anomalous and would defeat the clear object of the Legislature. The provision in exhibit A on which the plaintiff relies must therefore be held to be invalid, and in no way to affect the right to compensation for the improvements in dispute.

The second question for decision is whether in determining the amount of compensation to be awarded, the circumstance that the rent payable under exhibit A was less than that payable under the prior instrument of demise, should be taken into consideration as falling under clause (c) of section 6 of the Act.

As to this, the contention on behalf of the plaintiff was twofold. One was that the first part of the clause applied to the case and that within the meaning of that part there was, according to the facts here, "a reduction of rent" given by the landlord to the tenant, for which due allowance should be made in favour of the landlord. In order to see what force there is in this contention, it is necessary to bear in mind the precise position in which the parties to exhibit A stood with reference to each other when the document was executed. Now before its execution, the tenancy, that commenced in the first defendant's father's lifetime and was continued by the first defendant, seems to have been one from year to year. But in 1890 that tenancy was determined by the mutual consent of the landlord and the tenant and the accounts relating to the rent payable in respect of that tenancy were settled and the balance due was paid up. Then came into existence exhibit A whose terms, even if they had been the same as those of the prior demise, would clearly mark the creation of a fresh tenancy. Not the less so certainly when the terms, as has already been seen, are different; since the tenancy under exhibit A was for a year certain, although the tenant, as a matter of fact, held over. Can it be said under these circumstances that there was a "reduction of

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"rent"? Now these words imply a lessening of a liability created by the contract under which the property improved was demised. No doubt in letting the land again at the smaller amount, which was reserved as rent in exhibit A, the landlord showed a favour to the tenant. But the favour was one which did not relieve the tenant to any extent from the payment of anything due under the demise with reference to which the improvements were made. It follows that the facts relied on did not amount to a "reduction of rent" as contended for the plaintiff.

The second contention was that though there might not have been "reduction of rent," yet there was an "advantage" given by the landlord to the tenant within the meaning of the latter part of the clause. Now the word "advantage" in that part is qualified by the term "other" and, in a context such as that under consideration, on the principle of *ejusdem generis*, "other" means "other such like." But from what has just been said with reference to the reduction of rent it will be seen that the advantage given to the first defendant in allowing him to hold under exhibit A at the smaller amount of rent mentioned therein, was one which did not relieve the defendant partially or wholly from any subsisting liability. Such advantage cannot therefore be held to be similar to a "reduction or remission of rent," the particular kinds of advantage the enumeration of which precedes the general words "other advantage" in the clause and which, of course, as already stated, imply a discharge partial or complete from an existing obligation. The latter part of the clause also is therefore inapplicable.

Lastly, as to the costs awarded to the respondents on account of the fee paid to the Commissioner, who was deputed to ascertain the value of the improvements, I do not think that there is sufficient ground for interfering with the discretion exercised by the lower Courts. (See *Narayana v. Narayana*(1).)

I would, therefore, dismiss the second appeal with costs.

DAVIES, J.—The first question raised by the plaintiff (appellant) is whether the first defendant was bound by his agreement in A not to demand compensation for his improvements. With reference to section 7 of the Malabar Compensation for Tenants' Improvements Act, 1887, it was argued that that section applies to improvements

to be made after the date of the contract; but I think it is clearly intended to refer to any improvements made after the first day of January 1886 whether the contract be made prior to or subsequent to the making of such improvements. The contract in this case was made in 1890, but it related to improvements admittedly made after the 1st day of January 1886. I therefore hold that it was void under section 7 of the Act and was therefore not binding on the first defendant and therefore not upon those who claim through him.

The second question raised is whether the plaintiff is not entitled to deduct from the compensation payable the value of a certain reduction made in the rent in consideration of the said improvements. The amount of the reduction was 6 *paras* of paddy per annum, and this reduced rate of rent was enjoyed for 5 years; so that 30 *paras* of paddy is the amount claimed in reduction by the plaintiff under clause (c) of section 6 of the Act. I think the plaintiff is clearly entitled to make this deduction from the value of the improvements payable by him. It was urged that the reduction of rent, in order to be a good set-off against the value of improvements, should have been made in an existing rental, and not upon a new rental agreement such as A is. But I find that exhibit A was only a renewal of an old lease held by the first defendant's father from the year 1859, and it may therefore be taken to be a continuation of the old lease and not a new lease. Even, however, if it was otherwise and the first defendant had been a stranger and a new-comer, he did as a fact get a reduction of rent upon the former lease amount in consideration of the improvements which he had acquired from the last tenant in whose shoes he stood in regard to them, and therefore it seems to me quite immaterial whether it was upon the old lease or the new one that the reduction is claimable, the fact being that in consideration of such improvements as existed on the land, the value of which the landlord has now to pay the tenant, the latter did get a reduction of rent.

The only other point is whether the plaintiff was chargeable with the whole of the costs of the commission, viz., Rs. 15, the Commissioner's fee. I think that as the defendants made a claim for more than double what the Commissioner has found to be due to them, the fee for the Commissioner should have been divided equally between the plaintiff and the defendants as one side has gained as much as the other.

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The result is that there should be deducted from the amount payable for improvements by the plaintiff the value of 30 *paras* of paddy, namely, Rs. 15, the amount by which the rent was reduced and that the amount of the Commissioner's fee payable by the plaintiff to the defendants is reduced from Rs. 15 to Rs. 7½. With these modifications, I would dismiss the second appeal with proportionate costs.

Under section 575 of the Code of Civil Procedure, the judgment of Mr. Justice Subramania Ayyar prevails and the second appeal is dismissed with costs.

APPELLATE CIVIL.

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

1896.
November 30.

ARIYA PILLAI (APPELLANT), APPELLANT,

v.

THANGAMMAL (RESPONDENT), RESPONDENT.*

Succession Certificate Act—Act VII of 1889, ss. 9, 10—Order for issue of certificate subject to security being given—Appeal.

On a contested application for a succession certificate under Act VII of 1889, an order was made for the issue of the certificate on security being furnished by the applicant. The opposite party preferred an appeal against the order:

Held, that the appeal was maintainable.

APPEAL under Letters Patent, section 15, against the judgment of Subramania Ayyar, J., in Civil Miscellaneous Appeal No. 9 of 1896, rejecting an appeal which was preferred against the order of T. M. Horsfall, District Judge of Tanjore, on Civil Miscellaneous Petition No. 526 of 1895.

The above petition was preferred in the District Court of Tanjore under Act VII of 1889 by the widow and opposed by the undivided brother, of one Naga Pillai deceased. By the order appealed against the District Judge directed that the succes-

* Letters Patent Appeal No. 100 of 1896.

sion certificate should issue to the widow on her giving security which she subsequently did. The brother appealed to the High Court and his appeal came on for disposal before Mr. Justice Subramania Ayyar, who delivered judgment as follows:—

SUBRAMANIA AYYAR, J.—On behalf of the respondent it is argued that the order appealed against was an interlocutory order against which no appeal lies (*Bhagwani v. Manni Lal*(1)). This seems to be so as it appears that, after the security was furnished, the Judge passed on the 25th October 1895 an order granting the certificate. I therefore reject the appeal with costs.

The appellant now appealed as above under Letters Patent, section 15.

Seshagiri Ayyar for appellant.

ORDER.—We are unable to agree with the learned Judge that an appeal does not lie. The Allahabad case on which he relies was considered and dissented from by a Bench of this Court in *Venkatasami Naik v. Chinna Narayana Naik*(2) which, however, does not appear to have been brought to the notice of the learned Judge.

We agree with the previous ruling of this Court.

On the merits, however, we find no ground for the appeal. There is no affidavit or other evidence to show that the District Judge refused to examine any witness whom the appellant desired to examine.

The Vakils on both sides were heard.

We dismiss the appeal.

(1) I.L.R., 13 All., 214.

(2) Appeal against order No. 32 of 1894 (unreported).

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

VENKATARAM JETTI.*

Criminal Procedure Code—Act X of 1882, s. 11—Sentence imposed in British India postponed till expiry of a sentence imposed in Mysore.

It is competent to a Magistrate in British India to pass a sentence which should take effect after the expiration of a sentence in Mysore.

CASE reported for the orders of the High Court under section 438 of the Code of Criminal Procedure by H. Bradley, District Magistrate of Coimbatore.

A person, who was undergoing a sentence of six years' rigorous imprisonment in the jail at Mysore, was tried by the Tahsildar-Magistrate of Kollegal in Calendar Case No. 135 of 1891 for the offence of theft in a building, and was convicted and sentenced to six months' rigorous imprisonment to take effect after the expiry of the sentence which he was undergoing in the Mysore Jail. The District Magistrate entertained a doubt as to whether it was legal for the sentence imposed in a British Court to be postponed until the prisoner had served out in a foreign jail a sentence imposed in a foreign Court. He accordingly reported the case for the orders of the High Court as above.

The Public Prosecutor (Mr. Powell) for the Crown.

ORDER.—We think it was competent to the Magistrate to pass a sentence which should take effect at the only time when it could take effect, viz., after the expiration of the sentence in foreign territory.

We therefore decline to interfere.

* Criminal Revision Case No. 549 of 1896.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

RAMALINGAM AND OTHERS.*

Criminal trial in Sessions Court—Examination of some of the witnesses bound over—Stopping the trial.

Certain persons were tried in a Sessions Court for the offence of dacoity. Seven witnesses had been examined for the prosecution by the Committing Magistrate and were bound over to give evidence at the trial. After five witnesses have been examined, the Judge asked the jury whether they wished to hear any more evidence, and, on their stating that they did not believe the evidence and wished to stop the case, the Judge recorded a verdict of acquittal:

Held, that the procedure adopted was wrong, and that no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to have been arrived at until the two remaining witnesses had been examined.

CASE of which the records were examined by the High Court under section 439 of the Code of Criminal Procedure in Calendar Case No. 38 of 1896 on the file of the Sessions Court of Tanjore.

Ten persons were tried for the offences of rioting, dacoity and mischief. The charges of the offences of rioting and mischief were withdrawn by the Public Prosecutor with the consent of the Court under section 494 of the Code of Criminal Procedure. The trial on the charge of dacoity was stopped after the examination of five of the witnesses for the prosecution, when the jury stated that they did not believe the evidence, and the accused were acquitted.

The High Court sent for the records of the case under section 435 of the Code of Criminal Procedure.

The Public Prosecutor (Mr. Powell) for the Crown.

Ramanuja Rau for the complainant.

Krishnasami Ayyar for the accused.

JUDGMENT.—The Sessions Judge having examined five witnesses for the prosecution, and there being no further direct evidence of the offence, asked the jury whether they wished to hear any more evidence, and on their stating that they did not believe the evidence and wished to stop the case, the Judge recorded a verdict of

* Criminal Revision Case No. 414 of 1896.

QUEEN-
EMPRESS
v.
RAMALINGAM.

acquittal. We are unable to approve of the procedure adopted by the Sessions Judge. It is not warranted by any provision of law, and it might, under certain circumstances, lead to a failure of justice.

It appears that there were, in this case, two other witnesses examined before the Magistrate, and bound over to give evidence at the trial, whose evidence, if believed, would have corroborated the case for the prosecution, and might possibly have led the jury to form a different opinion of its credibility. No final opinion as to the falsehood or insufficiency of the prosecution evidence ought to be arrived at by the Judge or jury until the whole of that evidence is before them, and has been considered, and the jury ought, if need be, to be cautioned by the Judge to this effect. If, however, at the end of the prosecution evidence, the Public Prosecutor waives his right to sum up the evidence, where he has such right, and the jury then express an opinion that the evidence is incredible and the Judge agrees with them in such a case, we do not, as at present advised, say that it is necessary for the Judge to go through the formality of summing up the case to the jury. Their opinion might, in that case, we think, be at once accepted as a verdict. But we are clearly of opinion that this should not be done until the whole of the prosecution evidence has been duly recorded. In the present case, looking to the evidence recorded and all the circumstances, we do not think it necessary to do more than point out the proper procedure for the future guidance of the Sessions Judge.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

NATHURAM SIVIJI SETT (PLAINTIFF), APPELLANT,

v.

KUTTI HAJI (DEFENDANT), RESPONDENT.*

Civil Procedure Code, 1882, s. 252—Legal representative—Suit against the heir and possessor of the assets of a deceased person.

Where a party is sued for money as the heir and possessor of the assets of a deceased debtor, and it is proved that he has received sufficient assets to meet the debt, a personal decree therefor can be passed against him.

* Second Appeal No. 1213 of 1895.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 565 of 1894, modifying the decree of K. Ramanatha Ayyar, District Munsif of Cannanore, in Original Suit No. 491 of 1893. NATHURAM SIVIJI SETT v. KUTTI HAJI.

This was a suit for the price of articles purchased from the plaintiff, bought against the defendant as the heir and legal representative of the purchaser. The District Munsif passed a personal decree against him, which, on appeal, was modified by the District Court and altered to a decree passed against him as the legal representative of the deceased. The plaintiff appealed to the High Court.

Mr. C. Krishnan for appellant.

Sankara Menon for respondent.

JUDGMENT.—The Judge is in error in stating that the defendant was sued only as legal representative of the deceased. He was in fact sued as the heir and possessor of the assets of the deceased. It having been proved in the suit that the defendant had received sufficient assets to meet the plaintiff's debt, the Court of first instance was justified in passing a personal decree against him in the suit for that debt, and it was not necessary to wait for execution proceedings to determine the extent of the defendant's personal liability as contemplated in section 252 of the Code of Civil Procedure. The case of *Magaluri Garudiah v. Narayana Rungiah* (1) is, in point rather than the case of *Janaki v. Dhanu Lall* (2), quoted by the Judge. We must, therefore, reverse the decree of the Lower Appellate Court and restore that of the District Munsif. The defendant (respondent) must pay the plaintiff's costs in this and the Lower Appellate Court. This disposes of the memorandum of objections which is simply dismissed.

(1) I.L.R., 3 Mad., 359.

(2) I.L.R., 14 Mad., 454.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

VENKAYYA (RESPONDENT), APPELLANT,

v.

RAGAVACHARLU (APPELLANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 583—Limitation Act—Act XV of 1877, sched. II, art. 179—Application for restitution—Period of limitation—Fraud.

Applications made to obtain restitution under a decree in accordance with Civil Procedure Code, section 583, are proceedings in execution of that decree and are governed by Limitation Act, sched. II, art. 179.

APPEAL under Letters Patent, section 15, against the judgment of Mr. Justice Parker in Appeal against Order No. 13 of 1895 reversing the order of K. C. Manavedan Raja, Acting District Judge of Nellore, made in Civil Miscellaneous Appeal No. 3 of 1894, affirming the order of P. Adinarayanayya, District Munsif of Kanigiri, made on execution petition No. 144 of 1894.

This was a petition put in under Civil Procedure Code, sections 330 and 335, by the defendant in Original Suit No. 127 of 1879 on the file of the District Munsif of Kavali to obtain restitution.

The District Munsif rejected the application as being barred by the twelve years' rule of limitation overruling the petitioner's plea that he had been prevented by fraud from executing the decree.

The District Judge affirmed the decision of the District Munsif. The petitioner preferred an appeal to the High Court, which came on for hearing before Mr. Justice Parker, who said:—"I have no doubt that proceedings taken for obtaining restitution under section 583 of the Civil Procedure Code are proceedings in execution of the decree. The petition itself is put in under section 230 and execution will be barred under the twelve years' rule, unless the defendant has by fraud or force been prevented from executing the decree." He proceeded to refer to the allegations of fraud made by the petitioner and in the result set aside the order of the District Judge and remanded the case to be re-heard.

The respondent preferred the present appeal under the Letters Patent.

* Letters Patent Appeal No. 39 of 1896.

Seshagiri Ayyar for appellant.

Ramachandra Rau Sahab for respondent.

JUDGMENT.—We have no doubt but that the learned Judge is right in holding that applications made to obtain restitution under a decree in accordance with section 583, Civil Procedure Code, are proceedings in execution of that decree, and are governed, as regards limitation, by article 179 of the second schedule of the Limitation Act. This is in accordance with the view taken in *Nand Ram v. Sita Ram*(1).

The appellant's *vakil* relies on a remark in the case reported as *Kurupam Zamindar v. Sadasiva*(2) to the effect that the learned Judges in that case were disposed to think that the application in a similar case was governed by article 178. That remark, however, is a mere *obiter dictum* and as such is not binding on us. One of the Judges who took part in that case is the learned Judge, whose order in the present case rules that article 179 is the article properly applicable. The appeal, therefore, fails and we dismiss it with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

RAJA GOUNDAN (DEFENDANT), APPELLANT,

v.

RANGAYA GOUNDAN (PLAINTIFF), RESPONDENT.*

Rent Recovery Act—Act VIII of 1865 (Madras), s. 78—Limitation—Suit to recover property wrongfully distrained.

The plaintiff sued to recover certain property wrongfully distrained by the defendant who was his landlord, or in the alternative for its value. The defendant had tendered no patta to the plaintiff, but the distraint had taken place professedly under the Rent Recovery Act. The suit was not brought within six months from the date of the wrongful distraint:

Held that the suit was not barred under Rent Recovery Act, section 78.

SECOND APPEAL against the decree of W. J. Tate, District Judge of Salem, in Appeal Suit No. 181 of 1894, affirming the decree of

(1) I.L.R., 8 All., 545.

(2) I.L.R., 10 Mad., 66.

* Second Appeal No. 14 of 1896.

VENKAYYA
v.
RAGAVA-
CHARLU.

1897.
February 26.

1897.
March 29.

RAJA
GOUNDAN
v.
RANGAYA
GOUNDAN.

Syed Tajuddin Sahab, District Munsif of Namakal, in Original Suit No. 469 of 1893.

The plaintiff sued to recover certain property alleged to have been illegally distrained by the defendant who was his landlord more than six months before the institution of this suit. The defendant pleaded that the suit was barred under the six months' rule in section 78 of the Rent Recovery Act.

The District Munsif overruled this plea and passed a decree in favour of plaintiff, and his decree was affirmed on appeal by the District Judge.

The defendant preferred this second appeal.

Subramania Ayyar for appellant.

Sundara Ayyar for respondent.

JUDGMENT.—This was a suit by a tenant to recover specific property alleged to have been wrongfully distrained by his landlord, the defendant. The plaintiff prayed for the recovery of the property, or of its price, Rs. 100.

The defendant pleaded that the suit was barred by the special limitation prescribed under section 78 of Rent Recovery Act (Madras) VIII of 1865, as the suit was brought more than six months after the cause of action accrued. Section 78 enacts that "nothing in this Act contained shall be construed to debar any person from proceeding in the ordinary tribunals to recover money paid, or to obtain damages in respect of anything professedly done under the authority of this Act:

"Provided that Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action, unless such suit shall be instituted within six months from the time at which the cause of action arose."

The District Judge held that the distraint was not an act professedly done under the law, but in defiance of it, inasmuch as no patta had, in fact, been tendered as required by law and he referred to *Srinivasa v. Emperumanar*(1) in support of his decision. He, therefore, held that the special limitation in section 78 of Act VIII of 1865 did not apply, but that the case was governed by article 49, schedule 2 of the Indian Limitation Act, and confirmed the decree of the District Munsif awarding the plaintiff Rs. 60 as the value of the property distrained.

(1) I.L.R., 2 Mad., 42.

The defendant appeals.

We are unable to agree with the District Judge that the appellant did not act professedly under the Rent Recovery Act, but in defiance of it. The case of *Srinivasa v. Emperumanar*(1) stands on a different footing from the present case. There the Sub-Collector, finding that the formalities required by the Act had not been observed, removed the attachment and directed the restoration of the property. The cause of action was the refusal to restore the property after such order. That could not, in any view, be regarded as a thing even professedly done under the Act. It was clearly a wrongful withholding of the property independently of any provisions of the Act. In the present case the distress professed to be made by the landlord under the provisions of the Act. The fact that no patta had previously been tendered, though it may affect the legality of the distress, does not alter its character as a thing done professedly under the Act. We, therefore, disagree with the ground on which the District Judge has based his decision. We, however, hold on other grounds that section 78 is inapplicable.

The special limitation provided in that section must be restricted to the classes of suits specified in the section, viz., to suits (1) to recover money paid and (2) to obtain damages in respect of anything professedly done under the Act. The present suit was for the recovery of specific movable property, and therefore does not fall within the category under section 78. We are satisfied that the suit was not brought in this form in order to evade the limitation provided by section 78. The suit was for a jewel and a brass pot, and there was no allegation on either side that the property had been sold prior to the suit. The mere fact that there was an alternative prayer for the value of the property does not alter the essential character of the suit as one for recovery of specific movable property.

As section 78 is inapplicable, the limitation is that prescribed by article 49, schedule 2 of the Indian Limitation Act, and the suit is not barred.

We, therefore, confirm the decrees of the Courts below and dismiss this second appeal with costs.

(1) I.L.R., 2 Mad., 42.

RAJA
GOUNDAN
v.
RANGAYA
GOUNDAN.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

1897.
April 7, 8.

RAMASAMI KOTTADIAR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

MURUGESA MUDALI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Insolvent—Vesting order—Subsequent attachment—Dismissal of insolvency petition—Creditors' trustees.

A judgment-debtor was declared an insolvent by the Court for the Relief of Insolvent Debtors, Madras, and a vesting order was made. Part of his property was subsequently attached in execution of a decree. Afterwards, his petition in insolvency was dismissed and the vesting order discharged. On the same date a creditor's trust deed was executed, of which the plaintiffs were the trustees. They now sued to set aside the proceedings in execution and to cancel the sale of the property which had been sold in execution after the date of the trust deed:

Held, that the suit was not maintainable.

SECOND APPEAL against the decree of T. Ramachandra Rau, Subordinate Judge of Trichinopoly, in Appeal Suit No. 165 of 1892, reversing the decree of T. M. Rangachariar, District Munsif of Trichinopoly, in Original Suit No. 377 of 1890.

The plaint set forth that certain immovable properties now in question belonged to Venkatesa Tawker; that he applied to the High Court, Madras, on 11th January 1888, to be declared insolvent, whereupon on the same day, the High Court passed an order vesting the properties in the Official Assignee; that, subsequently, Venkatesa Tawker entered into an arrangement with his creditors, by which the plaintiffs and one Rangachariar were appointed trustees for the purpose of clearing off all his debts; that, under the composition deed (which was executed on 17th December 1888), the properties in question passed from the Official Assignee to the trustees with the consent of the majority of the creditors; that first defendant, one of the creditors, in execution of his decree against Venkatesa Tawker, attached the properties now in question on the 23rd January and 7th February 1888; that plaintiffs applied to have the attachment cancelled, but their application was dismissed on 3rd July 1889; that the properties were then brought to sale with the result that first defendant bought

item 1, second defendant 2nd item, and third defendant 5th item. Plaintiffs therefore prayed that the proceedings in execution should be set aside and the sale cancelled.

The District Munsif dismissed the suit, but his decree was reversed on appeal by the Subordinate Judge, who decided in favour of the plaintiffs.

The defendants preferred this second appeal.

Krishnasami Ayyar for appellants.

Tiagaraja Ayyar for respondent No. 1.

JUDGMENT.—The plaintiffs as trustees, appointed by one Venkatesa Tawker for the payment of his debts, sued to set aside the attachment of Tawker's property made by one of his creditors, and also to set aside certain sales made under the attachment. Before the order of attachment was issued, Tawker had applied to the Commissioner of Insolvency, Madras, to be declared an insolvent, and a vesting order had been made. Subsequent to the issue of the attachment, the insolvency petition was dismissed, and the vesting order discharged. The order of attachment was not objected to, nor was it withdrawn before the vesting order was discharged. Some of the properties attached were afterwards sold in pursuance of the attachment and were purchased by the defendants. The rest of the property remained under attachment. The plaintiffs were appointed trustees by an instrument of the same date as the discharge of the vesting order. They contend that the attachment having been made during the continuance of the vesting order, the judgment-debtor had no interest on which the attachment could operate, and that it was, therefore, invalid as against them. We do not think that this argument is sound. The effect of the proviso to section 7 of the Insolvency Act (11 & 12 Vic., Cap. 21) was to re-vest Tawker's property in him as from the date of the vesting order, subject, however, to all acts done by the assignee, or under his authority, during the continuance of the vesting order.

We think, therefore, that the attachment may properly be held to be capable of operating on Tawker's property as from the date of its first issue; but, in any case, it must be held to have taken effect from the moment of the discharge of the vesting order. That being so, it took effect, in any view, before the plaintiffs acquired an interest under the trust deed. The decree of the Sub-Judge must, therefore, be set aside, and that of the

RAMASAMI
KOTTADIAR
v.
MURUGESA
MUDALI.

* Second Appeal No. 1723 of 1895.

RAMASAMI
KOTTADIAR
v.
MURUGESA
MUDALI.

District Munsif dismissing the suit restored. The plaintiffs must pay defendants' costs throughout. The suit having been disposed of on the grounds stated above, it is not necessary for us to decide the other question argued before us as to whether section 42 of the Specific Relief Act is a bar to the suit as framed.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

1897.
April 9, 18.

SANKARA SUBBAYYAR (DEFENDANT No. 2), APPELLANT,

v.

RAMASAMI AYYANGAR AND ANOTHER (PLAINTIFF AND
DEFENDANT No. 1), RESPONDENTS.*

*Inam attached to the hereditary office of nattamgar—Enfranchisement of inam lands
in favour of two persons—Suit by the holder of the office to recover land.*

Inam lands constituting the emolument of the office of nattamgar, was enfranchised in favour of the plaintiff and defendant separately. In November 1890 the defendant was informed that a patta for half of the lands would be issued in his name, and it was so issued in the following May. In April 1891 (after the resolution to enfranchise the land was come to) the plaintiff was appointed to be the sole nattamgar, and he now sued in 1894 for the cancellation of the enfranchisement patta issued to the defendant, and for the issue of a patta in his own name in respect of the lands comprised therein and for possession of the lands:

Held, that the plaintiff was not entitled to the relief sought.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in Appeal Suit No. 446 of 1895, reversing the decree of V. Kuppasami Ayyar, District Munsif of Tirumangalam, in Original Suit No. 56 of 1894.

The plaintiff sued to recover certain land which formed part of the emoluments attached to the hereditary office of nattamgar in the village of Thadayampatti held by him.

The office of nattamgar in the village of Thadayampatti was jointly held, from the time of the *faisal* until 1873, by two persons, members of different families, of which the plaintiff and the second defendant were the respective representatives, and the *manibam* lands were enjoyed in equal shares by the office holders. In 1873

the second defendant's brother was dismissed for misconduct and thenceforward until 1889, when the second defendant's right to a moiety of the office was recognised by the Revenue authorities, the duties were performed by the plaintiff's father and the plaintiff with exclusive possession of the emoluments. In February 1890, after litigation under Regulation VI of 1831, the second defendant was formally appointed second nattamgar by order of the Deputy Collector, dated 23rd January 1890, but in the revision of village establishments which was undertaken the same year, it was decided that one nattamgar for the village was enough. The second defendant was accordingly displaced and the plaintiff was appointed sole nattamgar by the Deputy Collector on the 18th August 1890. The Collector set the Deputy Collector's order aside and appointed the second defendant as sole nattamgar on the 3rd January 1891, but, on the plaintiff's appeal, the Board of Revenue reversed the Collector's order on the 27th April 1891, and restored that of the Deputy Collector by which the plaintiff had been appointed sole nattamgar. Meanwhile the Village Cess Act IV of 1864 had been introduced into the district, and in enfranchising Village Service Inams the Inam Commissioner issued an enfranchisement patta in favour of the second defendant for a moiety of the lands which had formed the Inam of the Thadayampatti Nattamgar's office. The date of this enfranchisement patta is the 4th May 1891, and in August 1893, the Collector of the district ordered the sub-division of the lands into moieties, whereupon the plaintiff instituted this suit against the second defendant as the holder of the enfranchisement patta for half the land and against the Secretary of State for India in Council as the first defendant. The reliefs which the plaintiff sought were the cancellation of the enfranchisement patta granted to the second defendant, a declaration of his own right to the lands included in that patta, the issue of the patta for those lands also in his own name, and an injunction restraining the defendants from sub-dividing the lands.

The District Munsif dismissed the suit.

On appeal the District Judge reversed the decision of the District Munsif and passed a decree as prayed against the Secretary of State and defendant No. 2.

Defendant No. 2 preferred this second appeal.

Pattabhirama Ayyar and *Mahadeva Ayyar* for appellant.

Sivasami Ayyar for respondent No. 1

SANKAR
SUBBAYY.
v.
RAMASAM
AYYANGA

* Second Appeal No. 547 of 1896.

SANKARA
SUBBAYYAR
v.
RAMASAMI
ATTANGAR.

JUDGMENT.—The land itself (not its assessment) [was the inam of the office, set apart by Government as its emolument. For a long time prior to 1873 there were two nattamgars, belonging to different families—those of the plaintiff and of the second defendant, respectively. Second defendant's brother was removed from the office in 1873. The plaintiff then discharged the whole duty of the office, being regarded as a mere temporary occupant in so far as concerned the duties and emoluments attaching to the second defendant's family. Subsequently the second defendant sued under Regulation 6 of 1831 and eventually established his right to the office vacant by his brother's removal and to its emoluments. In pursuance of this decision he was actually put in possession of the office and received a share of the emoluments. This was in the beginning of 1890. In the same year the Government resolved to enfranchise the lands attached to both the offices and to appoint a single person to do the duty of both offices and to pay him a money salary. Second defendant was at first selected for the office; but eventually the plaintiff was appointed. Contemporaneously with these proceedings, steps were taken to carry out the enfranchisement, and the second defendant was informed in November 1890 that patta for half of the lands would be issued in his name and it was so issued in May 1891. The appointment of the plaintiff as sole office-holder was in April 1891. The plaintiff's contention is that, as he alone was in office when the patta was issued in May 1891, he alone was entitled to receive the patta for all the lands. This view was accepted by the Lower Appellate Court, but we are unable to support it. The exact day on which the resolution to enfranchise the land was come to does not appear, but it certainly was before the plaintiff was appointed sole nattamgar. It is also clear that the enfranchisement was made on the footing that each nattamgar was entitled to a moiety of the land. In the circumstances, this was the only reasonable and proper course for Government to adopt, and we are unable to see on what grounds the plaintiff can validly dispute it.

We think that the enfranchisement of half of the land in second defendant's name was in accordance with the principle accepted in the Full Bench case (*Venkata v. Rama*(1)) referred to

(1) I.L.R., 8 Mad., 249.

by the District Judge, inasmuch as the right of the second defendant, established by the suit under Regulation 6 of 1831, was never subsequently set aside or even disowned by the revenue authorities. The appointment of the plaintiff as sole nattamgar in April 1891 was never intended to affect the right of the second defendant to the moiety of the lands. It was merely an act of policy on the part of the Government for the more convenient discharge of the duties of the office and could only affect the right of the second defendant from the date of such appointment. We do not think it would be reasonable, nor is there any authority for holding that the plaintiff's appointment in April 1891 should have effect retrospectively so as to divest the second defendant of the right which had vested in him by the prior order to enfranchise half the lands in his name. We must therefore reverse the decree of the District Judge and restore that of the District Munsif. First respondent must pay appellant's costs in this and in the Lower Appellate Court.

SANKARA
SUBBAYYAR
v.
RAMASAMI
ATTANGAR.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

MUTHAYYA.*

*Criminal Procedure Code—Act X of 1892, s. 83—Breach of Contract Act—
Act XIII of 1859—Warrant.*

Criminal Procedure Code, section 83, is applicable to warrants issued under Breach of Contract Act, 1859, and they can be executed outside the jurisdiction of the Court which issued them.

CASE referred for the orders of the High Court by K. C. Manavedan Raja, Acting District Magistrate of Anantapur, under Criminal Procedure Code, section 438.

The case was stated as follows:—

“In this case the District Magistrate of Coorg issued a warrant for the arrest of one Muthayiga, a resident of Nasanakota

1897.
July 22.

* Criminal Revision Case No. 74 of 1897.

QUEEN-
EMPRESS
v.
MUTHAYYA.

"village of Dharmavaram taluk in this district, on the ground
"that he had received an advance of money amounting to Rs. 30
"from a recruiter of labour named Homna Maistry under an
"agreement to work in the Habri Coffee Estate from 25th
"March 1896 to 25th March 1897 at the rate of wages usually
"paid or prevalent at that place, and had failed to carry out the
"terms of the contract. The warrant directed that he should
"be produced before the District Magistrate unless he can give
"bail himself in the sum of Rs. 30 with a surety in the sum of
"Rs. 60 to appear before him on 21st December 1896. The
"man applied to the Head Assistant Magistrate to be allowed
"time to produce bail and was remanded for a day pending its
"production and then released.

"It is doubtful whether the provisions of the Criminal Procedure Code, 1882, relating to warrants apply to warrants issued under Act XIII of 1859, and whether a warrant under the Act can be executed at all outside the jurisdiction of the Court which issues it. On the one hand the words of section 83 of the Code are unqualified and so far appear to apply to all warrants. On the other hand they may be restricted to warrants 'issued under the Code' by virtue of sections 75 and 93, which seem to apply to the whole chapter. It is to be noted that though a warrant may issue under section 1 of Act XIII of 1859, no 'offence' has been committed until the Magistrate has made an order and that order has been disobeyed; and it appears very hard that the special procedure provided by that Act which applies in certain cases penal provisions to the breach of a civil contract should be capable of being employed to drag labourers many hundred miles from their homes to answer a charge of such breach. I request, therefore, that it may be decided by an authoritative ruling whether the existing law permits of such procedure. I beg further to add that the warrant in the case under report purports to have been issued under section 75, Criminal Procedure Code."

The Public Prosecutor (Mr. Powell) for the Crown.

ORDER.—We are clearly of opinion that section 83 of the Criminal Procedure Code is applicable to warrants issued under the provisions of the Act XIII of 1859. There are no words in that section limiting the operation of it to warrants issued under the Code. The reference to warrants issued under the Code made

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in sections 75 and 93 cannot, we think, be taken to have the effect suggested. It cannot be supposed that, if when the Codes of 1861 and 1872 were in force, the sections in them corresponding to section 83 of the present Code were applicable to warrants issued under Act XIII of 1859, that state of the law was intended to be altered in the Code of 1882. To hold that none of the provisions of chapter VI of the Code apply to such warrants would lead to the conclusion that there is no provision made for the issuing or executing of them. It is not necessary to say whether, under the Act of 1859, breach of contract is constituted an offence. The language of the Act appears to us to indicate that such was the intention of Legislature, but at any rate the Act authorizes the Magistrates, on a complaint being made, to issue a warrant, and the only question is whether the provisions of the Criminal Procedure Code apply to that warrant. We think that the provision in question does apply.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

PARVATHI AMMAL (PLAINTIFF), APPELLANT,

v.

SUNDARA MUDALI (DEFENDANT), RESPONDENT.*

*Hindu Law—Partition of land between widow and mother of the last male owner—
Widow's right on death of mother.*

The widow and mother of a land-owner, who died without issue, divided his land between them in 1869. The mother sold her share of the land in 1870, and died in 1890. The widow now sued in 1893 to recover the property from the vendee:

Held, that the suit was not barred by limitation and the plaintiff was entitled to recover.

SECOND APPEAL against the decree of S. Russell, District Judge of Chingleput, in Appeal Suit No. 272 of 1894, reversing the decree of P. S. Gurumurthi Ayyar, District Munsif of Poonamallee, in Original Suit No. 426 of 1893.

* Second Appeal No. 689 of 1896.

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Suit to recover possession of land with mesne profits computed from December 1890. The last male owner of the land in question was the plaintiff's husband, who died without issue, leaving besides his widow, Agiammal his mother. On his death disputes arose between the plaintiff and Agiammal, which were compromised under an instrument filed as exhibit I in the suit, whereby the property now in question passed to Agiammal, from whom it passed by sale to the present defendant under a conveyance, dated 12th December 1870. The plaintiff's case was that the land in question was under exhibit I allotted to Agiammal for her maintenance, and that Agiammal having died in December 1890, the plaintiff was entitled to possession and to mesne profits as prayed.

The District Munsif passed a decree for the plaintiff, but his decree was reversed on appeal by the District Judge, who held that Agiammal took an absolute interest in the property, and that the property had been held adversely to the plaintiff for more than twelve years.

Plaintiff preferred this second appeal.

Krishnasami Chetty for appellant.

Pattabhirama Aiyar for respondent.

JUDGMENT.—The parties to exhibit I are Hindus related to each other as mother-in-law (under whom defendant claims) and daughter-in-law (plaintiff). By this instrument they arranged for their respective enjoyment of the property left by the late husband of the plaintiff. They divided the property between them. The mother-in-law alienated a portion of the property assigned to her enjoyment. She has since then died, and the plaintiff now sues to recover the property from the alienee. The question is whether, under exhibit I, the deceased took a life estate only, or a larger interest. The District Judge has held that she took an absolute estate, the intention being to transfer the property absolutely in lieu of all future claims for maintenance. We cannot accept this construction. There are no express words to indicate such intention. The words referring to enjoyment do not indicate anything more than an enjoyment for life. The respondent relies on the provision in the document that neither party shall sell her share of the house and backyard except to the other party. No doubt this provision implies that the parties contemplated the possible alienation of the other properties, but there is nothing to suggest that the alienation contemplated was more

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than that of the life interest of the alienor. Such alienation would have been perfectly legal, whether they had agreed to it or not, and the provision relating to the house and backyard was nothing more than a mutual limitation of that power made by each in favour of the other in respect of that portion of the property, the transfer of which to a stranger during the life time of the other would have been specially inconvenient. The general tenor of the arrangement under exhibit I does not suggest that the parties contemplated any alienation by each party to enure beyond the life of the alienor, and it is difficult to see what object they could have had in providing that the survivor should be bound by the alienations of the other after the death of the latter.

In the absence of express terms or clear indications to the contrary the presumption is that the parties, being Hindu females, did not intend to create in each other an absolute estate. Their intention was to create a life estate only. As to the question of limitation, the mother-in-law, who had only a life estate having died in 1890, the plaintiff's suit for possession is clearly not barred by limitation.

We must, therefore, reverse the decree of the Lower Appellate Court and restore that of the District Munsif with costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

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

BARBER MARAN AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
APPELLANTS,

v.

RAMANA GOUNDAN AND ANOTHER (PLAINTIFF AND
DEFENDANT NO. 3), RESPONDENTS.*

*Contract Act—Act IX of 1872, ss. 38, 42, 43, 45—Joint promisee—Discharge
by one of two joint mortgagees.*

The sum due upon a mortgage was paid to one of the two mortgagees, and he gave an acquittance without the knowledge of the other mortgagee who now

1897.
July 29.
August 10.

* Second Appeal No. 1010 of 1896.

BARBER
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brought this suit upon the mortgage. It appeared that there was no fraud on the part of the mortgagors and that the mortgagee who received payment was not the agent of the plaintiff in that behalf:

Held, that the mortgage had been discharged and the plaintiff was not entitled to sue.

SECOND APPEAL against the decree of M. B. Sundara Ran, Subordinate Judge of Coimbatore, in Appeal Suit No. 95 of 1895, reversing the decree of S. Krishnasami Ayyar, District Munsif of Erode, in Original Suit No. 431 of 1894.

Suit to recover principal and interest due on a mortgage, dated 13th May 1891, and executed by defendants Nos. 1 and 2 in favour of the plaintiff and defendant No. 3. The mortgagors pleaded that the mortgage had been discharged, and it appeared that three years before this suit they had paid to defendant No. 3 the sum then due upon the mortgage and received from him a receipt; but the plaintiff was not present at the time and had not received the money, and defendant No. 3 was not his agent for the purpose of receiving it. The District Munsif dismissed the suit, but his decree was reversed on appeal by the Subordinate Judge who passed a decree for the plaintiff.

The mortgagors preferred this second appeal.

Mahadeva Ayyar for appellants.

Kasturi Rangayyanagar for respondent No. 1.

JUDGMENT.—The question raised by this appeal is whether a payment made to one of two persons jointly entitled under a mortgage bond can be pleaded as a valid discharge of the debt in an action brought by the other person interested in the bond. It is found that the party who received payment was not the agent in that behalf of the plaintiff. On the other hand it is not suggested that there was any fraud on the part of the defendants who made the payment. The appellants' wakil in support of his contention that the payment to one joint creditor was a valid discharge of the debt as against the other referred to in section 38 of the Contract Act and to the English case of *Wallace v. Kelsall*(1). "An offer to one of several joint promisees has the same legal consequences as an offer to all of them." That is the language of the last paragraph of the section. In the first part of the section it is provided that, where an offer of performance has been

(1) 7 M. & W., 261.

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made and not accepted, the promisor is not responsible for non-performance. It follows that, when a legal tender has been made to one of two joint promisees and refused by him, the promisor is discharged from liability in respect of his promise. It would be difficult to reconcile with this proposition the view adopted by the Subordinate Judge, viz., that the defendants were not discharged by the payment made to the party jointly entitled with the plaintiff. But it is argued on the first respondent's behalf that section 45 of the Act, by declaring the right of the several joint promisees to performance, makes it incumbent on the debtor to satisfy them all before obtaining a complete discharge. It is also suggested that the fact of the creditor being a mortgagee makes a material difference. With regard to section 45, we cannot see that the declaration that the several joint promisees are entitled to performance is otherwise than consistent with English Law or that, unless it be construed as converting the joint rights under a contract into several rights, it conflicts with the last paragraph of section 38. To put that construction on the section would amount to saying that, where a contract is made in favour of more than one person, they must be taken to be severally entitled under it, for they cannot be jointly and severally entitled (*Keightley v. Watson*(1), Bullen and Leake's Precedents, 3rd edition, page 471). There is no reason whatever to suppose that this was intended by the Legislature. A somewhat similar contention was raised in *Hemendro Coomar Mullick v. Rajendrolall Moonshee*(2) with reference to section 43 of the Act as affecting the obligation of persons liable for a debt. The point there decided on the authority of *King v. Hoare*(3) was that a decree against one joint debtor was a bar to an action afterwards brought against the others. The Court refused to accede to the contention that, since the passing of the Contract Act, the rule in *King v. Hoare*(3) had become inapplicable, because the effect of section 43 was to enable a promisee to sue one or two of his joint promisors severally in two or more suits. Taking together sections 42, 43 and 45, we find that the Legislature has declared against the common law rule of survivorship as well in the case of joint creditors as in that of joint debtors. Further in section 44, the Act has abolished the rule of English Law according to which the release of one joint

(1) 3 Ex., 723.

(2) I.L.R., 3 Cal., 353.

(3) 13 M. & W., 494.

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P.
IANA
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debtor operates to release his co-debtors. For the proposition that the Legislature intended to go beyond this and refuse recognition altogether to rights or liabilities *in solidum*, we do not think that there is any foundation. We think that effect must be given to the plain language used in section 38 and that the question above stated must be answered in the affirmative. So construed the section is consistent with section 165 which lays down the rule that a bailee who has taken goods from several joint owners may deliver them back to one without the consent of all. It is also consistent with the common law case of *Wallace v. Kelsall*(1) and does not as far as we can ascertain conflict with any other case except one which might have been cited in support of the respondents and which we think it well to mention, lest it should be supposed that it has been overlooked. We refer to *Steeds v. Steeds*(2), the material facts of which are similar to those in *Wallace v. Kelsall*(1). In both the cases one of the joint creditors who joined in the action had been satisfied by payment or otherwise. In *Wallace v. Kelsall*(1) the plea was held good on demurrer. In *Steeds v. Steeds*(2) the statement of defence was held to be good only as regards the plaintiff who had been satisfied and his share of the debt. The cases cited in the judgment in *Steeds v. Steeds*(2) do not, in our opinion, altogether support the conclusion arrived at. They go to show that, in equity, persons lending money to a third person are deemed to be tenants in common, and not joint tenants as well of the debt as of any security held for it. Some of the cases refer to the presumption in favour of tenancy in common as against the rule of survivorship; while *Watson v. Dennis*(3) which is also cited, is to the effect that a purchaser of property comprised in a mortgage would not be compelled to accept the title when it appears that the receipt for the money paid to discharge the mortgage was signed by one only of the mortgagees. Lord Justice Knight Bruce in holding that the estate was not fully discharged by such a receipt carefully avoids expressing an opinion as to the question which might arise in an action for the mortgage money. In the present case it may be that a purchaser of the mortgaged property might rightly have refused to complete on the ground that the plaintiff, one of the mortgagees, was not ready to give a receipt or acknowledgment for

(1) 7 M. & W., 264. (2) L.R., 22 Q.B.D., 540. (3) 4 DeG. J. & S. B., 345.

the mortgage money. But, when the question arises in an action to recover the debt, we cannot see that it makes any difference that the debt was secured by a mortgage. If the debt has been satisfied by payment, the rights under the mortgage instrument are extinguished and the action must fail. The law entitles a mortgagor to a registered receipt for his mortgage money, but does not exclude other evidence of payment or make the giving of the receipt a condition precedent to the discharge of the property. In our opinion the mortgage amount was discharged by payment made to the plaintiff's co-mortgagee and therefore the suit should have been dismissed.

The decree of the Lower Appellate Court is set aside and that of the District Munsif restored with costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

RAMASAMIA PILLAI (PLAINTIFF), APPELLANT,

v.

ADINARAYANA PILLAI AND OTHERS (DEFENDANTS NOS. 1 TO 3),
RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, s. 53—Transfer in fraud of creditors—
Good faith.*

When it is said that a deed is not executed in good faith what is meant is that it was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself.

SECOND APPEAL against the decree of H. T. Ross, District Judge of Tinnevely, in Appeal Suit No. 382 of 1894, reversing the decree of T. Sadasiva Ayyar, District Munsif of Srivaikuntam, in Original Suit No. 660 of 1893.

Suit to recover principal and interest due on the mortgage, dated 6th December 1886, and executed by defendant No. 1 in favour of the plaintiff. The land comprised in the mortgage had been attached and brought to sale in execution of a decree against the mortgagor and purchased at the court-sale in January 1890 by

* Second Appeal No. 1277 of 1896.

BARBER
MARAN
v.
RAMANA
GOUNDAN.

1897.
August 23.

RAMASAMIA
PILLAI
v.
ADINARA-
YANA
PILLAI.

defendant No. 2. Defendant No. 3 was under contract to purchase the property from defendant No. 2. Defendant No. 1 did not defend the suit. The other defendants pleaded that the mortgage was executed for no consideration in order to defeat and defraud the claim of defendant No. 3, the creditor of the mortgagor.

The District Munsif passed a decree for the plaintiff. On appeal the District Judge held that the mortgage was supported by consideration, but after a review of the facts disclosed by the evidence he said :—

“The effect of all these circumstances taken together is to point strongly to these two persons, the plaintiff and the first defendant having acted in concert with intent to defeat the third defendant by means of this document exhibit A.

“I find, therefore, that this transaction, though it cannot be said to be without consideration, poor as its consideration was in the circumstances, was certainly not entered into by the plaintiff in good faith, and that it was a transaction made with intent to defeat the creditors of the first defendant. To obtain the protection of the last clause of section 53 of the Transfer of Property Act, the plaintiff would have to be transferred both in good faith and for consideration. These two conditions are however not fulfilled in the present case.”

In the result the District Judge reversed the decree of the District Munsif and dismissed the suit.

Plaintiff appealed.

Ramachandra Rau Sahab and *Ramakrishna Ayyar* for appellant.
Pattabhirama Ayyar and *Sivasami Ayyar* for respondents.

JUDGMENT.—On the facts found by the District Judge we do not think he was justified in his conclusion that the transaction was in fraud of creditors.

The Judge finds there was good consideration for the mortgage, but considers that the want of good faith brought the case within the purview of section 53 of the Transfer of Property Act. The reference to good faith occurs only in the proviso to the section.

It has first to be seen whether there was intent to defraud creditors within the meaning of the former part of the section. When it is said that a deed is not executed in good faith what is meant is that it was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the

benefit to himself (*ex-parte Games*(1)). There is nothing to show that there was want of good faith in that sense in the present case. Section 53 cannot be understood and correctly applied without reference to the English cases on which the section is really founded.

We must reverse the decree of the District Judge and restore that of the District Munsif.

Respondents must pay costs in both Appellate Courts.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

SESHAMMA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

CHENNAPPA (DEFENDANT), RESPONDENT.*

Construction of will—Appointment of executors by implication—Civil Procedure Code, ss. 27, 53—Amendment of plaint by bringing on a new plaintiff on second appeal.

Plaintiffs sued in 1894 to recover property belonging to the estate of a testator, claiming to be his executors under a will. The property was alleged to have been entrusted by the testator in 1893 to the defendant. The will contained no express appointment of executors, but it provided that the plaintiffs should take care of the estate during the minority of a son who was to be adopted to the testator, and imposed upon them the duty of providing for the maintenance of persons therein named :

Held, (1) that the plaintiffs were not appointed executors by implication ;

(2) that, under the circumstances of the case, the plaint should be amended on second appeal in 1897, by substituting the adopted son as plaintiff, with one of the present plaintiffs as his next friend.

SECOND APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in Appeal Suit No. 986 of 1895, affirming the decree of T. Sami Ayyar, District Munsif of Chittoor, in Original Suit No. 421 of 1894.

The plaintiffs sued as the executors of the will of one Ramappanayanivaru to recover from his brother certain jewels alleged to have been entrusted to him by the testator on 5th November 1893. The will set up was as follows :—

“Will, dated 29th October 1893, executed by Ramappanayuni
“Garu, &c.

(1) L.R., 12 Ch. D., 314.

* Second Appeal No. 385 of 1897.

RAMASAMIA
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v.
ADINARA-
YANA
PILLAI.

1897.
September
10.

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v.
CHENNAPPA.

"1. As we have no children by the two wives, whom we have married according to the customs and ways of our caste, as we have been falling sick now and then by reason of our old age and have been ill at present, the two wives we have married according to the customs and ways of our caste, Subbambi and Laxmambi should both continue to live in the very same palace at Pullur where we have been living and should enjoy after our death, all the movable and immovable properties with all the rights and privileges we possessed in respect thereto, which have been under our possession and enjoyment in virtue of the partition deed executed between us and our brother Chennappanayanivaru.

"2. As Subbambi, the senior of our two wives, has female issue, you, the junior wife, Laxmambi, should act in accordance with her will, and in case you do not beget male issue during my lifetime, should adopt some boy among my relatives whom Subbambi likes, and after him should adopt another boy and do so any number of times and thus should protect (perpetuate) our family.

"3. Our son-in-law M.R.Ry. Bangaru Seshamanayanivaru, Sriman Mahanayakacharylu, the Zamindar of Bangarupallam, and my father-in-law M.R.Ry. Irri Vengatapa Nayanivaru, Inamdar of Mopi Reddipalle, should take care of the aforesaid properties until the said adopted boy attains majority and becomes capable of managing the same. [These persons were the present plaintiffs.]

"4. Laxmi who has been under our protection for a long time with her three children—two sons—Sarangapani and Kumara Ramudu and one daughter, Janaki, and the children that she may in future beget through me should live with my wives at the place where they live in the palace at Pullur.

"7. The persons who are taking care of the said properties and the adopted son after he takes possession of the same should pay to Laxmi's present male and female children and those whom she might beget through me in future some adequate amount out of the said property required for all their expenses.

"8. The persons who take care of the said properties should pay out of the same for all expenses of our legal wife's daughter, adopted boy, our wives and for our family."

The District Munsif held that the will was not genuine and dismissed the suit.

On appeal, the District Judge affirmed the decision of the District Munsif on the ground (not taken by the defendant) that the plaintiffs had no right to maintain the suit even if the will was genuine.

The plaintiffs preferred this second appeal.

Sundara Ayyar for appellants.

Srirungachariar for respondent.

JUDGMENT.—We are not satisfied that this is a case in which the plaintiffs would be entitled to probate as executors by implication. The duties which the plaintiffs are directed to perform are not specifically the duties of an executor. It is not the administration of the estate which they are told to carry out. But rather it is as guardians of the child whose adoption is contemplated that they are intended to act. We think, it is quite clear, that there was no intention to vest any property in them. They were only directed to protect the property during the minority. For these reasons, we think that the suit is wrongly brought in the name of the plaintiffs as executors. But as the objection was not taken in the Court of First Instance, and was apparently taken by the Judge himself, we think the suit ought not to have been dismissed without giving the plaintiffs an opportunity to amend. We shall now allow the amendment which, we think, the Judge ought to have allowed and which, if it had been allowed, would have saved the suit from any danger of limitation. The amendment will take the form of substituting the minor son as plaintiff with one of the present plaintiffs as next friends.

The decree of the Judge must be reversed and the appeal remanded for disposal on the merits. Costs will be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

BOYAMMA (PLAINTIFF), APPELLANT,

v.

BALAJEE RAU (DEFENDANT No. 9), RESPONDENT.*

Limitation Act—Act XV of 1877, s. 4—Gazetted holiday—Computation of time.

In calculating the time allowed by law for the presentation of an appeal to a

* Appeal against Appellate Order No. 8 of 1897.

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District Court, an appellant is entitled to deduct the last day being a gazetted holiday, although the District Judge held his Court on that day.

APPEAL against the order of E. J. Sewell, Acting District Judge of North Arcot, in Miscellaneous Appeal No. 11 of 1895, dismissing, as being barred by limitation, an appeal preferred against the order of T. Sami Ayyar, District Munsif of Chittoor, on execution petition No. 129 of 1895.

Ponnusami Ayyangar and Subramania Ayyar for appellant.

Respondent was not represented.

JUDGMENT.—We do not think that the fact that the District Judge held Court on a gazetted holiday is sufficient to disentitle the appellant to regard the day as *dies non* in calculating the time allowed by law for presenting an appeal.

We, therefore, set aside the order of the District Judge refusing to admit the appeal and direct him to now admit it and dispose of it according to law.

Costs will abide and follow the result.

APPELLATE CRIMINAL—FULL BENCH.

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

IN CRIMINAL REVISION CASE No. 472 of 1896.

GANTAPALLI APPALAMMA

v.

GANTAPALLI YELLAYYA.*

IN CRIMINAL REVISION CASE No. 505 of 1896.

PERIANAYAGAM

v.

KRISHNA CHETTI.*

Criminal Procedure Code—Act X of 1882, s. 488—Maintenance—Adultery.

Adultery on the part of the husband, not being such adultery as would be punishable under Indian Penal Code, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under Criminal Procedure Code, section 488.

* Criminal Revision Cases Nos. 472 and 505 of 1896.

CASES referred for the orders of the High Court under Criminal Procedure Code, section 438, by the Acting Sessions Judges of Godavari and Tanjore, respectively.

In each of these cases the Magistrate had ordered a husband, under Criminal Procedure Code, section 488, to make a monthly allowance for the maintenance of his wife who alleged that he was living in adultery. In the one case the adultery was alleged to have been committed with a widow, and in the other case with a concubine who had lived with the husband for many years. The Sessions Judges reported the cases on the ground that the adultery alleged was not within the definition of the offence of adultery in the Indian Penal Code and referred to Criminal Procedure Code, section 4.

These cases came on for orders before SHEPHARD and BENSON, JJ., who the Court made the following order of reference to Full Bench.

ORDER OF REFERENCE TO FULL BENCH.—As the question involved in these two cases is one of some importance and we do not agree with the decision reported as *Queen-Empress v. Mamatha Achari*(1), we resolve to refer for the decision of the Full Bench the following question, viz. :—

Whether adultery on the part of the husband, not being such adultery as would justify a conviction under the Indian Penal Code, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under the provisions of the Criminal Procedure Code?

These cases coming on for hearing on the above reference before the Full Bench constituted as above.

The parties were not represented.

COLLINS, C. J.—I think it would be wrong to limit the meaning of the word 'adultery' in section 488, Criminal Procedure Code, to the very limited definition of the word in section 497 of the Penal Code. Adultery is a crime under that section that can only be committed by a man having sexual intercourse with the wife of another without the consent or connivance of the husband of that wife.

Section 488 of the Criminal Procedure Code provides for the maintenance of the wife and enacts that a Magistrate may make an

(1) I.L.B., 17 Mad., 260.

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YELLAYYA.

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23.
1897.
February 23.
July 20.
October 14.

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order for maintenance in favour of the wife, even though the husband offers to maintain his wife on condition of her living with him if the Magistrate is satisfied that the husband is living in adultery. The term adultery is used in that section in the ordinary sense, that is a married man having sexual connection with a woman who is not his wife. It appears to me that this construction is not affected by the last words of section 4 of the Criminal Procedure Code, but is consistent with it. It is clear that a different intention appears from the subject or context—see the first part of section 4.

A difficulty must always arise in deciding in what cases the adultery of the husband is sufficient cause for the wife to claim maintenance. Amongst the Hindu community concubinage is recognised, and it is possible for concubines to have a certain status. If, therefore, a husband keeps a concubine in a house apart from his wife, it is doubtful, whether such an act alone would entitle the wife to separate maintenance, but if he kept such concubine in the same house as his wife lived in and against the wishes, or in such a manner as to offend the self-respect of his wife, in my opinion that would entitle the wife to separate maintenance under section 488, Criminal Procedure Code.

I answer the question referred to the Full Bench in the affirmative.

SHEPARD, J.—I have nothing to add to the observations already made by me about the applicability of the Penal Code definition of 'adultery.*' The solution of the question what conduct

* "I do not think we are compelled to put such an unreasonable interpretation on the language of the Legislature as the Sessions Judge suggests. "Adultery, according to the Penal Code, is an act capable of being done by a man only. It is an offence committed by a third person against a husband in respect of his wife. In the Criminal Procedure Code the term adultery is used in the larger and ordinary sense. Either the husband or the wife may be guilty of it. It is with the breach by either party of the marriage obligation, not with offence of a third party, that section 488, Criminal Procedure Code, is concerned. If the Sessions Judge's view were correct, it would follow that the husband could not properly be charged with adultery in a maintenance case, unless all the conditions of section 497 of the Penal Code, including absence of consent or connivance on the part of the other husband, could be established. This is to my mind absurd. Comparing section 497 of the Penal Code and section 488 of the Criminal Procedure Code, I think we are entitled to say that, while in the former adultery of one species only is dealt with, in the latter adultery in the sense of a breach by either party of the matrimonial tie was intended. I would therefore decline to interfere."

on the part of the husband amounts to 'living in adultery' within the meaning of the Criminal Procedure Code is however not much advanced by the conclusion that the Penal Code definition cannot be applied. The words point to a continuous course of conduct, not to isolated acts of immorality. But conduct of this sort which according to Western notions would be condemned as a breach of the marital obligation is not so condemned either by Hindus or by Muhammadans. No doubt the right of maintenance enforceable under the Procedure Code is a right which exists independently of the personal law of the parties. The provision is analogous to that made by the English Poor Law, under which children who have no common law right to maintenance at their fathers' hands, may claim it from them before a Magistrate (see *Bazeley v. Forder*(1)).

The circumstance, however, that the right rests on statute and not personal law, does not, I think, preclude a consideration of the usages of the particular community for the purpose of determining the meaning of the term 'adultery.' I cannot conceive that it was intended to apply the term to conduct considered by the community to which the parties belong as innocent from a matrimonial point of view. Subject to these observations on the general question I am of opinion that the question referred must be answered in the affirmative.

SUBRAMANIA AYYAR, J.—Adultery, according to the Penal Code, is an act of which a man alone can be guilty. It is an offence committed by a third person against a husband in respect of his wife. If, as was held in *Queen-Empress v. Mannatha Achari*(2), this limited meaning be adopted in construing the term adultery in section 488 of the Criminal Procedure Code, it would follow that the husband could not properly be charged with adultery in a maintenance case unless all the conditions of section 497, Indian Penal Code, are complied with. Such, however, could not possibly have been the intention of the legislature. For, what difference does it make to the wife, whom the husband has neglected or refused to maintain, whether the woman with whom he is living in adultery is a married woman or not and, if the woman be married, whether the woman's husband connives at the adultery or not? So far as the wife is concerned her grievance is all the same. Therefore while in section 497, Indian Penal Code, adultery of

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(1) L.R., 3 Q.B., 559.

(2) I.L.R., 17 Mad., 260.

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one specific description only is dealt with, it is clear that in section 488 of the Criminal Procedure Code adultery is used in the wider and ordinary sense of voluntary sexual connection between either of the parties to the marriage and some one, married or single, of the opposite sex other than the offender's own spouse. This construction is not inconsistent with any part of the interpretation clause, section 4 of the Criminal Procedure Code, referred to in *Queen-Empress v. Mannatha Achari*(1). For though the concluding paragraph of that section says that all words and expressions used in the Criminal Procedure Code and defined in the Indian Penal Code, but not defined in the previous part of the section 4 should be deemed to have the meanings respectively attributed to them by the Penal Code, yet this provision must, in reason, be held to be governed by the qualification laid down in the opening sentence of the section, viz.: "Unless a different intention appears from the subject or context." Now looking to the context, a different intention cannot but be inferred, considering that the offence of adultery under section 497 of the Indian Penal Code, as already observed, is one against the husband, whereas under section 488 of the Criminal Procedure Code, the term includes cases where the wrong done is to the wife. And notwithstanding that the concluding paragraph of section 4 is separated by a full stop from that part of the section which contains the qualifying words "Unless, &c., &c.," it is difficult to believe that the framers of the section intended that that paragraph was not to be taken subject to the qualification specified in the beginning of the section. To the extent stated above, therefore, the conclusion arrived at in *Queen-Empress v. Mannatha Achari*(1) cannot be supported. But it should not be understood that the ruling in Criminal Revision Case No. 547 of 1884* referred to and relied on by Muttusami Ayyar, J., in that case is dissented from. In determining, in cases like the present, whether the cause shown by the wife for refusing to live with her husband is good and reasonable, it is but just that the Magistrate should take into consideration

(1) I.L.R., 17 Mad., 260.

* TURNER, C.J.—"It has been held that concubinage is so far recognized by persons who are by religion Hindus, that the circumstance that the husband keeps a concubine in the house will not entitle a wife to an allowance for maintenance if her husband is willing to receive her and treat her with the consideration which is due to her position. The order of the Magistrate must be set aside and he is directed to pass fresh orders."

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the social habits of the particular community to which the parties belong. If that community (as is the case with Hindus) does not completely disapprove of concubinage and tolerates it so far as to give kept women some status and rights (*Yaswant Rao v. Kashibai*(1)), the fact that the husband keeps a concubine ought not by itself entitle the wife to claim separate maintenance. The question in each case will be whether the conduct of the husband is such as the wife consistently with self-respect and due regard to her position as wife, can live in the house of the husband. If this is possible and the husband is willing to receive her, the Magistrate may refuse to order separate maintenance. I concur therefore in answering the question in the affirmative.

BENSON, J.—I have no doubt but that the question proposed must be answered in the affirmative. The concluding words, no doubt, of section 4 of the Criminal Procedure Code enact that any word used but not defined in that Code shall be deemed to have the meaning attributed to it in the Indian Penal Code, but this provision is subject to the opening words of section 4, which say "unless a different intention appears from the subject and context." This limitation seems to have been overlooked by the learned Judges who decided the case of *Queen-Empress v. Mannatha Achari*(2).

In the present case "the subject and context" show that "adultery" in section 488, Criminal Procedure Code, has a much wider significance than adultery as defined in section 497, Indian Penal Code. In the Indian Penal Code it is an offence committed by a man against another man in respect of the wife of the latter. It is an offence which cannot be committed by a woman; but the Criminal Procedure Code expressly contemplates adultery by a woman. For this reason, if for no other, it is impossible to say that 'adultery' in section 488, Criminal Procedure Code, has the limited meaning attributed to it in section 497, Indian Penal Code.

Again 'adultery' under the Indian Penal Code is not committed by a man who has sexual intercourse with an unmarried woman, or with a widow, or even with a married woman whose husband consents to it, but such considerations cannot, in reason, be held to make any difference in the 'adultery' contemplated by the

(1) I.L.R., 12 Bom., 26.

(2) I.L.R., 17 Mad., 260.

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Criminal Procedure Code. The 'adultery' there contemplated is, I think, adultery in the popular sense of the term, viz.:—a breach of the matrimonial tie by either party.

I would not, however, be understood to imply that a Magistrate ought, as a matter of course, to decree maintenance for a wife who refuses to live with her husband, solely because he has been guilty of an isolated act or acts of adultery or even because he keeps a concubine. The words "living in adultery" imply a course of action more or less continuous. Moreover, a discretion is vested in the Magistrate. He 'may,' not he 'shall,' make an order, &c. He has, then, a discretion to consider and be guided by the social ideas and feelings of the community to which the parties belong. Concubinage is, within certain limits, recognized both by Hindu and Muhammadan Law, and is not in all circumstances reprobated by the public opinion of those communities. It follows that the keeping of a concubine is not necessarily and in all circumstances, to be regarded by the Magistrate as a sufficient reason for a woman refusing to live with her husband, though it is equally clear that a Magistrate may in certain circumstances regard it as a sufficient reason, and award separate maintenance to the wife. The Magistrate must be guided by all the facts and circumstances of each case and with due regard to the social ideas and customs of the community to which the parties belong. With these remarks, I would answer the reference in the affirmative.

APPELLATE CIVIL.

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

KUMARA AKKAPPA NAYANIM BAHADUR (DEFENDANT),
APPELLANT,

v.

SITHALA NAIDU (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, ss. 6, 12—Rent Recovery Act—Act VIII of 1865 (Madras), ss. 18, 69—Deduction of time occupied in obtaining copy of judgment appealed against.

A tenant whose property had been distrained for arrears of rent sued under Rent Recovery Act, s. 18, by way of appeal against the distraint. The Revenue

* Second Appeal No. 1104 of 1896.

Court decided in his favour. The landlord preferred an appeal under section 69 more than 30 days after the date when the decision was pronounced. He claimed that the time occupied in procuring a copy of the judgment appealed against should be deducted in the computation of the 30 days' period of limitation:

Held, that the appellant was not entitled to have the deduction made, and that the appeal was barred by limitation.

SECOND APPEAL against the decree of E. J. Sewell, Acting District Judge of North Arcot, in Appeal Suit No. 320 of 1895, affirming the decree of R. F. Grimley, Head Assistant Collector of North Arcot, in Summary Suit No. 672 of 1894.

The plaintiff was a tenant of the Raja of Kalahasti, who had distrained movable property of the plaintiff for arrears of rent due by him. This was a summary suit brought by him before the Head Assistant Collector by way of appeal against the distraint. On the 10th April 1895 the Head Assistant Collector pronounced judgment in favour of the plaintiff. The defendant appealed to the District Judge under section 69 of the Act, the appeal being filed on the 14th May. In bar of the 30 days' rule of limitation the appellant claimed that the time occupied in obtaining a copy of the judgment appealed against should be deducted. The District Judge held that the appellant was not entitled to have this deduction made and dismissed the suit as being barred by limitation.

Defendant preferred the second appeal.

Mr. *Stephen Andy* and *Sundara Ayyar* for appellant.

Mahadeva Ayyar for respondent.

COLLINS, C.J.—The appeal to the Lower Appellate Court was filed under section 69 of Act VIII of 1865, and it was objected that the appeal was out of time, having been presented more than 30 days after the date of the Collector's judgment. It was contended by the appellant that the time taken in obtaining copies of the judgment must be deducted and if that was done the appeal would be within time. The question to be decided is—does section 12 of the Limitation Act apply to an appeal filed under section 69 of Act VIII of 1865, the Rent Recovery Act. Section 69 enacts that a regular appeal shall lie to the Zillah Judge from all judgments passed by a Collector under this Act, provided that the appeal be presented within 30 days from the date of the Collector's judgment. It may be here noticed that the section does not require the appellant when filing the appeal to file therewith a copy of the decree or judgment appealed against.

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Section 12 of the Limitation Act is to the effect that, in computing the period of limitation prescribed for an appeal, the time requisite for obtaining a copy of the decree and judgment shall be excluded. This provision can only be held to apply, where it is necessary to file with such appeal a copy of the decree or judgment. It appears to me, however, that the point has been decided. *Syed Mohidin Hussen Saheb in re*(1), *Krishnasami Muppanor v. Sankara Row Peshair*(2) and *Sri Raja Gopala Krishna v. Ramireddi*(3) are authorities in favour of the argument that section 12 of the Limitation Act does not control the time fixed for appealing by section 69 of Act VIII of 1865. See also *Veeramma v. Abbiah*(4).

Another argument might also be used that the Rent Recovery Act is an Act complete in itself and therefore section 12 of the Limitation Act does not apply (*Nagendro Nath Mullick v. Mathura Mohun Parhi*(5) and *Veeramma v. Abbiah*(4)). This appeal must be dismissed with costs.

SHEPARD, J.—The question to be decided is whether the provisions of section 12 of the Limitation Act are applicable to an appeal filed under the provisions of section 69 of Act VIII of 1865. The suit, in this case, was a summary suit filed, under section 18 of the latter Act, by the tenant who sought to have certain property released from distraint. The District Judge held that the appeal petition having been presented more than 30 days after the date of the judgment, could not be entertained, because under section 69 of the same Act any appeal from the judgment passed by the Collector, under the Act, must be presented within 30 days from the date of the Collector's judgment. As far as the decisions in this Court are concerned, there can be no doubt that the District Judge is right. In two cases the question now raised was decided with reference to the Limitation Act of 1871 (*Syed Mohidin Hussen Saheb in re*(1), *Krishnasami Muppanor v. Sankara Row Peshair*(2)). In the latter of these cases it was decided that an appellant proceeding under the Rent Act was not entitled to any enlargement of the period of 30 days laid down by section 69. These cases have been followed in a recent case *Sri Raja Gopala Krishna v. Ramireddi*(3). It is now contended that

(1) 8 M.H.C.R., 44.

(2) The Madras Law Reporter, 271.

(3) S.A. No. 1250 of 1895, unreported.

(4) I.L.R., 18 Mad., 98.

(5) I.L.R., 18 Calc., 368.

the law laid down in the earlier cases has since the passing of the Limitation Act of 1877, ceased to be in force and reference is particularly made to the alteration of the language of section 6 of the present Act as compared with the section 6 of the Act of 1871. In *Syed Mohidin Hussen Saheb in re*(1) it is pointed out that there is no provision in the Rent Act similar to that in the Civil Procedure Code requiring the appellant to produce, with the petition of appeal, a copy of the decree appealed against. This being so, I think, it follows that section 12 of the Limitation Act can have no application. This was the view taken in the Full Bench case in Allahabad, *Fusal Mahammad v. Phul Kuar*(2), where an appeal under clause 10 of the Letters Patent was in question.

Another ground on which the judgment of the District Judge may be supported is that Act VIII of 1865 is an enactment dealing with a special subject and intended, so far as the provisions of the Act go, to be a complete body of law. The Act is entitled an Act to consolidate and improve the laws which define the process to be taken for the recovery of rent. Under it, suits may be brought by either landlord or tenant to decide disputes regarding arrears of rent and other questions arising between them; for such summary suits, section 51 provides that they must be brought within 30 days from the date of the cause of action. Section 40 provides for the case of a summary suit by a tenant against whom the landlord has threatened sale for arrears of rent. Such suit is to be brought within one month from the date of service of notice on the defaulter. Section 69 already cited contains a general provision for the case of an appeal to the Zillah Judge from the judgment passed by the Collector under the Act. Section 78 provides for the case of an action to recover money paid or damages with respect to anything done under the authority of the Act and requires that any such action in the Civil Court must be brought within six months from the time when the cause of action arose. It appears to me that the observations made in the case of *Unnoda Persaud Mookerjee v. Kristo Coomar Moitro*(3) apply to this enactment. There the Judicial Committee was dealing with the Limitation Act (Act XIV of 1859) in connection with the Bengal Rent Act X of 1859. The Judicial Committee considered that the appeal under the latter Act was governed by the provisions of that Act and not

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(1) 8 M.H.C.R., 44.

(2) I.L.R., 2 All., 192.

(3) 15 B.L.R., 60.

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by those of the general law. They regarded Act X of 1859 as forming a special and complete act of procedure with regard to the trial of questions relating to rent and the occupancy of land in the mofussil and by which all the proceedings before the Collector were regulated and governed. In conformity with this decision the Full Bench of the Calcutta High Court has held that the provisions of section 14 of the Limitation Act cannot be taken advantage of by a plaintiff proceeding against his tenant under Act X of 1859 (*Nagendro Nath Mullick v. Mathura Mohun Parhi*(1)). Section 14 like section 12 appears in Part III of the Act under the heading "Computation of Period of Limitation" and as far as the present question is concerned no distinction can be drawn between the language of the two sections.

With regard to the argument founded on section 6 of the Act of 1877, I adhere to the opinion expressed by me in *Veeramma v. Abbiah*(2). Here we are in effect asked to read instead of the words "from the date of the Collector's judgment" in section 69 the words "from the date when the copy of that judgment should be obtained." I cannot see how it can be said that the period of 30 days prescribed by the special law enacted in Act VIII of 1865 would not be effected by reading into section 69, the provisions of section 12 of the Limitation Act. It does not appear to me correct to say that the Legislature has reverted to the language of Act XIV of 1859. For it is one thing to say as is said in section 3 of that Act that the shorter period of limitation specially prescribed for any class of suits shall be applied notwithstanding that Act. It is another thing to say as is said in the Act of 1877 that the period of limitation specially prescribed by an existing enactment shall not be affected or altered by any provision of the Act of 1877. For these reasons, I think, the second appeal ought to be dismissed with costs.

(1) I.L.R., 18 Cal., 368.

(2) I.L.R., 18 Mad., 99.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

KAMALAMMAL (PLAINTIFF No. 1), APPELLANT,

v.

PEERU MEERA LEVVAI ROWTHEN (DEFENDANT),
RESPONDENT.*

Contract Act—Act IX of 1872, s. 73—Interest—Suit for money payable under an oral contract.

The plaintiff sued to recover a sum of money due to her on an oral contract together with interest. No agreement or usage giving a right to interest was alleged, and no written demand and notice had been given under the Interest Act:

Held, that the plaintiff was not entitled to interest.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in Appeal Suit No. 284 of 1895, modifying the decree of V. Kuppusami Ayyar, District Munsif of Tirumangalam, in Original Suit No. 415 of 1894.

Plaintiff sued to recover Rs. 1,478 on account of rent due by the defendant to her and interest thereon at 12 per cent. per annum. There was no agreement to pay interest and no notice that interest would be charged. The District Munsif passed a decree as prayed holding that the plaintiff was entitled to interest by way of damages.

The Subordinate Judge modified the decree by disallowing interest. The plaintiff preferred this second appeal.

Rangachariar for appellant.

Mr. N. Subramanyam for respondent.

JUDGMENT.—The question in this case is whether the first plaintiff, to whom a sum of money was payable under an oral contract, is entitled to interest prior to the date of the suit.

No agreement or usage giving a right to the interest was alleged, and it was admitted that no written demand giving notice that interest would be claimed, was sent under Act XXXII of 1839.

In these circumstances it must be held that the interest cannot be decreed.

* Second Appeal No. 237 of 1896.

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It will be seen from the judgments delivered in the Court of appeal and in the House of Lords in *London Chatham and Dorer Railway Company v. South Eastern Railway Company*(1), that in England, at common law, interest was not recoverable as damages in cases similar to the present. That the law of this country must be taken to be substantially the same, was established by the decision of the Judicial Committee in *Juggo Mohun Ghose v. Kaisreechund*(2); and in *Kisara Rukunma Rau v. Cripati Viyanna Dikshatulu*(3), Scotland, C. J., and Holloway, J., laid down broadly that, in the absence of a demand in writing, interest up to date of suit cannot be awarded upon sums which are not payable under a written instrument and of which payment has been illegally delayed. The learned Judges arrived at that conclusion in spite of the practice, which they admitted, had for a long series of years prevailed in the mofussil Courts of awarding interest upon all demands improperly withheld—a practice which the learned Judges felt bound to declare was unsupported by authority.

It was, however, contended for the first plaintiff that the law on the point has been otherwise, since the passing of the Contract Act and section 73 of the Act coupled with illustration (a) annexed thereto, was relied on. No doubt, the section applies to, and includes cases of, breach of contract to pay money. But to construe the section as giving a right to interest even in those cases, in which it could not be awarded according to the provisions of Act XXXII of 1839, would be to hold that the latter enactment was virtually repealed by the former. Now this is totally opposed to the maxim *generalia specialibus non derogant*. Referring to this principle, Bovill, C. J., observed in *The Queen v. Champneys*(4) "it is a fundamental rule in the construction of statutes, that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication." The reason for the presumption against a repeal by implication in these cases, as stated by Wood, V. C., is "in passing a special Act, the legislature had their attention directed to the special case which the Act was

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"meant to meet, and considered and provided for all the circumstances of that special case; and, having done so, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated" (*Fitzgerald v. Champneys*(1)). In the present case, Act XXXII of 1839 is not one of the enactments specified in the schedule to the Contract Act as repealed, and there are no express words in section 73 indicating an intention to rescind the earlier Act. In fact, there is no real conflict between the two, since effect may well be given to section 73, by holding that the award of interest, as compensation contemplated by that section, has reference to cases in which such award can be made without infringing the provisions of the other Act. Still less can that Act be held to be in any way affected by the illustration relied on; inasmuch as an illustration has not the same operation as the sections which really form the enactment (*Nanak Ram v. Mehin Lal*(2), and *Koylash Chunder Ghose v. Sonatun Chung Barooie*(3)). Even were it otherwise, it is obvious that the framers of the illustration were not considering under what conditions and limitations interest should be awardable in cases of breach of contract to pay money. They meant only to point out that, if in consequence of a breach of that kind, a man finds himself unable to pay his debts and is ruined; he cannot recover compensation for loss of that remote character; and the allusion to interest was made to show that that was the only legally recoverable compensation for the breach.

The appeal, therefore, fails and is dismissed with costs.

(1) 80 L.J., Ch., 782. (2) I.L.R., 1 All., 487. (3) I.L.R., 7 Cal., 132.

(1) 1893, App. Cas., 429.
(3) 1 M.H.C.R., 369.

(2) 9 M.I.A., 260.
(4) L.R., 6 C.P., 394.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

1897.
April 23.

KRISHNAN NAMBUDEI (PLAINTIFF), APPELLANT,

v.

RAMAN MENON AND OTHERS (DEFENDANTS), RESPONDENTS.*

Registration Act—Act III of 1877, s. 17 (c)—Agreement to renew a kanom and to credit as renewal fees a sum of money then due by plaintiff to defendant—Want of registration—Admissibility in evidence.

Per cur; A written agreement to renew a kanom and to credit as renewal fees a sum of money then due is not an acknowledgment of money paid for the creation of an interest in land within the meaning of section 17 (c) of the Registration Act and therefore is admissible in evidence though unregistered:

Held, that in such an agreement, the agreement to renew is severable from the rest of the agreement and the document, though unregistered, is admissible in evidence of the agreement to renew even if it were inadmissible for other purposes.

SECOND APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in Appeal Suit No. 594 of 1895, affirming the decree of K. Govinda Nambiar, District Munsif of Ernad, in Original Suit No. 112 of 1894.

This was a suit to redeem a kanom of 1869. Defendant No. 1 pleaded that an agreement to renew the said kanom had been executed by the plaintiff in his favour. The agreement, Exhibit II, which was not registered, was as follows:—

“Deed executed by Valia Chembashi Illoth Narayanan Nam-budripad, residing in Ugraparam deshoh, Iruvetti amshoh, “Ernad taluk, to Palakkal Raman Menon, residing in Paunian-gara amshoh, Calicut taluk.

“The amount due on settlement of accounts in respect of monies previously received in respect of expenses of suits relating to our illom properties and the amount borrowed this day in cash from “Raman Menon amount of Rs. 125. I shall repay this sum of “Rs. 125 and the interest due thereon at the usual rate within the “30th Dhanu 1050 and take back this deed. If I fail to pay off “this debt within the period fixed, at the time of renewal when “the term fixed in the renewal deed granted to Raman Menon for

“24 years in respect of Melepurakkat nilam and others which “are our jenm, expires, grant a demise crediting the principal of “Rs. 125 against the amount due to me on account of renewal “fees.”

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The lower Courts held that this agreement was proved and dismissed the suit.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Ryru Nambiar for respondent No. 1.

JUDGMENT.—We are unable to agree with the appellant's contention that exhibit II is not admissible in evidence for want of registration. We do not think that it contains an acknowledgment of money paid for the creation of an interest within the meaning of section 17 (c) of the Registration Act. It evidences an agreement to renew and to credit as renewal fees a sum of money which had become due by the plaintiff to the defendant at the time the document was executed. The promise so to credit the money was not in our opinion, an acknowledgment such as is contemplated by the section.

Even if it were such an acknowledgment, the document would still be admissible as evidence of the agreement to renew, a part of the document which in our opinion is severable from the part which is alleged to amount to an acknowledgment.

It is further argued that even if there was an agreement to renew it was not valid, because the amount of the renewal fees was not fixed.

As to this, we observe that, though the language of the instrument is not very clear, we are unable to say that it is inconsistent with the contention that the renewal fee was to be the sum stated in the document, viz., Rs. 125 with interest. If the appellant's present contention were well founded, it would probably have been raised in the Courts below, but we find that it was not, in fact, raised in either Court.

The second appeal therefore fails and we dismiss it with costs.

* Second Appeal No. 806 of 1896.

APPELLATE CIVIL.

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

PURNAMAL CHUND (DEFENDANT No. 3), APPELLANT,

v.

VENKATA SUBBARAYALU (PLAINTIFF), RESPONDENT.*

Mortgage—Priority—Merger of former mortgage in decree—Right of subsequent mortgagee to keep the prior incumbrance alive.

Where there is a subsisting prior incumbrance and a subsequent mortgagee advances money for the purpose of discharging it, but it is for his benefit still to keep it alive, his right to keep it alive is not affected by the fact that the prior incumbrance had at the time taken the form of a decree. *Adams v. Angell*(1) followed.

SECOND APPEAL against the decree of S. Russell, District Judge of Chingleput, in Appeal Suit No. 62 of 1894, affirming the decree of N. Sarvothama Rau, District Munsif of Poonamallee, in Original Suit No. 230 of 1892.

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

Sankaran Nayar for appellant.

Ramachandra Rau Sahib for respondent.

JUDGMENT.—The respondent (plaintiff) seeks to enforce a mortgage executed in his favour on the 15th December 1891. The sum of Rs. 1,150, part of the sum advanced by him was, it is found, advanced and actually for the amount due under a decree, dated the 20th March 1890, obtained by one Subba Reddi on a mortgage in his favour executed in the year 1887. The appellant was the holder of an intermediate incumbrance, dated the 4th February 1890, upon which also a decree was obtained on the 4th November 1890. Prior to the date of the respondent's mortgage, there were therefore two mortgage decrees in existence, the earlier one in favour of Subba Reddi, the later in favour of the appellant. It is found, as a fact, that the respondent when advancing Rs. 1,150 for the discharge of the earlier decree intended to keep alive the prior incumbrance, and it has been

* Second Appeal No. 1427 of 1895.

(1) L.R., 5 Ch. D., 645.

held that he is to that extent entitled to priority as against the appellant whose incumbrance is intermediate in point of time.

On the hearing of the appeal, it was argued before us that inasmuch as Subba Reddi's mortgage had become merged in the decree passed upon it and that decree had been satisfied, the intention of keeping it alive for his own benefit could not properly be imputed to the respondent. Notwithstanding the opinion to the contrary expressed in the unreported case, we are of opinion that the principle on which the respondent bases his claim to priority is not affected by the circumstance that the money advanced by him was advanced in order to pay off a mortgage debt due under a decree. It is sufficient for the respondent to show that there was a subsisting prior incumbrance; that his money was lent for the purpose of discharging it, and that it was for his benefit that that prior incumbrance should still be kept alive. It cannot be said that he had any the less a right to keep the incumbrance alive, because it had taken the form of a decree. The same thing had happened in the case of *Adams v. Angell*(1), nor can it be said in the present case that the respondent did anything which could serve to negative an intention on his part to adopt the course which it was obviously for his benefit to adopt. The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

MAMMOD (JUDGMENT-DEBTOR), APPELLANT,

v.

LOCKE AND ANOTHER (DECREE-HOLDER AND AUCTION-PURCHASER),
RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, s. 244 (c)—Parties to the suit—
Auction-purchaser.*

Land was sold in execution of a decree of a Subordinate Court, and a sale certificate was issued. A question having subsequently arisen as to what had actually been the subject of the sale, the auction-purchaser applied to the Court, and an order was made by which the sale certificate was amended. The judgment-debtor appealed to the District Court joining the decree-holder and the auction-purchaser as respondents.

(1) L.R., 5 Ch. D., 645.

* Appeal against Appellate Order No. 22 of 1897.

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CHUND
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VENKATA
SUBBA-
RAYALU.

1897.
August 6.
September 2.

MAMMOO
v.
LOCKE.

The appeal was dismissed on the ground that no appeal lay :

Held, that the question was not one which could be determined under Civil Procedure Code, section 244, and consequently the decision of the Lower Appellate Court was right.

APPEAL against the order of H. H. O'Farrell, District Judge of South Malabar, in Civil Miscellaneous Appeal No. 65 of 1896, affirming the order of M. Srinivasa Rau, Subordinate Judge of Cochin, dated 3rd August 1896, and made on Miscellaneous Petition No. 332 of 1896 in the matter of the execution of the decree in Original Suit No. 9 of 1895.

The facts of the case, as stated by the District Judge, were as follows :—

The municipality of Cochin lent a certain sum of money to one Kunhi to tile his house, and the latter, as security, hypothecated to the municipality the house and the paramba on which it stood. On his death defendants Nos. 1 to 4 were sued as his representatives on the hypothecation bond, and a decree was passed, which, it is said by oversight, made liable the paramba only without mention of the buildings. The paramba was brought to sale and purchased for Rs. 1,500.

The sale proclamation and the sale certificate followed the terms of the decree and made no mention of the buildings. Afterwards the auction-purchaser applied to the Court to amend the sale certificate on the ground that what was really sold was the building as well as the paramba, and the Subordinate Judge, with the consent of all parties except the present appellant (first defendant) and after taking evidence, was satisfied that what was really put up for sale and purchased, was the building as well as the paramba and amended the sale certificate accordingly. Against this order the first defendant appeals, and has made not only the plaintiff—the municipality—but the auction-purchaser a party to the appeal.

The District Judge held that the dispute was not one to which section 244 was applicable, and consequently that no appeal lay against the order of the Subordinate Judge, although the first defendant might obtain a remedy by an application for revision, and he accordingly dismissed the appeal.

The judgment-debtor preferred this appeal making the decree-holder and the auction-purchaser again parties.

Sundara Ayyar for appellant.

Subramania Sastri for respondents.

MAMMOO
v.
LOCKE.

JUDGMENT.—Certain immovable property was sold by the Subordinate Court of Cochin in execution of a decree obtained by the Cochin Municipal Commissioners against the appellant upon a mortgage instrument executed by him. The sale was confirmed. But before the certificate of sale was issued, disputes arose as to whether certain buildings should be included in the certificate as part of the property sold. After hearing the auction-purchaser, the judgment-creditor and the judgment-debtor, the Subordinate Court passed an order directing that the buildings should be included in the certificate. The appellant preferred an appeal against the order to the District Court. The appeal, however, was rejected on the ground that no such appeal lay. On behalf of the appellant it was contended that the view taken by the District Court was wrong, inasmuch as the question in dispute was one which fell under section 244 of the Code of Civil Procedure.

This contention is, in our opinion, untenable. Now, if the dispute involved the question of the validity of the sale, the case would, no doubt, be governed by the ruling of the Judicial Committee in *Prosunno Coomar Sanjal v. Kasi Das Sanjal*(1). But the sale was not, and could not have been, impeached by any of the parties at the time when the order in question was passed. The dispute was, and is, as to whether, under the sale, the right to the land mentioned in the sale certificate alone passed to the auction-purchaser as the appellant contends or whether, as the purchaser contends, the right to the buildings also passed. If the former contention be upheld, the party that would be affected thereby would be the purchaser. If, on the other hand, the latter contention prevailed, it is the appellant that would suffer by such decision. In neither case, the sale itself being valid, would the judgment-creditor's rights be in any way touched. There is, therefore, in this case no question in dispute between the judgment-debtor on the one side and the judgment-creditor on the other, as urged for the appellant. The question in dispute is really one between the judgment-debtor and the purchaser only. Section 244 of the Code does not, therefore, apply, and the conclusion of the District Court is right.

The appeal is dismissed with costs.

(1) I.L.R., 19 I.A., 166.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

1897.
February
18, 19.

SUBBARAYA CHETTI AND ANOTHER (DEFENDANTS NOS. 4 AND 5),
APPELLANTS,

v.

SADASIVA CHETTI AND OTHERS (DEFENDANTS NOS. 1, 2, 3, 6,
7, 8, 9, and 10), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, s. 525—Date from which partition operates—
Partition—Arbitration—Suit to enforce the award with an alternative claim
for partition—Whether such suit maintainable.*

Disputes between the members of a Hindu family were referred to arbitrators who made an award as to how the whole of the property should be divided. In pursuance of the award part of the movable property was divided. Subsequently one of the members of the family died. The plaintiff, another member of the family, now sued to enforce the award or in the alternative for partition:

Held, (1) that the alternative claim for partition was barred by the award;

(2) that the provisions of Civil Procedure Code, section 525, did not preclude the plaintiff from suing to enforce the award;

(3) that the partition should be considered to have taken effect from the date of the award and consequently that the share allotted to the deceased member of the family passed to his heir.

APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in Original Suit No. 8 of 1895.

The facts of this case were as follows:—The plaintiff's father, Abbu Chetti, fourth defendant, seventh defendant, Vasantaraya Chetti, father of defendants Nos. 1, 2 and 3, eighth defendant's father-in-law and ninth defendant's late husband Cundasami Chetti were brothers. Tenth defendant was the widow of the first defendant's younger brother Ramasami Chetti. Cundasami Chetti adopted fifteen years before his death Sabapathi Chetti, elder brother of plaintiff and the son of Abbu Chetti; eighth defendant was the widow of the Sabapathi Chetti. Sabapathi Chetti and Cundasami Chetti died without male issue. All the above persons lived together until 23rd May 1892. Mis understandings arose and they asked certain mediators to divide and give them their shares in the whole estate. The mediators arranged (exhibit A) that the properties should be divided thus: one and three-fourths shares

* Appeal No. 98 of 1896.

to defendants Nos. 1, 2 and 3, one share to Sabapathi, one share to Abbu Chetti, plaintiff's father, one share to fourth defendant and one share to seventh defendant. Accordingly some of the movable property was divided, but owing to some of the defendants raising objections, the mediators could not effect a division of all the properties. "Plaintiff in this suit" said the Judge "claims a division being made of the property as above with this variation that as Sabapathi Chetti died since the award, his share should go to eighth defendant and ninth defendant. Tenth defendant was made a party, as she was in possession of some of the family property."

The defendants Nos. 1 to 3 and 7 to 9 did not contest plaintiff's claim, and the District Judge found that defendants Nos. 4 and 5 had agreed to the division fixed by the arbitrators, and had themselves taken some of the property and allowed the other brothers to take some of the rest. He accordingly held that they could not now repudiate the award and passed a decree that the family property be divided and that $\frac{1}{3}$ rds of it delivered to the plaintiff, and that the actual partition be, by consent, made by a commissioner in execution, who was to ascertain the value of the whole property, and of the amount plaintiff has received and then to divide the property so as to award plaintiff $\frac{1}{3}$ rds of the whole.

Defendants Nos. 4 and 5 preferred this appeal.

Seshagiri Ayyar for appellants.

Subramania Ayyar for respondents Nos. 1, 2 and 8.

Sivagnana Mudaliar for respondent No. 4.

Kothandarama Ayyar for respondents Nos. 5 and 6.

JUDGMENT.—The first question is what is this suit. Is it a suit to enforce an award or for a partition of family property or on a contract to accept the shares settled by arbitrators? The Judge has treated it as a suit on a contract to accept the shares settled by arbitrators, but we are unable to see that this is what was alleged or claimed by the plaintiff. We think the suit is a suit to enforce an award with an alternative claim for partition of family property.

There having been an award, it is clear that the alternative claim for partition cannot succeed. See *Krishna Panda v. Balaram Panda*(1) with which we agree.

(1) I.L.R., 19 Mad., 290.

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CHETTI
v.
SADASIVA
CHETTI.

BARAYA
HETTI
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DASIYA
HETTI.

It was argued before us that the suit to enforce the award will not lie, as the proper and only course open to the plaintiff was to proceed under the Civil Procedure Code, section 525. Having regard, however, to the decision in *Gopi Reddi v. Mahanandi Reddi*(1) and the apparent consensus of opinion in this Court from the time of *Palaniappa Chetti v. Rayappa Chetti*(2) down to *Husananna v. Linganna*(3), we think that the procedure directed by the Civil Procedure Code does not preclude an action being brought to enforce an award. We, therefore, hold that the plaintiff is entitled to succeed as to this.

There is no doubt that an award was given (exhibit A). It was argued that it was an incomplete award, and could not be enforced. We think, however, that the award is complete in itself. But it is said that only a declaratory decree can be given upon it, and that the decree of the Judge directing a partition went beyond the award. The parties, however, agreed at the settlement of issues that, when the shares were determined, the actual partition of the family property should be made by a commissioner in execution and this is all that the Judge has decreed. We do not see that there is anything illegal in this.

Then an objection is taken that it has not been settled in the suit or by the arbitrators what the family property is which the commissioner is to divide. All we can say is that no question as to this was raised in the Lower Court, and we must assume that any dispute there may have been was waived, and that the property mentioned in the plaint is the property to be divided.

Finally, the question arises when the partition is to be considered as taking effect—on the date of the award or on the date of the Lower Court's decree, because in the former case, the share of one Sabapathi Chetti would go to his heirs, instead of to the coparceners as the appellant's claim. We are, however, of opinion that the award (exhibit A) followed up as it was immediately, by an actual division of some of the movable properties, effected a division at that time so that the share allotted to Sabapathi, now deceased, passes to his heirs.

We must support the decree of the Court below and dismiss the appeal with costs (two sets—plaintiff and defendants Nos. 1 to 3).

(1) I.L.R., 15 Mad., 89.

(2) 4 M. H.C.R., 119.

(3) I.L.R., 18 Mad., 429.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

VENKATARAMAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

VENKATALAKSHMAMMA (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 141—Suit by reversioner on the death of female heir—Adverse possession—Hindu law—Law of succession.

A Hindu died in 1880, leaving him surviving (1) a daughter who died in 1886, who was the grandmother of one of the plaintiffs, and (2) the son of a predeceased daughter who was another plaintiff, and (3) the widow of a predeceased son who was the defendant. The plaintiffs now sued in 1893 to recover possession of his land, of which the defendant had been in possession since his death:

Held, that the suit was not barred by limitation and that the plaintiffs were entitled to a decree.

SECOND APPEAL against the decree of W. G. Underwood, District Judge of Cuddapah, in Appeal Suit No. 20 of 1895, reversing the decree of P. Sambayya, District Munsif of Madanapalle, in Original Suit No. 613 of 1893.

Suit to recover land, formerly the property of Appajappa, who died in 1880, leaving him surviving (1) Subbammal, his daughter, who died in 1886, leaving her son Subbarayudu since deceased, the father of the second plaintiff, and (2) Venkataramayya, the first plaintiff, his grandson, being the son of a daughter who predeceased him, and (3) Venkatalakshmamma, the defendant, his daughter-in-law, being the widow of his son who predeceased him. The defendant entered into possession on the death of Appajappa and she now pleaded that the suit was barred by limitation.

The District Munsif overruled this plea and held that the plaintiffs were entitled to recover and he passed a decree accordingly.

The District Judge reversed his decree on appeal on the ground that the suit was barred by limitation.

Plaintiffs preferred this second appeal.

Ramachandra Rau Sahib for appellants.

Mahadeva Ayyar and Ramachandra Rau for respondents.

JUDGMENT.—The District Judge while stating the law correctly has failed to properly apply it.

* Second Appeal No. 275 of 1896.

VENKATA-
RAMAYYA
v.
VENKATA-
LAKSHMAMMA.

The last male owner died in 1880, and the defendant at once took possession of the property. The last male owner's daughter, who was the party entitled to possession, died in 1886. The present suit by the reversioners to recover possession was filed in 1893. Under article 141, schedule 2 of the Indian Limitation Act (XV of 1877), the reversioners had 12 years from the date of the daughter's death and their suit was therefore clearly in time (*Srinath Kur v. Prosunno Kumar Ghose*(1), *Sham Lall Mitra v. Amarendra Nath Bose*(2), *Cursandas Govindji v. Vundravandas Purshotam*(3), *Mukta v. Dada*(4), *Tai v. Ladu*(5), *Ram Kali v. Kedar Nath*(6)). The respondent relies on the Privy Council case reported as *Lachhan Kunwar v. Manorath Ram*(7). If that case was a decision with reference to article 141, schedule 2 of the present Act (XV of 1877), or the corresponding article of Act IX of 1871, it would be in point, but there is nothing to show that it is so, and the dates in the recital of facts lead us to the conclusion that the rights of the reversioners in that suit had become barred under Act XIV of 1859 before the provisions of Act IX of 1871 came into force.

We must, therefore, reverse the decree of the District Judge and restore the decree of the District Munsif. The appellants must have their costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

SUBBARAYAR AND OTHERS (PLAINTIFFS NOS. 1, 2, 3 AND 5),

APPELLANTS,

v.

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

Revenue Recovery Act—Act II of 1864 (Madras), s. 38—Sale for arrears of revenue—Benami-purchase.

The purchaser at a sale held for arrears of revenue sued for possession of the land. It was pleaded that his purchase was made *benami* for the persons from whom the defendant derived title:

- (1) I.L.R., 9 Calc., 934. (2) I.L.R., 23 Calc., 460. (3) I.L.R., 14 Bom., 482.
(4) I.L.R., 18 Bom., 216. (5) I.L.R., 20 Bom., 801. (6) I.L.R., 14 All., 156.
(7) I.L.R., 22 Calc., 445. Second Appeal No. 278 of 1896.

Held, that Revenue Recovery Act, s. 38, did not debar the defendant from raising this plea, and that the averments on which it was based having been proved, the suit should be dismissed.

SECOND APPEAL against the decree of S. Gopalachariar, Subordinate Judge of Tinnevely, in Appeal Suit No. 48 of 1894, affirming the decree of V. K. Desikachariar, District Munsif of Tuticorin, in Original Suit No. 425 of 1891.

Suit to recover possession of certain land with mesne profits. The land in question had been sold under Revenue Recovery Act for arrears of revenue due by the landholder and had been purchased by the father, since deceased, of the plaintiff on 28th October 1879.

Possession had never been obtained by the purchaser, and it was pleaded that the purchase had been made *benami* for the vendors of defendant No. 1.

The District Munsif held that it was open to the defendant to raise this plea, and that it was proved, and that defendant No. 1 and his vendors had been in adverse possession for over 12 years. He accordingly dismissed the suit.

The Subordinate Judge, on appeal, held that the suit was not barred by limitation, but affirmed the decree on the other ground on which the District Munsif based his judgment.

Plaintiff preferred this second appeal.

Krishnasami Ayyar for appellants.

Sivasami Ayyar for respondent No. 1.

JUDGMENT.—It is contended that, as the plaintiff's father purchased the land at a sale for arrears of revenue, section 38 of Act II of 1864 (Revenue Recovery Act) precludes the defendants from proving that the purchase was really made by the plaintiff's father not solely on his own behalf but on behalf of the villagers generally. The words of section 38 are "such sale certificate shall state the property sold and the name of the purchaser, and it shall be conclusive evidence of the fact of the purchase in all courts and tribunals, where it may be necessary to prove the same, and no proof of the Collector's seal or signature shall be necessary, unless the authority before whom it is produced shall have reason to doubt its genuineness."

The intention clearly was to prevent any plea from being raised that the defaulter's interest did not pass by the sale. There is nothing in the language of the section to warrant the contention

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that the legislature intended thereby to preclude proof being given that the person whose name was entered in the certificate was not the person, or the only person who acquired a right under the purchase.

Where this was intended, the legislature has made a distinct provision to that effect, as in section 317, Civil Procedure Code.

The evidence objected to was, therefore, rightly admitted, and upon the findings the suit was rightly dismissed. We dismiss this second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

1897.
September 1.

KUNHI MARAKKAR HAJI (DEFENDANT), APPELLANT,

v.

KUTTI UMMA (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code—Act XIV of 1882, s. 574—Contents of appellate judgment—
Duty of Appellate Court to examine the correctness of a finding in the absence
of a memorandum of objections.*

A Judge having remanded a case for further evidence to be taken and a fresh finding recorded on a question of fact, he is bound to examine the correctness of the finding, and to state in his judgment the reasons for which he either accepts or rejects it.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of South Malabar, in Appeal Suit No. 612 of 1895, modifying the decree of T. V. Anantan Nayar, District Munsif of Kutnad, in Original Suit No. 120 of 1895.

The plaintiff sued as the divorced wife of the defendant to recover Rs. 105 agreed mahur, and Rs. 28-13-9 the kizhi given to the defendant at the time of their marriage which took place in 1871. The divorce was alleged to have taken place in March 1874, but the defendant denied the divorce and on that ground disputed his liability to repay the kizhi. As to the claim for mahur he pleaded that he had already satisfied it by purchasing land for the plaintiff.

* Second Appeal No, 55 of 1897.

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The District Munsif held that neither the divorce alleged by the plaintiff nor the satisfaction of the claim for mahur was established by the evidence, and he passed a decree for Rs. 105 only.

The plaintiff preferred an appeal to the District Court, no memorandum of objections being filed by the defendant.

The District Judge, on appeal, ordered that the evidence of one additional witness named should be taken as to the fact of divorce, and that the defendant should be permitted to adduce evidence to impeach his testimony should he prove hostile. The order prescribed the dates within which the fresh finding should be returned and objections to it taken.

The District Munsif complied with this order and recorded a finding that the divorce set up by the plaintiff was true. No memorandum of objections was filed by the defendant with reference to this finding, and on the appeal coming on for hearing again, the District Judge delivered judgment as follows:—

“The Lower Court now finds on further evidence that its former decision was wrong, and that a divorce as alleged by the plaintiff really took place. The appeal is allowed and the decree of the Lower Court modified by directing that plaintiff get a decree as prayed in the plaint with costs throughout.”

The defendant preferred this second appeal on the following grounds:—

“The Lower Appellate Court has failed to record findings on the issues raised in the case.

“The judgment of the Lower Appellate Court is not in accordance with the provisions of section 574 of the Code of Civil Procedure.

“The Lower Appellate Court ought to have given reasons for allowing the appeal.

“The Lower Appellate Court ought not to have upheld the Munsif's finding on the first issue.

“The defendant's plea of divorce being inconsistent with the plea of the payment of dower, he was not entitled to set up that plea.”

Sundara Ayyar for appellant.

Govinda Menon for respondent.

JUDGMENT.—Albeit there may have been no memorandum of objections, it was incumbent on the Judge to examine into the correctness of the finding and come to a conclusion whether he

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accepted it or not, unless its correctness had been admitted by the party to whom it was adverse, viz., the defendant in this case. There is nothing to show there was such admission, and the Judge has not expressed any opinion on the matter in question. There is therefore no judgment as prescribed by the Code. We must, therefore, reverse the decree and remand the appeal to be disposed of according to law. (See *Umed Ali v. Salima Bibi*(1), *Mumtaz Begam v. Fateh Husain*(2), *Bhagvan v. Kesur Kuverji*(3), and see also *Ramchandra Govind Manik v. Sono Sadashw Sarkhot*(4).) Costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

1897.
September
1, 2.

OLIVER (DEFENDANT No. 1), APPELLANT,

v.

ANANTHARAMAYYAR (PLAINTIFF), RESPONDENT. *

Rent Recovery Act—Act VIII of 1865 (Madras), ss. 18, 39, 40—Attachment for arrears of rent—Suit to set aside attachment—Subsequent sale.

A landlord attached his tenant's holding for arrears of rent in 1889, and within the time prescribed by Rent Recovery Act, section 18, put in an application for sale to the Collector, and otherwise complied with the procedure prescribed by the Act. The land was sold, but the sale was set aside as having been irregularly conducted. The landlord then made in 1894 an application to the Collector for a fresh sale (which was granted); a fresh sale took place without a fresh notice being given to the tenant under section 39 of the intention to sell. The tenant now sued to have this sale set aside:

Held, that the plaintiff was not entitled to have the sale set aside.

SECOND APPEAL against the decree of F. H. Hamnett, District Judge of Tanjore, in Appeal Suit No. 122 of 1896, reversing the decree of N. Sambasiva Ayyar, District Munsif of Tiruvadi, in Original Suit No. 348 of 1895.

The plaintiff was a tenant on the Tanjore palace estate, of which defendant No. 1 was the receiver. Defendant No. 2 was the purchaser of the lands, which the plaintiff had occupied, at a sale which took place in January 1895.

(1) I.L.R., 6 All., 383. (2) I.L.R., 6 All., 391. (3) I.L.R., 17 Bom., 428.

(4) I.L.R., 19 Bom., 551.

* Second Appeal No. 89 of 1897.

The plaintiff now sued to set aside the sale. It appeared that the receiver had attached the plaintiff's holding for arrears of rent in July 1889. The plaintiff instituted a summary suit to have the attachment raised. This suit terminated in favour of the receiver, who thereupon brought the property to sale in December 1892. The plaintiff then instituted a regular suit to have the sale set aside and succeeded on the sole ground that the sale had not been held on the date originally fixed, but on an adjourned date. The receiver then caused fresh notice of sale to be issued and had the attached property brought to sale. Hence this suit.

The District Munsif was of opinion that the attachment was not cancelled as the result of the previous decree setting aside the sale and held that the sale now in question was a valid sale and he passed a decree dismissing the suit.

The District Judge on appeal reversed his decree and set aside the sale on the ground that the application for the sale had not been made within the period prescribed by Rent Recovery Act of 1865, section 18. He held that the intermediate proceedings did not operate to extend the time allowed by that section, and he made the following observations:—

“The application for the second sale was only made in 1894 and the attachment of the property sold is alleged to have taken place in July 1889. The Lower Court considers that there is no limit as to the time within which application for sale may be made after attachment. In the view the Lower Court appears to me to be quite wrong. Section 40 clearly provides that the sale of immovable property shall be conducted under the rules laid down for sale of movable property. One of those rules is contained in section 18. There must be an application to the Collector for an order directing the sale and that application must be made within the time prescribed in section 18. There is nothing in section 40 which implies that the provisions of section 18 do not apply as regards the time within which the application is to be made. The wording of Act VIII of 1865 is no doubt vague and unscientific, but the Act must be interpreted reasonably. It is clear that the framers of the Act, in providing in section 40 that the sales of immovable property ‘should be conducted under the rules laid down for movable property’ intended that the same procedure should be adopted in both cases, not only at the time of sale itself, but also in the preliminary steps

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"to be taken to bring the attached property to sale through the Collector. It would be monstrous to suppose that the Legislature intended that, after once issuing a notice under section 39 of the Act, the landlord could, years afterwards, have the property sold without the issue of any fresh notice, except the general proclamation of the sale prescribed in section 18 of the Act."

Defendant No. 1 preferred this second appeal.

Pattabhirama Ayyar for appellant.

Sundara Ayyar for respondent.

JUDGMENT.—It is admitted in this case that the first application to the Collector for sale under section 40 of the Act (VIII of 1865) was made within the time proscribed by section 18, and that the sale which took place in pursuance of that application was set aside on the ground of an irregularity in the conduct of the sale by the officer carrying it out. After the sale was thus set aside, the landlord applied again to the Collector for a fresh sale without giving a second notice to the tenant of his intention to sell under section 39. The Lower Appellate Court has held that such notice was necessary, in other words that all that had been done up to the irregular sale was practically void, and that the landlord must begin '*de novo*.' We are unable to accept this view. The landlord was in no way responsible for the irregularity in the sale, and he was entitled to ask the Collector to rectify what had gone wrong by giving orders for a proper sale. The second application to the Collector must be considered in the light of a continuation of the original application for sale, which was admittedly in order. It is contended that a fresh notice of intention to sell ought to be insisted on in the interest of the tenant. But the tenant being the party in default, is entitled to less consideration than the landlord who would necessarily be delayed by the adoption of such a procedure. We must therefore hold that a second notice to the tenant under section 39 of the Act was not necessary in law before the landlord's application to the Collector for a regular sale in lieu of the invalid one. We accordingly reverse the decree of the District Judge and restore that of the Munsif. The respondent must pay the appellant's costs in this and in the Lower Appellate Court.

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 The plaintiffs and defendants, together with one Subbaraya Pai who died in 1884, were trustees of a temple, having been appointed by the committee under Act XX of 1863. For some years before his death Subbaraya Pai was left in exclusive management. Subsequently the defendants were in sole management of the temple until 1891, when the plaintiffs brought the present suit charging that the defendants had excluded them from the right of management, and claiming that they should make good sums lost to the institution by reason of breaches of trust alleged to have been committed by them. Some of the breaches of trust took place before 1884. Of the others, which took place subsequently, some consisted in improper dealings with the temple property to the detriment of the temple and to the advantage of certain relatives of the defendants. The plaintiffs also asked for an injunction to restrain the defendants from excluding them from management:—*Held*, (1) that, in the absence of evidence of an absolute denial by the defendants of the plaintiffs' right to act as trustees, the suit for an injunction was not barred by limitation; (2) that the suit could not be regarded as a suit by the beneficiaries and was not within the operation of Limitation Act, section 10; (3) that the suit was not maintainable in respect of breaches of trust committed in the lifetime of the deceased manager, as being to that extent barred by limitation, and also for the reason that such breaches were not more imputable to the defendants than to the plaintiffs; (4) that even if it

had been proved that the community interested in the temple had sanctioned the acts of the defendants now complained of, that circumstance would not suffice to excuse the defendants; (5) that the defendants were liable to make good the loss occasioned by any breach of trust committed within six years of the date when the suit was instituted even in the absence of fraud, and that, in estimating such loss, prospective loss should be assessed: *Held further*, that an objection taken on behalf of respondents at the hearing of an appeal as to the amount of Court-fee stamp affixed to the petition of appeal to the High Court, cannot be entertained.

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CHRISTIAN MARRIAGE ACT—ACT XV OF 1872, s. 68—Solemnize:

In Indian Christian Marriage Act, section 68, the word 'solemnize' is equivalent to the words 'conduct, celebrate or perform.' Therefore any unauthorised person not being one of the persons being married, who takes part in performing a marriage, that is, in doing any act supposed to be material to constitute the marriage is liable to be convicted under that section; and a charge of abetment is sustainable against the persons being married.

Queen-Empress v. Paul 12

CIVIL PROCEDURE CODE—ACT XIV OF 1882, s. 12—Suit for money—Application by defendant for an account of dealings with plaintiff—Defendants' right to bring a separate suit for an account:

In a suit for money the defendant admitted that there had been money dealings between him and plaintiff, but averred that the taking of an account would show that the plaintiff was indebted to him. The Court dismissed the plaintiff's suit, but declined to take an account against the plaintiff:—*Held*, that the defendant was not entitled to have an account taken in the suit and that Civil Procedure Code, section 12, would not have precluded him from suing for an account during the pendency of the plaintiff's suit.

Ramalinga Chetti v. Ragunatha Rau 418

2. _____, s. 13—Decision of Revenue Court—'Res judicata':

A zamindar distrained for rent under the Rent Recovery Act of 1865. Thereupon the tenant filed a summary suit under that Act in a Revenue Court, and the distraint was annulled on the ground that the zamindar had not tendered a proper patta as required by section 7. The zamindar now sued in the Court of the District Munsif to recover the arrears of rent:—*Held*, that the question of the propriety of the patta tendered was not *res judicata*.

Rangayya Appa Rau v. Ratnam 392

3. _____, Hindu Law—Po-Brahman—Alienation by widow for religious purposes—'res judicata'—Decision on title in proceedings under Land Acquisition Act, 1870:

When a Po-Brahman receives a salary for the performance of his duties, a gift to him by the widow of the person whose exequial rites he has been appointed to perform to reward him for having performed any of those exequial rites is not a gift binding on the reversioners. In proceedings under the Land Acquisition Act, 1870, to apportion the compensation payable, a decision by the Judge on a question of title does not operate as *res judicata* between the parties to those proceedings.

Mahadevi v. Neelamani 269

4. _____, ss. 27, 53—*Amendment of plaint by bringing on a new plaintiff on second appeal—Construction of will—Appointment of executors by implication:*

Plaintiffs sued in 1894 to recover property belonging to the estate of a testator, claiming to be his executors under a will. The property was alleged to have been entrusted by the testator in 1893 to the defendant. The will contained no express appointment of executors, but it provided that the plaintiffs should take care of the estate during the minority of a son who was to be adopted to the testator, and imposed upon them the duty of providing for the maintenance of persons therein named:—*Held*, (1) that the plaintiffs were not appointed executors by implication; (2) that, under the circumstances of the case, the plaint should be amended on second appeal in 1897, by substituting the adopted son as plaintiff, with one of the present plaintiffs as his next friend.

Seshamma v. Chennappa 467

- i. _____, s. 32—*Joinder of parties—Change in character of suit:*

In an ejectment suit by a landlord against his tenant, the Court should not bring on to the record the person from whom the plaintiff holds the land, nor persons claiming to hold it from a third party, nor such third party.

Sankaran Narayanan v. Ananthanarayana 375

- i. _____, ss. 32, 45, 46—*Dismissal of suit against one defendant without trial after first hearing:*

The plaintiff sued for damages for the infringement of certain hereditary rights claimed by him in connection with a temple. The first defendant was a magistrate, and it was alleged as the cause of action against him that he had disobeyed the instructions of his superiors and played into the hands of the other defendants by passing an illegal order. After issues had been framed the Judge without trial dismissed the suit with costs against the first defendant:—*Held*, that the order was illegal.

Singa Reddi v. Madava Rau 380

- i. _____, s. 43—*Transfer of Property Act, s. 85—Ejectment suit by a mortgagor's vendee against the purchaser under a mortgage decree—Subsequent suit to redeem:*

Certain land mortgaged to A was sold to B. A brought a suit on his mortgage without joining B as a party, obtained a decree for sale and became the purchaser under the decree. B then sued to eject him praying for a declaration that the sale was not binding on him. The suit having been dismissed, he now sued to redeem:—*Held*, that the suit was not barred under Civil Procedure Code, section 43, and the plaintiff was entitled to redeem.

Kuppu Nayudu v. Venkatakrishna Reddi 82

- i. _____, s. 44—*Limitation Act—Act XV of 1877, s. 14—Cause of like nature—Misjoinder of causes of action—Want of leave:*

In March 1891 the plaintiff sued the defendant to recover the sum of money due on the taking of an account between the plaintiff and the defendant, who was his agent, and to recover possession of certain land. The plaintiff did not obtain leave under Civil Procedure Code, section 44, for the institution of this suit which was accordingly dismissed for misjoinder of causes of action. The plaintiff now instituted on 5th April 1893 two suits, the one for the money and the other for the land:—*Held*, that the

plaintiff was entitled under Limitation Act, section 14, to have the time occupied in the previous proceedings deducted in the computation of the period of limitation applicable to his suit for money which accordingly was not barred by limitation.

Venkiti Nayak v. Murugappa Chetti 48

- i. _____, s. 54—*Court Fees Act—Act VII of 1870, ss. 6, 28—Presentation of plaint improperly stamped:*

A suit is not instituted, within the meaning of the explanation to section 4 of the Limitation Act, by the presentation of a document purporting to be a plaint, if that document, while not undervaluing the claim, is written on paper that does not bear the proper court-fee.

Venkatramayya v. Krishnayya 319

- i. _____, s. 158—*Adjustment of decree out of Court—Agreement not certified to Court—Action for damages:*

A decree for partition of family property was passed in favour of two plaintiffs. One of the plaintiffs having died before execution, a question arose between the survivor and one of the defendants as to the devolution of his interest, and the decision was in favour of the surviving plaintiff. The contending parties made an arrangement, according to which some of the land representing the share of the deceased plaintiff should be given to the defendant. This agreement was not certified to the Court and the decree was executed at the instance of the surviving plaintiff who subsequently refused to give effect to the arrangement. The then defendant now sued in the alternative for possession of the land awarded to him or for damages:—*Held*, (1) that the plaintiff's claim for the land was not maintainable; (2) that the claim for damages for breach of the agreement was maintainable.

Krishnasami Ayyangar v. Ranga Ayyangar 369

- i. _____, s. 214—*Limitation Act—Act XV of 1877, s. 28, sched. II, art. 10—Right of pre-emption asserted by one in possession under an otti mortgage in Malabar:*

Land in Malabar was in the possession of the defendants and was held by them as otti mortgagees under instruments executed in August 1873 and January 1876. The plaintiff having purchased the jenm right under instruments executed and registered in May and June 1877, now sued in 1893 for redemption:—*Held*, that the defendants' right of pre-emption was not extinguished under Limitation Act, section 28, and that they were not precluded from asserting it by article 10, owing to the lapse of time, and that Civil Procedure Code, section 214, was inapplicable to the case, because the persons asserting a right of pre-emption were in possession.

Krishna Menon v. Kesavan 305

- i. _____, s. 215—*Decree for account of dissolved partnership—Taking of accounts:*

In a suit for an account of a dissolved partnership a decree should be passed under Civil Procedure Code, section 215, in accordance with form No. 132 in schedule IV; and it should direct an account to be taken of the dealings and transactions between the parties and of the credits property and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the outstanding debts and effects. Observations on the procedure to be adopted and the burden of proof on the taking of the account.

Thirukumaresan Chetti v. Subbaraya Chetti 313

13. _____, ss. 224, 311—*Application to set aside sale—Effect of fraud—Auction-purchaser no party to fraud—Absence of certificate under s. 224—Mere irregularity:*
- A judgment-debtor cannot have a court sale set aside on the ground of fraud in the absence of proof that the auction-purchaser was a party to the fraud, and that the fraud came to the judgment-debtor's knowledge subsequent to the confirmation of the sale. The omission to transmit to the Court executing the decree the certificate required by section 224, Civil Procedure Code, is a mere irregularity which would not vitiate the sale.
- Abubaker Sahab v. Mohidin Sahab 10
14. _____, ss. 243, 588—*Stay of execution pending suit between decree-holder and judgment-debtor—Stay of execution refused—Appeal:*
- An appeal lies from an order refusing stay of execution under Civil Procedure Code, section 243, pending a suit between a decree-holder and his judgment-debtor.
- Lingum Krishna Bhupati Devu v. Kandula Sivaramayya 366
15. _____, ss. 244, 257(a)—*Representative of judgment-debtor—Agreement for satisfaction of judgment-debt:*
- A money decree was passed against a zamindar by the High Court in 1883, and it was transferred to the District Court for execution. The decree-holder attached and prepared to bring to sale certain villages of the judgment-debtor. These villages were included in a mortgage subsequently executed by the judgment-debtor in favour of third parties. Both before and after the mortgage the decree-holder received from the zamindar certain sums in consideration of his agreeing to postponements of the sale; also it was agreed between them at a date subsequent to the mortgage that interest should be computed at a higher rate than that provided by the decree. Subsequently the decree-holder sought to bring the land to sale, and in computing the amount then due gave credit for none of the sums so received and calculated interest at the enhanced rate. The mortgagee objected that the computation was erroneous in both these respects and the District Judge upheld his objection. The judgment-debtor took no part in the contest:—*Held*, (1) that the mortgagee was a representative of the judgment-debtor within the meaning of Civil Procedure Code, section 244, and that an appeal lay against the order of District Judge; (2) that the District Court not being the Court which passed the decree had no power to sanction the agreements under section 257 (a), and the decision was right.
- Paramananda Das v. Mahabeer Dossji 378
16. _____, s. 244 (c)—*Parties to the suit—Auction-purchaser:*
- Land was sold in execution of a decree of a Subordinate Court, and a sale certificate was issued. A question having subsequently arisen as to what had actually been the subject of the sale, the auction-purchaser applied to the Court, and an order was made by which the sale certificate was amended. The judgment-debtor appealed to the District Court joining the decree-holder and the auction-purchaser as respondents. The appeal was dismissed on the ground that no appeal lay:—*Held*, that the question was not one which could be determined under Civil Procedure Code, section 244, and consequently the decision of the Lower Appellate Court was right.
- Mammod v. Locke 487

17. _____, s. 252—*Legal representative—Suit against the heir and possessor of the assets of a deceased person:*
- Where a party issued for money as the heir and possessor of the assets of a deceased debtor, and it is proved that he has received sufficient assets to meet the debt, a personal decree therefor can be passed against him.
- Nathuram Siviji Sett v. Kutti Haji 448
18. _____, ss. 291, 311—*Material irregularity—Substantial loss:*
- Where a material irregularity is proved to have occurred in the conduct of a court sale and it is shown that the price realised is much below the true value, it may ordinarily be inferred that the low price was a consequence of the irregularity even though the manner in which the irregularity produced the low price be not definitely made out. When a sale is adjourned under section 291, the provisions of that section must be followed with exactitude.
- Venkatasubbaraya Chetti v. Zamindar of Karvetnagar 159
19. _____, s. 295—*Rateable distribution—Decrease for money—Mortgage decree:*
- The plaintiff and defendant, respectively, held successive mortgages on the same land. The defendant obtained a decree on his mortgage against the land and in respect of any unrealized balance against the mortgagor, two months' time for redemption being given. The plaintiff then obtained a like decree. The defendant abandoned his claim on the mortgage premises and attached other property of the mortgagor. The plaintiff applied to execute his decree against the mortgage premises and the other property, but with regard to the latter his application was rejected. The defendant having brought to sale the property attached, the plaintiff applied under Civil Procedure Code, section 295, for rateable distribution which was refused. The plaintiff then brought to sale the mortgage premises, which did not realize the amount of the debt, and he now sued to recover the sum which would have been payable to him under section 295:—*Held*, that the plaintiff's decree was a decree for money within the meaning of section 295, and that he was entitled to recover the sum claimed: *Per cur*, the property ought not to have been sold and the money paid to the defendant until the mortgaged property had been sold and had been found insufficient to pay his debt.
- Kommachi Kather v. Pakker 108
20. _____, s. 310 A (a)—*Application to set aside sale—Deposit by judgment-debtor of the amount of debt—Poundage money:*
- A judgment-debtor, whose land has been sold in execution, is entitled to have the sale set aside under Civil Procedure Code, section 310A (a), if he deposits 5 per cent. of the purchase money including that deducted by the court for poundage and fulfils the requirements of clause (b) even though something more on account of the poundage was recoverable from him under the head of costs.
- Muthu Ayyar v. Ramasami Sastrial 158
21. _____, s. 317—*Execution sale—Right to prove purchase benami:*
- Certain property was mortgaged in 1881 and again in 1882. In 1883 the interest of one of the mortgagors in the property was brought to sale subject to the mortgages in execution of a decree against him, and was purchased by the assignor of defendant No. 6. In 1884 a decree for sale was obtained on the mortgage of 1882, neither defendant No. 6 nor his assignor having been brought on to the record. In execution of that decree the property now in question was purchased by the predecessor in title of

the plaintiff who now brought this suit for redemption, averring that the purchase of 1883 was *benami* for the mortgagors:—*Held*, that the plaintiff was not debarred by Civil Procedure Code, section 317, from proving this averment.

Kollantavida Manikoth Onakkan v. Tiruvalil Kalandan Atiyamma ... 362

22. —————, ss. 317, 244—*Purchase by a benamidar with funds belonging to a joint Hindu family—Right of member of family not being a party to benami transaction to sue for his share:*

A Hindu sued for partition of his share of the family property and obtained a decree which he partially executed. He then died without issue leaving a widow. The rest of the family remained undivided, and the plaintiff was born into it after the decree was passed. Some of the members of the family arranged for the purchase of the late decree-holder's property with their money *benami* for them and for a similar purchase of other portions of the family property at court sales held in further execution of the decree. The plaintiff now sued for partition of *inter alia* those portions of the family property which had been the subject of the *benami* transactions:—*Held*, that the plaintiff was entitled to share therein and was not precluded from asserting his right by Civil Procedure Code, section 244, or section 317.

Minakshi Ammal v. Kallanurama Rayer ... 349

23. —————, s. 365—*Legal representative—Malabar Law—Adoption by the karnavan of a Marumakkatayam tarwad—Want of consent by the rest of the tarwad:*

A tarwad in Malabar subject to Marumakkatayam Law was reduced in number to two persons, viz., the karnavan and his younger brother the plaintiff. They quarrelled, and the former without the consent of the latter adopted as members of the tarwad his son and daughter and her children. On his death the plaintiff sued for possession of the tarwad property and for a declaration that the adoptions were invalid:—*Held*, that the plaintiff was entitled to the relief asked for. After an appeal was presented by plaintiff, who had obtained a decree for possession but no other relief, he died leaving a will making certain dispositions of the property to which he was solely entitled on the assumption that the adoptions in question were invalid, and his executor was admitted as his legal representative for prosecuting the appeal.

Payyath Nanu Menon v. Thiruthipalli Raman Menon ... 51

24. —————, s. 470—*Inter-pleader suit—Act IX of 1889—Provincial Small Cause Courts Act, sched. II, arts. 11 and 14—Claim for compensation awarded under Land Acquisition Act:*

Land having been compulsorily acquired under Land Acquisition Act for the purpose of the East Coast Railway, the compensation was fixed at Rs. 468. A conflict having arisen as to the right to receive the compensation and the District Court having declined to determine it under Land Acquisition Act, section 15, an inter-pleader suit was instituted on behalf of the Secretary of State in the Court of the District Munsif. The decision of the District Munsif having been confirmed on appeal, the unsuccessful claimant preferred a petition to the High Court under section 622, Civil Procedure Code:—*Held*, that the inter-pleader suit was not within the jurisdiction of a Provincial Small Cause Court and was rightly brought on the ordinary side of the District Munsif's Court and consequently where the petitioner's remedy was by way of second appeal the petition for revision was not admissible.

Tirupati Raju v. Vissam Raju ... 155

25. —————, ss. 521, 522, 528—*Application to file award—Objection that submission was revoked before award made—Jurisdiction of Court to determine objection—Subsequent suit to annul award:*

The plaintiff's case was that arbitrators, to whom differences between him and the defendant had been referred, had out of enmity to him and at the defendant's instance, made a fraudulent award on 17th February after he had revoked his submission and had antedated it as on 1st February; that the defendant had instituted proceedings under Civil Procedure Code, chapter XXXVII, and his objections to the above effect having been overruled, a decree was passed in terms of the award. He now sued to have it declared that neither the decree nor the award was binding:—*Held*, that the Court had jurisdiction to determine the genuineness or validity of the award in the proceedings under chapter XXXVII, and that the present suit was not maintainable.

Chintamallayya v. Thadi Gangireddi ... 89

26. —————, s. 525—*Date from which partition operates—Partition—Arbitration—Suit to enforce the award with an alternative claim for partition—Whether such suit maintainable:*

Disputes between the members of a Hindu family were referred to arbitrators who made an award as to how the whole of the property should be divided. In pursuance of the award part of the movable property was divided. Subsequently one of the members of the family died. The plaintiff, another member of the family, now sued to enforce the award or in the alternative for partition:—*Held*, (1) that the alternative claim for partition was barred by the award; (2) that the provisions of Civil Procedure Code, section 525, did not preclude the plaintiff from suing to enforce the award; (3) that the partition should be considered to have taken effect from the date of the award and consequently that the share allotted to the deceased member of the family passed to his heir.

Subbaraya Chetti v. Sadasiva Chetti ... 490

27. —————, s. 562—*Remand—Preliminary point:*

Where a District Munsif, without entering into the merits of a case, dismissed a suit on the ground that the plaintiffs had no cause of action, and on appeal the Appellate Court reversed his decree and remanded the case:—*Held*, that the suit had been disposed of upon a preliminary point within the meaning of section 562, Civil Procedure Code, and that the remand was right.

Kanakammal v. Rangachariar ... 25

28. —————, s. 574—*Contents of Appellate judgment—Duty of Appellate Court to examine the correctness of a finding in the absence of a memorandum of objections:*

A Judge having remanded a case for further evidence to be taken and a fresh finding recorded on a question of fact, he is bound to examine the correctness of the finding, and to state in his judgment the reasons for which he either accepts or rejects it.

Kunhi Marakkar Haji v. Kutti Umma ... 496

29. —————, s. 583—*Limitation Act—Act XV of 1877, sched. II, art. 179—Application for restitution—Period of limitation—Fraud:*

Applications made to obtain restitution under a decree in accordance with Civil Procedure Code, section 583, are proceedings in execution of that decree and are governed by Limitation Act, schedule II, article 179.

Venkayya v. Ragavachariu ... 448

30. —————, s. 558—*Letters Patent, s. 15—
Appeal under Letters Patent—Powers of Appellate Court under s. 588:*

A Judge of the High Court when hearing an appeal under Civil Procedure Code, section 588, against an erroneous order of remand under section 562 may, if he thinks fit, pass a final decree in the suit instead of merely remanding the suit to the Lower Appellate Court. No appeal lies against such decree under Letters Patent, section 15.

Sankaran v. Raman Kutti 152

31. —————, s. 588—*Letters Patent, s. 15:*

A District Munsif having dismissed a suit on a preliminary point, the District Court on appeal made an order remanding it to him to be disposed of on the merits. Against this order an appeal was preferred to the High Court, which came on for disposal before a single Judge, who delivered judgment dismissing it:—*Held*, that no appeal lay under Letters Patent, section 15, against his judgment.

Vasudeva Upadaya v. Visvaraja Thirthasami 407

32. —————, ss. 617, 647—*Village Courts' Act
(Madras)—Act I of 1889, s. 13, proviso 3—'Land' includes 'house':*

In Act I of 1889, section 13, proviso 3, the word land includes land covered by a house, and consequently a suit for house-rent unless due under a written contract signed by the defendant is not cognizable in a Village Munsif's Court.

Narayamma v. Kamakshamma 21

- COLLUSIVE DECREE—*Fraud on creditors—Sham sale-deed to defeat creditors—
Suit to declare title of fraudulent transferor in possession:***

A executed a sale-deed of his land to B. An attachment placed on the land was raised at the instance of B as vendee. The attaching creditor sued impeaching the transfer as collusive; but finally consented to a decree upholding the title of B who then applied to be registered as owner in the place of A. A, who remained in possession throughout, resisted the application, and now sued B for a declaration that he was entitled to remain on the register as owner. It was alleged and proved that the apparent sale-deed was a sham, and had been executed for no consideration with intent to defraud the plaintiff's creditors, and that the plaintiff had paid the attaching creditor to consent to the abovementioned decree to which both he and B were parties:—*Held*, that the suit should be dismissed.

Yaramati Krishnayya v. Chundru Papayya 326

2. —————*Suit to set aside decree:*

The plaintiff was a Hindu who, in order to prevent his undivided son from obtaining his share of the family property, made and delivered to the defendant certain promissory notes unsupported by consideration, the agreement between them being that the defendant should obtain a decree on the notes and in execution attach and bring to sale and himself purchase the lands of the family and should hold them at the disposal of the present plaintiff. The suit and the subsequent proceedings in Court were carried on by them collusively, the present plaintiff supplying the necessary funds. The son then sued for his share of the property, and having with the aid of his father (who had meanwhile lost his confidence in the defendant) successfully impeached the sale as collusive, obtained a decree which was executed. It had been agreed that the defendant should hold the land at the disposal of the plaintiff, but he now refused to surrender to him his share. The plaintiff accordingly sued to recover his share of the property and for a declaration that the collusive decree

against him and the subsequent proceedings in execution thereof were not binding on him:—*Held*, that it is not competent to a party to a collusive decree to seek to have it set aside, and that the plaintiff accordingly was not entitled to relief.

Varadarajulu Naidu v. Srinivasulu Naidu 333

3. —————*Fraudulent conveyance—Fraud on creditors—Fraudulent
purpose carried out—Suit by legal representative of the fraudulent transferor
and judgment-debtor to set aside conveyance and restrain execution of decree—
Widow of Hindu transferor:*

A, with the intention of defeating and defrauding his creditors, made and delivered a promissory note to B without consideration and collusively allowed a decree to be obtained against him on the promissory note, and conveyed to B a house in part satisfaction of the decree: and it appeared that certain of A's creditors were consequently induced to remit parts of their claim. A having died, his widow and legal representative, under Hindu Law, now sued B to have the promissory note, and the conveyance set aside, and to have the defendant restrained by injunction from executing the decree:—*Held*, (1) that the plaintiff was not entitled to relief, for A if now alive could not have claimed to have his own fraudulent acts set aside, and the plaintiff was in no better position than he would have been. *Quære*: Whether a widow might successfully maintain a claim for maintenance out of property alienated by her husband without consideration and fraudulently if she herself was no party to the fraud.

Rangammal v. Venkatachari 323

- COMPANIES ACT—ACT VI OF 1882, s. 4—*Unregistered association for gain—Illegal contract:***

The prize winners in a lottery in which more than twenty persons took tickets covenanted with the promoters of the lottery to continue their subscriptions in respect of the successful ticket for two more years in accordance with the arrangement under which the lottery was established. The money not having been paid the promoters brought a suit on the covenant:—*Held*, that there was no association of twenty persons for the purpose of gain or at all, and consequently, that the plaintiffs were not precluded from suing for want of registration under Companies Act, section 4.

Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar. 68

- CONTRACT—*Usage imported as term of a contract—Practice on a particular estate:***

In order that the practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be shown that the practice was known to the person whom it is sought to bind by it, and that he assented to its being a term of the contract: and when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he and all prior assignees (if any) for value knew that the practice was a term of the original contract.

Mana Vikrama v. Rama Patter 274

- CONTRACT ACT—ACT IX OF 1872, s. 23—*Unlawful agreement—Promissory note given in fraud of Insolvency law:***

In a suit on a promissory note it appeared that it had been given by the defendant to the plaintiff in consideration of his withdrawing his threatened opposition to the discharge of an insolvent and consenting to an arrangement among the general body of creditors, who were not though the insolvent was aware of this transaction whereby the plaintiff was to obtain a special advantage:—*Held*, that the contract was unlawful and the suit could not be maintained.

Krishnappa Chetti v. Adimula Mudali 84

2. *Joint promises—Discharge by one of two joint mortgagees :* **ss. 38, 42, 43, 45—Joint promises—Discharge by one of two joint mortgagees :** ... **PAGE**
- The sum due upon a mortgage was paid to one of the two mortgagees, and he gave an acquittance without the knowledge of the other mortgagee who now brought this suit upon the mortgage. It appeared that there was no fraud on the part of the mortgagors and that the mortgagee who received payment was not the agent of the plaintiff in that behalf:—*Held*, that the mortgage had been discharged and the plaintiff was not entitled to sue.
- Barber Maran v. Ramana Goundan* ... **461**
3. *Interest—Suit for money payable under an oral contract :* **s. 73—Interest—Suit for money payable under an oral contract :** ...
- The plaintiff sued to recover a sum of money due to her on an oral contract together with interest. No agreement or usage giving a right to interest was alleged, and no written demand and notice had been given under the Interest Act:—*Held*, that the plaintiff was not entitled to interest.
- Kamalammal v. Peeru Meera Levvai Rowthen* ... **481**
4. *Agency to sell, coupled with interest—Discretion as to price left with agent—Power of principal to impose limits as to price :* **s. 122—Agency to sell, coupled with interest—Discretion as to price left with agent—Power of principal to impose limits as to price :** ...
- The defendant consigned goods to a firm in London for sale, and in respect of each consignment he received an advance from the plaintiff who was the agent of the London firm, and signed a consignment note, which contained the following passage:—"I hereby authorize you to sell the above goods at the best price obtainable without reference to me and I give you full discretion and power to act on my behalf to the best of your judgment in regard to such sale and in all matters connected with the management of this consignment. Should there be any short-fall after realization of the above consignment, I hereby authorize you to draw on me for the amount, and I engage to honour such draft and to pay it on presentation." The plaintiff guaranteed the payment of the redrafts to the London firm on whose account he made the advances to the defendant. Shortfalls having occurred on certain consignments and the London redrafts having been dishonoured, the plaintiff paid them, and now sued to recover the amount from the defendant. It appeared that consignments had been sold at prices less than certain limits which have been fixed by the defendant subsequent to the receipt of the advances and the signature of the consignment notes:—*Held*, that the defendant had no right (regard being had to the terms of the consignment note and the course of dealing between the parties) so to impose limits of price, and that the plaintiff was entitled to recover.
- Kondayya Chetti v. Narasimhulu Chetti* ... **97**

COURT FEES ACT—ACT VII OF 1870, s. 5—Limitation Act—Act XV of 1877, s. 10—Suit between co-trustees—Breach of trust—Objection as to Court fee paid on appeal :

The plaintiffs and defendants, together with one Subbaraya Pai who died in 1884, were trustees of a temple, having been appointed by the committee under Act XX of 1863. For some years before his death Subbaraya Pai was left in exclusive management. Subsequently the defendants were in sole management of the temple until 1891, when the plaintiffs brought the present suit charging that the defendants had excluded them from the right of management, and claiming that they should make good sums lost to the institution by reason of breaches of trust alleged to have been committed by them. Some of the breaches of trust took place before 1884. Of the others, which took place subsequently, some consisted in improper dealings with the temple property to

the detriment of the temple and to the advantage of certain relatives of the defendants. The plaintiffs also asked for an injunction to restrain the defendants from excluding them from management:—*Held*, (1) that in the absence of evidence of an absolute denial by the defendants of the plaintiffs' right to act as trustees, the suit for an injunction was not barred by limitation; (2) that the suit could not be regarded as a suit by the beneficiaries and was not within the operation of Limitation Act, section 10; (3) that the suit was not maintainable in respect of breaches of trust committed in the lifetime of the deceased manager, as being to that extent barred by limitation, and also for the reason that such breaches were not more imputable to the defendants than to the plaintiff; (4) that even if it had been proved that the community interested in the temple had sanctioned the acts of the defendants now complained of, that circumstance would not suffice to excuse the defendants; (5) that the defendants were liable to make good the loss occasioned by any breach of trust committed within six years of the date when the suit was instituted even in the absence of fraud, and that, in estimating such loss, prospective loss should be assessed:—*Held further*, that an objection taken on behalf of respondents at the hearing of an appeal as to the amount of Court-fee stamp affixed to the petition of appeal to the High Court, cannot be entertained.

Ranga Pai v. Baba ... **398**

2. *Civil Procedure Code—Act XIV of 1882, s. 54—Presentation of plaint improperly stamped :* **ss. 6, 28—Civil Procedure Code—Act XIV of 1882, s. 54—Presentation of plaint improperly stamped :** ...

A suit is not instituted, within the meaning of the explanation to section 4 of the Limitation Act, by the presentation of a document purporting to be a plaint, if that document, while not undervaluing the claim, is written on paper that does not bear the proper court-fee.

Venkatramayya v. Krishnayya ... **319**

CRIMINAL PROCEDURE—Criminal trial in Sessions Court—Examination of some of the witnesses bound over—Stopping the trial :

Certain persons were tried in a Sessions Court for the offence of dacoity. Seven witnesses had been examined for the prosecution by the Committing Magistrate and were bound over to give evidence at the trial. After five witnesses have been examined, the Judge asked the jury whether they wished to hear any more evidence, and, on their stating that they did not believe the evidence and wished to stop the case, the Judge recorded a verdict of acquittal:—*Held*, that the procedure adopted was wrong, and that no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to have been arrived at until the two remaining witnesses had been examined.

Queen-Empress v. Ramalingam ... **445**

CRIMINAL PROCEDURE CODE—ACT X OF 1882, s. 11—Sentence imposed in British India postponed till expiry of a sentence imposed in Mysore :

It is competent to a Magistrate in British India to pass a sentence which should take effect after the expiration of a sentence in Mysore.

Queen-Empress v. Venkataram Jetti ... **444**

2. *Breach of Contract—Act XIII of 1859—Warrant :* **s. 83—Breach of Contract—Act XIII of 1859—Warrant :** ...

Criminal Procedure Code, section 83, is applicable to warrants issued under Breach of Contract Act, 1859, and they can be executed outside the jurisdiction of the Court which issued them.

Queen-Empress v. Muthayya ... **457**

3. _____, s. 88—Attachment of property
as of an absconding person—Claim to property attached—Procedure:
When a claim is made to property attached under section 88 of the Code of Criminal Procedure, the Magistrate should stay the sale to give the claimant time to establish his right. If the Magistrate errs, the remedy of the aggrieved party is by civil suit and not by criminal revision petition.
Queen-Empress v. Kandappa Goundan ... 88
4. _____, ss. 157, 168, 173—Occurrence reports—Charge sheets—Right of an accused to copies of, before trial—Public documents—Evidence Act, ss. 74, 76—Right to inspect and have copies:
Held, by the Full Bench (SUBRAMANIA AYYAR, J., *diss.*).—Reports made by a Police officer in compliance with sections 157 and 168 of the Criminal Procedure Code are not public documents within the meaning of section 74 of the Indian Evidence Act, and consequently an accused person is not entitled, before trial, to have copies of such reports:—*Held*, by COLLINS, C.J., and BENSON, J.—The same rule applies to reports made by a Police officer in compliance with section 173 of the Criminal Procedure Code:—*Held*, by SHEPHARD and SUBRAMANIA AYYAR, JJ.—Reports made by a Police officer in compliance with section 173 of the Criminal Procedure Code are public documents within the meaning of section 74 of the Indian Evidence Act, and consequently an accused person, being a person interested in such documents, is entitled by virtue of section 76 of the Indian Evidence Act to have copies of such reports before trial.
Queen-Empress v. Arumugam ... 189
5. _____, s. 195—Sanction to prosecute
—Power of Court to go outside record:
A Magistrate in deciding whether to sanction under Criminal Procedure Code, section 195, a prosecution for giving false evidence has power to hold an enquiry and record other evidence besides that in the case before him, in the course of which the offence is supposed to have been committed.
Queen-Empress v. Motha ... 389
6. _____, ss. 195, 433—Abetment of an offence, Penal Code, s. 109—Sanction to prosecute unnecessary:
Though sanction to prosecute is necessary in cases falling under the sections of the Penal Code set forth in section 195, Criminal Procedure Code, no such sanction is required previous to the prosecution of a person charged with the abetment of such offences.
Queen-Empress v. Abdul Kadar Sheriff Saheb ... 8
7. _____, s. 202—Reference of cases to the Police for enquiry:
A Magistrate can send a case for enquiry by the Police under Criminal Procedure Code, section 202, only when for reasons stated by him he distrusts the truth of the complaint. In cases where the accused is a member of the Police force, it is generally better that the enquiry should be prosecuted by a Magistrate.
Queen-Empress v. Kanappa Pillai ... 387
8. _____, s. 203—Duty of Magistrate to examine witnesses for the complainant:
When a case has not been disposed of under Criminal Procedure Code, section 203, and the complainant's witnesses have been summoned, the

- Magistrate is bound to examine the witnesses tendered by the complainant, and is not entitled to acquit the accused on a consideration of the complainant's statement alone.
Queen-Empress v. Simai Goundan ... 388
9. _____, s. 419—Presentation of appeal
petition by the clerk of the appellants' pleader:
Presentation of an appeal petition by the clerk of the appellants' pleader is equivalent to a presentation by the pleader himself when it is signed by him and he is duly authorised.
Queen-Empress v. Karuppa Udayan ... 87
10. _____, s. 487—Judicial proceedings:
A Magistrate, who has refused to set aside an order sanctioning a prosecution on the charge of perjury, has no jurisdiction under Criminal Procedure Code, section 487, to try the case himself.
Queen-Empress v. Seshadri Ayyangar ... 383
11. _____, s. 488—Maintenance—Adultery:
Adultery on the part of the husband, not being such adultery as would be punishable under Indian Penal Code, may nevertheless constitute sufficient cause for the wife separating from her husband and enable her to claim maintenance under Criminal Procedure Code, section 488.
Gantapalli Appalamma v. Gantapalli Yellayya ... 470
12. _____, s. 488—Maintenance—Sentence of imprisonment on default:
The imprisonment provided by section 488, Criminal Procedure Code, in default of payment of maintenance awarded is not limited to one month. The maximum imprisonment that can be imposed is one month for each month's arrear, and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrear.
Allapichai Ravuthar v. Mohidin Bibi ... 3
- EASEMENTS ACT—ACT V OF 1882, s. 2 (b)—Easement over a well—Customary right to use the well:
No fixed period of enjoyment is laid down by law as necessary to establish a customary right, and a customary right to use a well may exist apart from a dominant heritage.
Palaniandi Tevan v. Puthirangonda Nadan ... 389
- ENFRANCHISEMENT OF INAM LAND—Inam attached to the hereditary office of nattamgar—Enfranchisement of inam lands in favour of two persons—Suit by the holder of the office to recover land:
Inam lands constituting the emolument of the office of nattamgar was enfranchised in favour of the plaintiff and defendant separately. In November 1890 the defendant was informed that a patta for half of the lands would be issued in his name, and it was so issued in the following May. In April 1891 (after the resolution to enfranchise the land was come to) the plaintiff was appointed to be the sole nattamgar and he now sued in 1894 for the cancellation of the enfranchisement patta issued to the defendant, and for the issue of a patta in his own name in respect of the lands comprised therein and for possession of the lands:—*Held*, that the plaintiff was not entitled to the relief sought.
Sankara Subbayyar v. Ramasami Ayyangar ... 454

EVIDENCE ACT, ss. 74, 76—Occurrence reports—Charge sheets—Right of an accused to copies of, before trial—Criminal Procedure Code, ss. 157, 168, 173—Public documents—Right to inspect and have copies :

Held, by the Full Bench (SUBRAMANIA AYYAR, J., *diss.*)—Reports made by a Police officer in compliance with sections 157 and 168 of the Criminal Procedure Code are not public documents within the meaning of section 74 of the Indian Evidence Act, and consequently an accused person is not entitled, before trial, to have copies of such reports :—*Held*, by COLLINS, C.J., and BENSON, J.—The same rule applies to reports made by a Police officer in compliance with section 173 of the Criminal Procedure Code :—*Held*, by SHEPARD and SUBRAMANIA AYYAR, J.J.—Reports made by a Police officer in compliance with section 173 of the Criminal Procedure Code are public documents within the meaning of section 74 of the Indian Evidence Act, and consequently as accused person, being a person interested in such documents, is entitled by virtue of section 76 of the Indian Evidence Act to have copies of such reports before trial.

Queen-Empress v. Arumugam 189

EXECUTION—Receiver—Moneys collected by receiver in execution of decree misappropriated by him—Discharge of judgment-debtor :

In execution of a decree a receiver was appointed to collect certain rents due to the judgment-debtor. Some of the judgment-debtor's tenants paid the rents due by them into the hands of the receiver, but the receiver did not pay the money into Court :—*Held*, per SHEPARD, J., that the payment by the tenants to the receiver did not *pro tanto* discharge the judgment-debtor from liability under the decree :—*Held*, per DAVIES, J., that payment by the tenants to the receiver *pro tanto* discharged the judgment-debtor from liability under the decree.

Muthia Chetti v. Orr 224

FOREIGN JUDGMENT—Suit on a foreign judgment—Jurisdiction of foreign Court—Residence of defendant—Constructive residence :

The plaintiff having obtained against defendant a judgment in the District Court of Kandy now sued in British India to enforce it. It appeared that the defendant was domiciled and ordinarily resident in British India and that he had not appeared to defend the suit at Kandy and was not at the date of that suit or subsequently even temporarily resident in Ceylon : but he was a partner in a firm which carried out business at Kandy, and he was interested in lands at that place which he had visited once or twice :—*Held*, that the Court at Kandy had no jurisdiction over the defendant.

Nallakaruppa Settiar v. Mahomed Iburaam Sahab 112

FOREST ACT—ACT V OF 1882 (MADRAS), ss. 10, 11—Claim to uninterrupted flow of natural stream—Jurisdiction of Forest Settlement-officer :

A Forest Settlement-officer appointed under section 4 of the Madras Forest Act, 1882, has, under sections 10 and 11 of that Act, jurisdiction to decide a claim by a riparian owner to the uninterrupted flow of the water of a natural stream.

Sangili Veera Pandia Chinna Tambiar v. Sundaram Ayyar 279

FRAUDULENT CONVEYANCE—Collusive decrees—Fraud on creditors—Fraudulent purpose carried out—Suit by legal representative of the fraudulent transferor and judgment-debtor to set aside conveyance and restrain execution of decree—Widow of Hindu transferor :

A, with the intention of defeating and defrauding his creditors, made and delivered a promissory note to B without consideration, and collusively allowed a decree to be obtained against him on the promissory note, and

conveyed to B a house in part satisfaction of the decree : and it appeared that certain of A's creditors were consequently induced to remit parts of their claim. A having died, his widow and legal representative, under Hindu Law, now sued B to have the promissory note, and the conveyance set aside, and to have the defendant restrained by injunction from executing the decree :—*Held*, that the plaintiff was not entitled to relief, for A if now alive could not have claimed to have his own fraudulent acts set aside, and the plaintiff was in no better position than he would have been. *Quære* : Whether a widow might successfully maintain a claim for maintenance out of property alienated by her husband without consideration and fraudulently if she herself was no party to the fraud.

Rangammal v. Venkatachari 323

2. ———— **Fraud on creditors**—Sham sale-deed to defeat creditors—Collusive decrees—Suit to declare title of fraudulent transferor in possession :

A executed a sale-deed of his land to B. An attachment placed on the land was raised at the instance of B as vendee. The attaching creditor sued impeaching the transfer as collusive ; but finally consented to a decree upholding the title of B who then applied to be registered as owner in the place of A. A, who remained in possession throughout, resisted the application, and now sued B for a declaration that he was entitled to remain on the register as owner. It was alleged and proved that the apparent sale-deed was a sham, and had been executed for no consideration with intent to defraud the plaintiff's creditors, and that the plaintiff had paid the attaching creditor to consent to the above mentioned decree to which both he and B were parties :—*Held*, that the suit should be dismissed.

Yaramati Krishnayya v. Chundru Papayya 326

HINDU LAW—Conditional contract to sell family lands—Birth of vendor's son before fulfilment of condition :

A Hindu entered into a contract to sell certain land, being family property, of which he was not in possession as soon as possession should be obtained. Before possession was obtained a son was born to him. A decree for specific performance was passed and executed against him, the son not being brought on to the record. In a suit by the son for partition of the property in question :—*Held*, that the plaintiff had an existing right in the property which was not bound by the decree and the subsequent proceedings, and that he was entitled to the relief sought. *Semble* : that a contract for sale of land made by a Hindu before a son is born to him is not binding on the son born before the transfer of the property takes place.

Ponnambala Pillai v. Sundarappayyar 354

2. ———— **Impartible estate**—Power of testamentary disposition—Will, construction of—Misdescription of legatee :

The holder of an impartible estate may alienate it by will to the same extent that he may alienate it by gift *inter vivos*. A testator made a bequest to "A B my avurasa son," knowing that A B was not his avurasa son :—*Held*, that the misdescription was immaterial and that A B took the bequest.

The Court of Wards v. Venkata Surya Mahipati Ramakrishna Rau 167

3. ———— **Will by a Hindu**—Construction of—Gift to daughter—Daughters' estate :

A Hindu by will bequeathed to his daughters his separate property to be enjoyed by them 'as they pleased' :—*Held*, that the daughters took an absolute estate.

Kamarazu v. Venkataratnam 293

4. ———— *Impartibility not established—Possession of one member of joint family at a time—What constitutes partition:*

A zamindari granted by the Government in 1803 to a Hindu, descended in his family, possession being held by one member at a time. The estate, however, was not impartible. But whether it was, or was not, impartible was adjudged immaterial to the question raised on this appeal. The last zamindar having died without issue in 1888, his widow was in possession when this suit was brought by a male collateral descended from a great grandfather common to him and to the last zamindar. The plaintiff claimed to establish his right as member of an undivided family holding joint property against the widow who alleged that her husband had been sole proprietor. In proof of this she relied on certain arrangements as having constituted partition, viz., that in 1816, two brothers, then heirs, agreed that the elder should hold possession, and that the younger should accept a village, appropriated to him for maintenance in satisfaction of his claim to inherit: again, that in 1866, the fourth zamindar compromised a suit brought against him by his sister for her inheritance, on payment of a stipend to her, having already, on the claim of his brother, granted to him two villages of the estate; and, by the compromise, this was made conditional on the sister's claim being settled: again, that in 1871, the fourth zamindar having died pending a suit brought against him to establish the fact of an adoption by him, an arrangement was made for the maintenance of his daughter, and two widows, who survived him, the previous grant for maintenance of his brother holding good, the adoption being admitted, and the suit compromised:—*Held*, that there was nothing in the above which was inconsistent with the zamindari remaining part of the common family property; and that the course of the inheritance had not been altered:—*Held*, also, that the claimant was not precluded by the family compromise of 1871, or in any way, from maintaining this suit, and that it was not barred by limitation.

Sri Raja Viravara Thodhramal Rajya Lakshmi Devi v. Sri Raja Viravara Thodhramal Surya Narayana Dhatrazu ... 256

5. ———— *Law of succession—Limitation Act—Act XV of 1877, sched. II, art. 141—Suit by reversioner on the death of female heir—adverse possession:*

A Hindu died in 1880, leaving him surviving (1) a daughter who died in 1886, who was the grandmother of one of the plaintiffs, and (2) the son of a predeceased daughter who was another plaintiff, and (3) the widow of a predeceased son who was the defendant. The plaintiffs now sued in 1893 to recover possession of his land, of which the defendant had been in possession since his death:—*Held*, that the suit was not barred by limitation and that the plaintiffs were entitled to a decree.

Venkataramayya v. Venkatalakshamma ... 493

6. ———— *Marriage—Prohibited degrees:*

A marriage between a Hindu and the daughter of his wife's sister is valid.

Ragavendra Rau v. Jayaram Rau ... 283

7. ———— *Obstructed inheritance—Inheritance passing to daughter's son—Survivorship—Presumption of joint property:*

The daughter's sons of a deceased Hindu take the property of their maternal grandfather as an inheritance liable to obstruction and consequently take it without rights of survivorship *inter se*: Where property enjoyed in common by persons capable of forming a joint Hindu family was in its origin separate property, there is no presumption that such property has subsequently become joint property. *Muttayan Chetti v. Sivagiri Zamindar* (I.L.R., 3 Mad., 370) and *Sivaganga Zamindar v. Lakshmana* (I.L.R., 9 Mad., 188) doubted.

Sri Raja Chelikani Venkataramanayamma Garu v. Appa Rau Bahadur Garu. 207

8. ———— *Partition of land between widow and mother of the last male owner—widow's right on death of mother:*

The widow and mother of a land-owner, who died without issue, divided his land between them in 1869. The mother sold her share of the land in 1870, and died in 1890. The widow now sued in 1893 to recover the property from the vendee:—*Held*, that the suit was not barred by limitation and the plaintiff was entitled to recover.

Parvathi Ammal v. Sundara Mudali ... 459

9. ———— *Partition—Subsequent acquisitions—After-born son—Right to partition:*

A Hindu having two sons divided his property between them, reserving no share for himself. A third son was subsequently born who now sued for a partition of the property which had been divided and other property subsequently acquired by his brothers by means of its proceeds:—*Held*, that the plaintiff was entitled to the relief claimed.

Chengama Nayudu v. Munisami Nayudu ... 75

10. ———— *Partition—Arbitration—Suit to enforce the award with an alternative claim for partition—Whether such suit maintainable:*

Disputes between the members of a Hindu family were referred to arbitrators who made an award as to how the whole of the property should be divided. In pursuance of the award part of the movable property was divided. Subsequently one of the members of the family died. The plaintiff, another member of the family, now sued to enforce the award or in the alternative for partition:—*Held*, (1) that the alternative claim for partition, was barred by the award; (2) that the provisions of Civil Procedure Code, section 525, did not preclude the plaintiff from suing to enforce the award; (3) that the partition should be considered to have taken effect from the date of the award and consequently that the share allotted to the deceased member of the family passed to his heir.

Subbaraya Chetti v. Sadasiva Chetti ... 490

11. ———— *Po-Brahman—Alienation by widow for religious purposes—'Res judicata'—Decision on title in proceedings under Land Acquisition Act, 1870:*

When a Po-Brahman receives a salary for the performance of his duties, a gift to him by the widow of the person, whose exequial rites he has been appointed to perform to reward him for having performed any of those exequial rites is not a gift binding on the reversioners. In proceedings under the Land Acquisition Act, 1870, to apportion the compensation payable, a decision by the Judge on a question of title does not operate as *res judicata* between the parties to those proceedings.

Mahadevi v. Neelamani ... 269

12. ———— *Succession—Reversionary rights—Sister's grandson—Maternal uncle's son:*

The plaintiff sued as the nearest reversionary heir of one Vasudeva deceased to obtain a declaration that certain alienations made by the widow (who was defendant No. 1) in favour of defendant No. 2 was not binding on the reversion. Defendant No. 3 was the son of Vasudeva's sister's son, and was joined in the suit, because he claimed to be a nearer heir than the plaintiff who was the son of Vasudeva's maternal uncle:—*Held*, that both the plaintiff and defendant No. 3 were *athma bandhus* of the deceased, but defendant No. 3 was the nearer reversionary heir.

Balusami Pandithar v. Narayana Rau ... 342

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13. ———— <i>Suit by a purchaser from a coparcener—Decree for share of coparcener in specific property :</i>	
In a suit to recover possession of property purchased by the plaintiff, if it is found that the property is not the separate property of the plaintiff's vendor, but belongs to the joint family of which plaintiff's vendor is a member, the plaintiff is not entitled to a decree for his vendor's share in that property and the suit must be dismissed.	
<i>Palani Koman v. Masakonon</i>	248
INSOLVENCY—Insolvent—Vesting order—Subsequent attachment—Dismissal of insolvency petition—Creditors' trustees :	
A judgment-debtor was declared an insolvent by the Court for the Relief of Insolvent Debtors, Madras, and a vesting order was made. Part of his property was subsequently attached in execution of a decree. Afterwards, his petition in insolvency was dismissed and the vesting order discharged. On the same date a creditor's trust deed was executed, of which the plaintiffs were the trustees. They now sued to set aside the proceedings in execution and to cancel the sale of the property which had been sold in execution after the date of the trust deed:— <i>Held</i> , that the suit was not maintainable.	
<i>Ramasami Kottadiar v. Murugesu Mudali</i>	452
INTEREST—Interest—Suit for money payable under an oral contract :	
The plaintiff sued to recover a sum of money due to her on an oral contract together with interest. No agreement or usage giving a right to interest was alleged, and no written demand and notice had been given under the Interest Act:— <i>Held</i> , that the plaintiff was not entitled to interest.	
<i>Kamalammal v. Peeru Meera Levvai Rowthen</i>	481
INTEREST 'POST DIEM'—Mortgage—Limitation :	
A mortgagee is entitled to interest <i>post diem</i> , if there is nothing in the document to indicate that the parties did not intend that interest should be paid after the due date.	
<i>Nityananda Patnayudu v. Sri Radha Cherana Deo</i>	371
KARNAMS IN A PERMANENTLY-SETTLED ESTATE—Regulation XXV of 1802, ss. 8, 11—Regulation XXIX of 1802, s. 5—Right to dismiss a karnam—Delegation of such right to lessees of zamindari—Damages accrued by a karnam's neglect of a statutory duty :	
The lessees of a zamindari are not entitled to sue for the removal of a karnam from office, though their lease contains a provision purporting to authorise them to appoint and remove karnams, but if they suffer any loss from the karnam's neglect of his statutory duty, they are entitled to bring an action for damages against him.	
<i>Kumarasami Pillai v. Orr</i>	145
LANDLORD AND TENANT—Zamindar and Raiyat—Relation between :	
A raiyat cultivating land in a permanently-settled estate is <i>prima facie</i> not a mere tenant from year to year, but the owner of the kudivaram right in the land he cultivates.	
<i>Venkatanarasimha Naidu v. Dandamudi Kotayya</i>	209
LEGAL PRACTITIONERS ACT—ACT XVIII OF 1879, s. 28—Oral agreement for pleader's remuneration—Criminal proceedings—'Quantum meruit' :	
A pleader was retained by an accused person to conduct his defence. The accused did not pay the agreed fee, and the plaintiff whereupon declined to conduct his defence. The defendant, who was one of the accused, then	

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undertook orally to pay the fee, but failed to do so after the plaintiff had conducted the defence of both accused persons. The plaintiff now sued the defendant to recover the agreed amount:— <i>Held</i> , that under Legal Practitioners Act, section 28, the plaintiff was not entitled to recover on the contract, but that he was entitled to recover reasonable remuneration for the services rendered by him.	
<i>Narasimma Chariar v. Sinnavan</i>	365
LETTERS PATENT, s. 15—Appeal under Letters Patent—Civil Procedure Code, s. 588—Powers of Appellate Court under s. 588 :	
A Judge of the High Court when hearing an appeal under Civil Procedure Code, Section 588, against an erroneous order of remand under section 562 may, if he thinks fit, pass a final decree in the suit instead of merely remanding the suit to the Lower Appellate Court. No appeal lies against such decree under Letters Patent, section 15.	
<i>Sankaran v. Raman Kutti</i>	152
2. ————, s. 15—Civil Procedure Code—Act XIV of 1882, s. 588 :	
A District Munsif having dismissed a suit on a preliminary point, the District Court on appeal made an order remanding it to him to be disposed of on the merits. Against this order an appeal was preferred to the High Court, which came on for disposal before a single Judge, who delivered judgment dismissing it:— <i>Held</i> , that no appeal lay under Letters Patent, section 15, against his judgment.	
<i>Vasudeva Upadyaya v. Visvaraja Thirthasami</i>	407
LIMITATION—Adverse possession—Rent Recovery Act (Madras)—Act VIII of 1865—Omission by inamdar to obtain registration of title under Regulation XXVI of 1802—Effect of — :	
An inamdar had not obtained registration of his title under the registered landlord, and could not therefore sue to enforce acceptance of pattas, and had not collected rent from the tenants for more than 12 years:— <i>Held</i> , that the tenants had not by reason of these facts acquired rights against the inamdar by adverse possession.	
<i>Srinivasaragava Ayyangar v. Muttusami Padayachi</i>	6
LIMITATION ACT—ACT XV OF 1877, s. 4—Gazetted holiday—Computation of time :	
In calculating the time allowed by law for the presentation of an appeal to a District Court, an appellant is entitled to deduct the last day being a gazetted holiday, although the District Judge held his Court on that day.	
<i>Boyamma v. Balajee Rau</i>	469
2. ————, s. 5—Suit under s. 77 of Registration Act—Act III of 1877—Applicability of Limitation Act, s. 5—Filing of suit on re-opening of Court :	
When the period of limitation, prescribed by section 77 of the Indian Registration Act, 1877, for suits brought under that section, expires on a day when the Court is closed, section 5 of the Indian Limitation Act, 1877, does not apply, and the suit, if instituted on the day that the Court re-opens, is barred.	
<i>Appa Rau Sanayi Aswa Rau v. Krishnamurthi</i>	249
3. ————, ss. 6, 12—Rent Recovery Act—Act VIII of 1865 (Madras), ss. 18, 69—Deduction of time occupied in obtaining copy of judgment appealed against :	
A tenant whose property had been distrained for arrears of rent sued under Rent Recovery Act, section 18, by way of appeal against the distraint. The Revenue Court decided in his favour. The landlord preferred an	

appeal under section 69 more than thirty days after the date when the decision was pronounced. He claimed that the time occupied in procuring a copy of the judgment appealed against should be deducted in the computation of the thirty days' period of limitation:—*Held*, that the appellant was not entitled to have the deduction made, and that the appeal was barred by limitation.

Kumara Akkappa Nayanam Bahadur v. Sithala Naidu ... 476

4. —————, s. 10—*Suit between co-trustees—Breach of trust—Court Fees Act—Act VIII of 1870, s. 5—Objection as to Court fee paid on appeal:*

The plaintiffs and defendants, together with one Subbaraya Pai who died in 1884, were trustees of a temple, having been appointed by the committee under Act XX of 1863. For some years before his death Subbaraya Pai was left in exclusive management. Subsequently the defendants were in sole management of the temple until 1891, when the plaintiffs brought the present suit charging that the defendants had excluded them from the right of management, and claiming that they should make good sums lost to the institution by reason of breaches of trust alleged to have been committed by them. Some of the breaches of trust took place before 1884. Of the others, which took place subsequently, some consisted in improper dealings with the temple property to the detriment of the temple and to the advantage of certain relatives of the defendants. The plaintiffs also asked for an injunction to restrain the defendants from excluding them from management:—*Held*, (1) that in the absence of evidence of an absolute denial by the defendants of the plaintiffs' right to act as trustees, the suit for an injunction was not barred by limitation; (2) that the suit could not be regarded as a suit by the beneficiaries and was not within the operation of Limitation Act, section 10; (3) that the suit was not maintainable in respect of breaches of trust committed in the lifetime of the deceased manager, as being to that extent barred by limitation, and also for the reason that such breaches were not more imputable to the defendants than to the plaintiffs; (4) that even if it had been proved that the community interested in the temple had sanctioned the acts of the defendants now complained of, that circumstance would not suffice to excuse the defendants; (5) that the defendants were liable to make good the loss occasioned by any breach of trust committed within six years of the date when the suit was instituted even in the absence of fraud, and that in estimating such loss prospective loss should be assessed:—*Held further*, that an objection taken on behalf of respondents at the hearing of an appeal as to the amount of Court-fee stamp affixed to the petition of appeal to the High Court cannot be entertained.

Ranga Pai v. Baba ... 398

5. —————, s. 14—*Cause of like nature—Misjoinder of causes of action—Want of leave under Civil Procedure Code, s. 44:*

In March 1891 the plaintiff sued the defendant to recover the sum of money due on the taking of an account between the plaintiff and the defendant, who was his agent, and to recover possession of certain land. The plaintiff did not obtain leave under Civil Procedure Code, section 44, for the institution of this suit which was accordingly dismissed for misjoinder of causes of action. The plaintiff now instituted on 5th April 1893 two suits, the one for the money and the other for the land:—*Held*, that the plaintiff was entitled under Limitation Act, section 14, to have the time occupied in the previous proceedings deducted in the computation of the period of limitation applicable to his suit for money which accordingly was not barred by limitation.

Venkiti Nayak v. Murugappa Chetti ... 48

6. —————, s. 19—*Acknowledgment—Deposition signed by the debtor:*

To satisfy the requirements of section 19 of the Limitation Act, an acknowledgment of a debt must amount to an acknowledgment that the

debt is due at the time when the acknowledgment is made. A record made by a Judge of the evidence given by a debtor as a witness at the trial of a suit and signed by the debtor is a writing signed by the debtor within the meaning of section 19 of the Limitation Act.

Periavenkan Udaya Tevar v. Subramanian Chetti ... 239

7. —————, s. 28, sched. II, art. 10—*Civil Procedure Code—Act XIV of 1882, s. 214—Right of pre-emption asserted by one in possession under an otti mortgage in Malabar:*

Land in Malabar was in the possession of the defendants, and was held by them as otti mortgages under instruments executed in August 1873 and January 1876. The plaintiff having purchased the jenm right under instruments executed and registered in May and June 1877, now sued in 1893 for redemption:—*Held*, that the defendants' right of pre-emption was not extinguished under Limitation Act, section 28, and that they were not precluded from asserting it by article 10 owing to the lapse of time, and that Civil Procedure Code, section 214, was inapplicable to the case, because the persons asserting a right of pre-emption were in possession.

Krishna Menon v. Kesavan ... 805

8. —————, sched. II, art. 12(a)—*Dispossession:*

Limitation Act, schedule II, article 12 (a), is not applicable to a case in which dispossession is the cause of action and in which the plaintiff was not a party to, or bound by, the sale:—*Held*, accordingly, that a suit brought in 1892 to recover possession of the plaintiff's share of land sold by mistake in execution of a decree against his uncle in 1881, was not barred by limitation.

Kadar Hussain v. Hussain Sahab ... 118

9. —————, art. 12—*Rent Recovery Act—Act VIII of 1865 (Madras), ss. 38, 39, 40—Limitation Act—Act XV of 1877, art. 12:*

Where a plaintiff sued to recover land alleged to have been sold under the provisions of the Rent Recovery Act, alleging that the provisions of section 7 of that Act had not been complied with and that therefore the sale was illegal:—*Held*, that the suit could not proceed without setting aside the sale and that the sale having taken place more than a year before the institution of the suit, the suit was barred.

Ragavendra Ayyar v. Karuppa Goundan ... 83

10. —————, arts. 61, 99, 120—*Decree for rent against tenants jointly—Execution against one defendant—Suit by him for contribution:*

The holder of a zamindari village obtained a decree jointly against sixty-eight persons, including the present plaintiff and defendants, for Rs. 4,100 being rent accrued due on lands in the village and in execution he brought to sale property of the plaintiff and on 28th October 1889 he received out of the sale-proceeds, Rs. 2,650. The share payable by the plaintiff was Rs. 183-10-10 only, and he instituted the present suit against the defendants on 28th October 1892 to recover the amounts which they were liable to contribute:—*Held*, that Limitation Act, schedule II, article 99, did not govern the case and that whether article 61 or article 120 was applicable, the suit was not barred by limitation.

Pattabhiramayya Naidu v. Ramayya Naidu ... 23

11. —————, art. 118—*Suit for possession by Hindu widow as heiress—Defendant in possession under an alleged adoption—Limitation:*

A Hindu died in 1884, leaving the plaintiff, his widow, and certain landed and other properties. The defendant claimed, to the knowledge of the plaintiff in 1885, to have been adopted by the deceased, and from that

date he had claimed as an adopted son to be entitled to the estate of which the plaintiff never enjoyed possession. She now sued in 1893 for possession with mesne profits alleging in the plaint that the adoption had been falsely set up, but seeking no declaration with regard to it :—*Held*, that the suit was barred by limitation.

Parvathi Ammal v. Saminatha Gurukul 40

12. ————, art. 132—*Limitation—Hypothecation bond for payment on certain date—On default in payment of interest whole amount payable on demand—Meaning of “payable on demand”* :

When a hypothecation bond provided for the repayment of the principal sum on a certain date with interest in the meantime payable monthly, and further provided that, on default in payment of interest, the principal and interest should become payable on demand :—*Held*, that the period of limitation prescribed by article 132 of the Limitation Act began to run from the date of the default. *Hanmantram Sadhuram Pity v. Bowles* (I.L.R., 8 Bom., 561) and *Ball v. Stowell* (I.L.R., 2 All., 322) distinguished.

Perumal Ayyan v. Alagirisami Bhagavathar 245

13. ————, art. 141—*Suit by reversioner on the death of female heir—Adverse possession—Hindu Law—Law of succession* :

A Hindu died in 1880, leaving him surviving (1) a daughter who died in 1886, who was the grandmother of one of the plaintiffs, and (2) the son of a predeceased daughter who was another plaintiff, and (3) the widow of a predeceased son who was the defendant. The plaintiffs now sued in 1893 to recover possession of his land, of which the defendant had been in possession since his death :—*Held*, that the suit was not barred by limitation and that the plaintiffs were entitled to a decree.

Venkataramayya v. Venkatalakshamma 493

14. ————, art. 179—*Application for restitution—Period of limitation—Fraud—Civil Procedure Code, s. 583* :

Applications made to obtain restitution under a decree in accordance with Civil Procedure Code, section 583, are proceedings in execution of that decree and are governed by Limitation Act, schedule II, article 179.

Venkayya v. Ragavacharlu 448

- LOCAL BOARDS ACT—ACT V OF 1884 (MADRAS), s. 87, clause 3—*Government stores—Equipages* :

Stores and carts belonging to the Government jails come within the words ‘Government Stores and Equipages’ in clause 3, section 87, Act V of 1884, and are free from tolls under that Act.

Queen-Empress v. Kutti Ali 16

- MALABAR COMPENSATION FOR TENANTS’ IMPROVEMENTS ACT—Act I of 1887 (Madras), ss. 6 (c), 7—*Tenant’s agreement in 1890 not to claim compensation for improvements already made—Reduction of rent—Claim to make deduction from the value of improvements on account of reduction of rent* :

In an ejectment suit relating to agricultural property in Malabar, it appeared that the tenant was in possession under an agreement executed in 1890, in which it was recited that the tenant’s father had been let into possession thirty years previously at a certain rate of rent and had made improvements on the land, and the defendant agreed to hold at a lower rate of rent, and not to demand compensation for the previous improvements. The plaintiff relied on the last-mentioned provisions of the agreement which admittedly related to improvements made since January 1886 :—*Held*, that the provisions relied on by the plaintiff were invalid

under Malabar Compensation for Tenants’ Improvements Act, 1887, section 12 :—*Held*, also per SUBRAMANIA AYYAR, J. (DAVIES, J., diss.), that there was no reduction of rent or other advantage given by the landlord to the tenant within the meaning of section 6 (c), and accordingly that the plaintiff was entitled to evict only on payment of the value of improvements free from any deduction.

Uthunganakath Avuthela v. Thazhatharayil Kunhali 435

- MALABAR KANOM—*Mortgage—Redemption—Improvements—Depreciation of, between decree and date of redemption* :

A decree for the redemption of a kanom in Malabar was passed in December 1894, when there were on the land improvements in the form of trees, &c., to the value of Rs. 1,429. Within the six months limited by the decree for redemption the mortgagor applied for execution, and it appeared that the value of improvements had diminished by the loss of trees to the value of Rs. 157. The loss was the result of want of water and was not attributable to neglect on the part of the mortgagee :—*Held*, that the loss should fall on the mortgagee.

Krishna Patter v. Srinivasa Patter 124

- MALABAR LAW—*Adoption by the Karnavan of a Marumakkatayam tarwad—Want of consent by the rest of the tarwad—Civil Procedure Code, s. 365—Legal representative* :

A tarwad in Malabar subject to Marumakkatayam Law was reduced in number to two persons, viz., the karnavan and his younger brother the plaintiff. They quarrelled, and the former without the consent of the latter adopted as members of the tarwad his son and daughter and her children. On his death the plaintiff sued for possession of the tarwad property and for a declaration that the adoptions were invalid :—*Held*, that the plaintiff was entitled to the relief asked for. After an appeal was presented by plaintiff, who had obtained a decree for possession but no other relief, he died leaving a will making certain dispositions of the property to which he was solely entitled on the assumption that the adoptions in question were invalid, and his executor was admitted as his legal representative for prosecuting the appeal.

Payyath Namu Menon v. Thiruthupalli Raman Menon 51

2. ————*Decree against karnavan vinding on tarwad* :

A decree in a suit in which the karnavan of a Numbudri illom or a Marumakkatayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends is binding on the other members of the family not actually made parties.

Vasudevan v. Sankaran 129

- MORTGAGE—*Covenant to pay interest—Interest ‘post diem’* :

In a suit on a mortgage, it appeared that the instrument sued on was executed to secure a sum of money arrived at by calculating interest on sums previously due by the mortgagors, and it was expressed to be for securing the payment of that principal, together with interest as it might accrue annually. There was also a provision for compound interest. The principal was payable on 14th July 1886, and there was no express stipulation to pay interest after that date :—*Held*, that the mortgagees were entitled to interest for the subsequent period.

Pedda Subbaraya Chetti v. Ganga Razulungaru 140

2. ————*Decree on first mortgage, a puisne mortgagee not being joined—Purchase of mortgaged property by decree-holder for inadequate price—Right of puisne mortgagee—Improvements—Interest* :

A mortgaged land to B and then to C. B sued on his mortgage and obtained a decree for sale without joining as defendant C, of whose mortgage he had notice. D, the son of the decree-holder, became the purchaser

in execution and improved the land at a considerable cost. C now sued the sons and representatives of A and B (both deceased) on his mortgage and sought a decree for sale :—*Held*, (1) that the plaintiff was entitled to a decree for sale subject to the right of the representatives of B, if the purchaser did not elect to redeem; (2) that the purchaser was not entitled to allowances for improvements; (3) that the plaintiff was entitled to interest at the agreed rate to the date of decree.

Rangayya Othettiar v. Parthasarathi Naickar ... 120

3. ————Interest 'post diem'—Limitation :

A mortgagee is entitled to interest *post diem*, if there is nothing in the document to indicate that the parties did not intend that interest should be paid after the due date.

Nityananda Patnayudu v. Sri Radha Cherana Deo ... 371

4. ————Malabar Kanom—Redemption—Improvements—Depreciation of, between decree and date of redemption :

A decree for the redemption of a kanom in Malabar was passed in December 1894, when there were on the land improvements in the form of trees, &c., to the value of Rs. 1,429. Within the six months limited by the decree for redemption the mortgagor applied for execution, and it appeared that the value of improvements had diminished by the loss of trees to the value of Rs. 157. The loss was the result of want of water and was not attributable to neglect on the part of the mortgagee :—*Held*, that the loss should fall on the mortgagee.

Krishna Patter v. Srinivasa Patter ... 124

5. ————Priority—Merger of former mortgage in decree—Right of subsequent mortgagee to keep the prior incumbrance alive :

Where there is a subsisting prior incumbrance and a subsequent mortgagee advances money for the purpose of discharging it, but it is for his benefit still to keep it alive, his right to keep it alive is not affected by the fact that the prior incumbrance had at the time taken the form of a decree. *Adams v. Angell* (L.R., 5 Ch. D., 645) followed.

Purnamal Chund v. Venkata Subbarayalu ... 486

MORTGAGE TO A CO-OWNER—Suit to redeem—Right of one or more co-owners to redeem in absence of partition :

When several owners of undivided shares in immovable property mortgage their share with possession to another undivided sharer, a smaller number than the whole body of co-mortgagors cannot sue to redeem the whole mortgage until there has been a partition of the property mortgaged among the several co-owners. *Mamu v. Kuttu* (I.L.R., 6 Mad., 61) followed; *Naro Hari Bhava v. Vithalbhat* (I.L.R., 10 Bom., 648) distinguished.

Thillai Chetti v. Ramanatha Ayyan ... 295

PARTNERSHIP ACCOUNTS—Civil Procedure Code—Act XIV of 1882, s. 215—Decree for account of dissolved partnership—Taking of accounts :

In a suit for an account of a dissolved partnership, a decree should be passed under Civil Procedure Code, section 215, in accordance with form No. 132 in schedule IV; and it should direct an account to be taken of the dealings and transactions between the parties of the credits property and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the outstanding debts and effects. Observations on the procedure to be adopted and the burden of proof on the taking of the account.

Thirukumaresan Chetti v. Subbaraya Chetti ... 313

PENAL CODE, s. 174—Non-attendance in obedience to an order of a public servant—Absence of public servant :

The offence contemplated by section 174, Penal Code, is an omission to appear at a particular time and at a particular place before a specified public functionary. Where, therefore, the public servant was absent on the date fixed in a summons :—*Held*, that the person summoned could not be convicted under this section, though he failed to attend, having the intention to disobey the summons.

Queen-Empress v. Krishappa ... 31

2. ————, s. 188—Local Boards Act—Act V of 1884 (Madras), ss. 98, 100—Disobedience to notice :

The President of a Local Board, acting under Act V of 1884, issued a notice calling upon a person to remove certain encroachments on a public road within ten days :—*Held*, that such a notice was not an order within the meaning of section 188, Indian Penal Code, and a person neglecting to obey it could not be convicted under that section.

Queen-Empress v. Subramanian ... 1

3. ————, s. 211—False charge of dacoity made to a Police Station-house officer :

A false charge of dacoity was made to a Police Station-house officer, who, after some investigation, referred it to the Magistrate as false, and the Magistrate ordered the charge to be dismissed without taking any action against the parties implicated. The person who preferred the charge was now tried under Penal Code, section 211, and was found to have acted with the intent and the knowledge therein mentioned, and he was convicted and sentenced to four years' rigorous imprisonment :—*Held*, that the prisoner had instituted criminal proceedings within the meaning of that section, and that the conviction and sentence were in accordance with law.

Queen-Empress v. Nanjunda Rau ... 79

4. ————, ss. 268, 283—Encroachment on public highway—Public nuisance :

Whoever appropriates any part of a street by building over it infringes the right of the public *quoad* the part built over, and thereby commits an offence punishable under Penal Code, section 290, if not one punishable under section 283.

Queen-Empress v. Vvappa Chetti ... 433

PRE-EMPTION—Limitation Act—Act XV of 1877, s. 28, sched. II, art. 10—Civil Procedure Code—Act XIV of 1882, s. 214—Right of pre-emption asserted by one in possession under an *otti* mortgage in Malabar :

Land in Malabar was in the possession of the defendants and was held by them as *otti* mortgagees under instruments executed in August 1873 and January 1876. The plaintiff having purchased the *jenm* right under instruments executed and registered in May and June 1877, now sued in 1893 for redemption :—*Held*, that the defendant's right of pre-emption was not extinguished under Limitation Act, section 28, and that they were not precluded from asserting it by article 10 owing to the lapse of time, and that Civil Procedure Code, section 214, was inapplicable to the case, because the persons asserting a right of pre-emption were in possession.

Krishna Menon v. Kesavan ... 305

PRESIDENCY SMALL CAUSE COURTS ACT—ACT XV OF 1882, ss. 37, 38, 69—Stating case on application for a new trial :

When, upon an application to the Presidency Small Cause Court for a new trial, the Judges differ in their opinion as to any question of law and

the majority without ordering a new trial reverse the decree of the Judge who tried the suit, the Court is bound to state a case for the opinion of the High Court under section 69 of the Presidency Small Cause Courts Act.

Seshammal v. Munusami Mudali ... 358

PRIVY COUNCIL PRACTICE—Preparation of the copy of the record—Papers to be omitted:

In a suit in which the Original Court had framed and decided several issues, the High Court on appeal confined their decision to the questions which, in their opinion, governed the case, leaving other issues undecided as not affecting the result after the decision to which they had come. Afterwards the suit was admitted to appeal in conformity with section 603, Code of Civil Procedure. In the preparation of the printed copy of the record the question arose whether the copy should be made of the whole record, or of only so much of it as was material to the correctness of the High Court's decision. Their Lordships directed that only so much of the original record as bore upon, and was material to the questions decided by the High Court, and the subject of the appeal, should be printed in the copy.

Rajah Rao Venkata Suriya Mahipati Ram Krishna Rao Bahadur v. Court of Wards ... 395

PROVINCIAL SMALL CAUSE COURTS ACT—ACT IX OF 1887, Sched. I, art. 38
—Suit for arrears of maintenance:

A suit for arrears of maintenance payable under a written agreement does not lie in a Provincial Small Cause Court.

Saminatha Ayyan v. Mangalathanmal ... 29

2. Procedure Code, s. 470—Inter-pleader suit—Claim for compensation awarded under Land Acquisition Act:

Land having been compulsorily acquired under Land Acquisition Act for the purpose of the East Coast Railway, the compensation was fixed at Rs. 468. A conflict having arisen as to the right to receive the compensation, and the District Court having declined to determine it under Land Acquisition Act, section 15, an inter-pleader suit was instituted on behalf of the Secretary of State in the Court of the District Munsif. The decision of the District Munsif having been confirmed on appeal, the unsuccessful claimant preferred a petition to the High Court under section 622, Civil Procedure Code:—*Held*, that the inter-pleader suit was not within the jurisdiction of a Provincial Small Cause Court and was rightly brought on the ordinary side of the District Munsif's Court and consequently where the petitioner's remedy was by way of second appeal the petition for revision was not admissible.

Tirupati Raju v. Vissam Raju ... 155

RAILWAY ACT—ACT IX OF 1890, s. 113—Excess charge and fare recoverable as a fine—Magistrate not competent to impose imprisonment in default—Fine—Imprisonment:

Section 113, sub-section (4), (1) of the Indian Railway Act (IX of 1890), which directs that, on failure to pay on demand excess charge and fare when due, the amount shall, on application, be recovered by a Magistrate as if it were a fine, does not authorise the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such.

Queen-Empress v. Subramania Ayyar ... 385

RECEIVER—Moneys collected by receiver in execution of decree misappropriated by him—Discharge of judgment-debtor:

In execution of a decree a receiver was appointed to collect certain rents due to the judgment-debtor. Some of the judgment-debtor's tenants

paid the rents due by them into the hands of the receiver, but the receiver did not pay the money into Court:—*Held*, per SHEPHARD, J., that the payment by the tenants to the receiver did not *pro tanto* discharge the judgment-debtor from liability under the decree:—*Held*, per DAVIES, J., that payment by the tenants to the receiver *pro tanto* discharged the judgment-debtor from liability under the decree.

Muthia Chetti v. Orr ... 224

REGISTRATION ACT—ACT II OF 1877, ss. 3, 17 (d)—Interest in land—Timber—Lease—Specific Relief Act—Act I of 1877, s. 36—Injunction:

The plaintiff (who held on lease a share in a village and in the trees standing in the village tank), in consideration of Rs. 200, and a promissory note for Rs. 3,200, executed in favour of the defendant a document by which he assigned to the latter the right "to cut and enjoy the trees, &c." for a period of four years from its date. The instrument was not registered. The defendant felled the trees which were mature at the date of the instrument and subsequently felled others since matured. The plaintiff now sued for a declaration of his title to the remaining trees and for an injunction to restrain the defendant from intermeddling therewith, alleging that he had sold to the defendant orally the right to fell only such trees as were then matured:—*Held*, that the unregistered instrument purported to convey an interest in immovable property, and was not a lease and was inadmissible in evidence; and that the plaintiff was not entitled to relief by way of injunction or otherwise.

Seeni Chettiar v. Santhanathan Chettiar ... 58

2. s. 17 (c)—Agreement to renew a *kanom* and to credit as renewal fees a sum of money then due by plaintiff to defendant—Want of registration—Admissibility in evidence:

Per cur: A written agreement to renew a *kanom* and to credit as renewal fees a sum of money then due is not an acknowledgment of money paid for the creation of an interest in land within the meaning of section 17 (c) of the Registration Act, and therefore is admissible in evidence though unregistered:—*Held*, that in such an agreement, the agreement to renew is severable from the rest of the agreement and the document, though unregistered, is admissible in evidence of the agreement to renew even if it were inadmissible for other purposes.

Krishnan Nambudri v. Raman Menon ... 484

3. s. 17—Deed of relinquishment by tenant to land-holder:

An instrument by which a tenant in a zamindari, in consideration of the zamindar waiving his right to arrears of rent accrued due, relinquishes the land to him, is not admissible in evidence, unless it is registered in accordance with law, although it may have been drawn up and delivered to the servants of the zamindar before he had signified his consent to waive his right to the arrears.

Rangayya Appa Rau v. Kameswara Rau ... 367

4. Inquiry by registering officer into disability of testator—Indian Registration Act, ss. 35, 40, 41:

The procedure prescribed by section 35 of the Indian Registration Act is not applicable to the registration of wills which, under section 40 of that Act, are presented for registration after the death of the testator by persons claiming under them.

Arunugam Pillai v. Arunachallam Pillai ... 254

5. _____, s. 50—Registration—Loss of sale-deed :
 When a deed of sale of immovable property for more than Rs. 100 is lost within the time allowed for the registration of the same, the purchaser may bring a suit against the vendor to compel the execution and registration of a fresh deed; and if, after the execution of the lost sale-deed, the vendor has resold the property by a registered deed and delivered possession thereof to another who has notice of the sale to the plaintiff, the latter is entitled, as against the subsequent purchaser, to a decree for the possession of the property.
Nallappa Reddi v. Ramalingachi Reddi
6. _____, s. 77—Suit under s. 77 of Registration Act—Act III of 1877—Applicability of Limitation Act, s. 5—Filing of suit on re-opening of Court :
 When the period of limitation, prescribed by section 77 of the Indian Registration Act, 1877, for suits brought under that section, expires on a day when the Court is closed, section 5 of the Indian Limitation Act, 1877, does not apply, and suit, if instituted on the day the Court re-opens, is barred.
Appa Rau Sanayi Aswa Rau v. Krishnamurthi
- REGULATION XXV OF 1802 (MADRAS):** See KARNAM.
2. _____ XXIX OF 1802 (MADRAS): See KARNAM.
- RELIGIOUS ENDOWMENTS—Fort Pagodas at Tanjore—Right of management on death of the senior widow of the late Maharajah of Tanjore :**
 After the death in 1855 of the late Maharajah of Tanjore without male issue, Government assumed charge of the Fort Pagodas, of which he was the hereditary trustee. Subsequently his senior widow Her Highness Kamakshi Bayi Saheba applied that they should be handed over to her as the head of the family for the time being; and Government in 1863 made an order saying "it is desirable that the connection of Government with the pagodas should cease; they will accordingly be handed over to Her Highness Kamakshi Bayi Saheba." The pagodas and their endowments were handed over in pursuance of that order and were held by the senior widow till her death in 1892. On her death Government ordered that they should be placed under the Devasthanam Committees of the circles in which they were situated. The senior surviving widow now claimed to be entitled to possession and the right of management by succession, and sued accordingly :—*Held*, that Government intended to make an absolute transfer in 1863 without any reservation of a reversionary right to make a new appointment, and that whether Her Highness Kamakshi Bayi Saheba took the trust property for a widow's estate, or as stridhanam, the plaintiff was entitled to succeed.
Kalinasundaram Ayyar v. Umamba Bayi Saheb
- RENT RECOVERY ACT—ACT VIII OF 1865 (MADRAS), ss. 18, 39 and 40—Attachment for arrears of rent—Suit to set aside attachment—Subsequent sale :**
 A landlord attached his tenant's holding for arrears of rent in 1889, and within the time prescribed by Rent Recovery Act, section 18, put in an application for sale to the Collector, and otherwise complied with the procedure prescribed by the Act. The land was sold, but the sale was set aside as having been irregularly conducted. The landlord then made in 1894 an application to the Collector for a fresh sale which was granted; a fresh sale took place without a fresh notice being given to the tenant under section 39 of the intention to sell. The tenant now sued to have this sale set aside :—*Held*, that the plaintiff was not entitled to have the sale set aside.
Oliver v. Anantharamayyar

2. _____, ss. 18, 69—Deduction of time occupied in obtaining copy of judgment appealed against—Limitation Act, ss. 6, 12 :
 A tenant, whose property had been distrained for arrears of rent sued under Rent Recovery Act, section 18, by way of appeal against the distraint. The Revenue Court decided in his favour. The landlord preferred an appeal under section 69 more than thirty days after the date when the decision was pronounced. He claimed that the time occupied in procuring a copy of the judgment appealed against should be deducted in the computation of the thirty days' period of limitation :—*Held*, that the appellant was not entitled to have the deduction made, and that the appeal was barred by limitation.
Kumara Akkappa Nayanam Bahadur v. Sithala Naidu 476
3. _____, s. 78—Limitation—Suit to recover property wrongfully distrained :
 The plaintiff sued to recover certain property wrongfully distrained by the defendant who was his landlord, or in the alternative for its value. The defendant had tendered no patta to the plaintiff, but the distraint had taken place professedly under the Rent Recovery Act. The suit was not brought within six months from the date of the wrongful distraint :—*Held*, that the suit was not barred under Rent Recovery Act, section 78.
Raja Goundan v. Rangaya Goundan 449
- REVENUE RECOVERY ACT—ACT II OF 1864 (MADRAS), s. 38—Sale for arrears of revenue—Benami purchase :**
 The purchaser at a sale held for arrears of revenue sued for possession of the land. It was pleaded that his purchase was made *benami* for the persons from whom the defendant derived title :—*Held*, that Revenue Recovery Act, section 38, did not debar the defendant from raising this plea, and that the averments on which it was based having been proved, the suit should be dismissed.
Subbarayar v. Asirvatha Upadesayyar 494
2. _____, s. 38—Sale for arrears of revenue—Confirmation of sale after cancellation :
 When a Collector has passed an order under section 38 of Madras Act II of 1864, setting aside a sale for arrears of revenue, he cannot subsequently confirm the sale.
Kaliappa Gounden v. Venkatachalla Thevan 253
- SPECIFIC PERFORMANCE OF CONTRACT—Sale-deed fraudulently suppressed by defendant before registration—Cause of action :**
 Where the defendant agreed to sell certain land to the plaintiff and executed a sale-deed in favour of the plaintiff to that effect, but subsequently obtained possession of it before registration and fraudulently suppressed it :—*Held*, that the plaintiff was entitled to enforce specific performance of the contract by the execution and registration of a fresh document.
Chinna Krishna Reddi v. Dorasami Reddi 19
- SPECIFIC RELIEF ACT—ACT I OF 1877, s. 36—Injunction—Registration Act—Act III of 1877, ss. 3, 17 (d)—Interest in land—Timber—Lease :**
 The plaintiff (who held on lease a share in a village and in the trees standing in the village tank), in consideration of Rs. 200 and a promissory note for Rs. 3,200, executed in favour of the defendant a document by which he assigned to the latter the right 'to cut and enjoy the trees,

&c., for a period of four years from its date. The instrument was not registered. The defendant felled the trees which were mature at the date of the instrument and subsequently felled other trees since matured. The plaintiff now sued for a declaration of his title to the remaining trees and for an injunction to restrain the defendant from intermeddling therewith, alleging that he had sold to the defendant orally the right to fell only such trees as were then matured:—*Held*, that the unregistered instrument purported to convey an interest in immovable property, and was not a lease and was inadmissible in evidence; and that the plaintiff was not entitled to relief by way of injunction or otherwise.

Seeni Chettiar v. Santhanathan Chettiar 58

STAMP ACT—ACT I OF 1879, s. 48, sched. I, art. 21—Conveyance:

The amount payable on a conveyance under Stamp Act, schedule I, article 21, is properly calculated on the consideration set forth therein; and not on the intrinsic value of the property conveyed.

Reference under Stamp Act, s. 46 27

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889—Collection of debt on succession—Certificate of heirship—Act XXVII of 1860—Right of succeeding trustee to collect:

In a suit brought by a widow who had succeeded her husband as trustee of an endowment for a debt due thereto:—*Held*, that she was not suing as being entitled to the effects of her deceased husband, or for payment of a debt due to the estate which had been his, but that she was suing as representing the endowment in the capacity of a trustee of its money. Accordingly, neither Act XXVII of 1860 (Collection of debts on Succession), section 2, nor Act VII of 1889 (the Succession Certificate Act), section 4, was applicable to her claim, and her not having obtained a certificate of heirship to her husband's estate did not disentitle her to a decree.

Mallikarjuna v. Sridevamma 162

3. _____, s. 4—Debt due to Hindu family jointly:

In a suit by the members of a joint Hindu family for a debt due on a document executed in favour of a deceased member of the family, the plaintiffs need not produce a certificate under the Succession Certificate Act, if they can prove that the debt was due to the family jointly: *Quere*: whether a plaintiff, in a suit to recover money by the sale of property mortgaged, need produce a certificate under the Succession Certificate Act.

Subramanian Chetti v. Rakku Servai 232

3. _____, ss. 9, 10—Order for issue of certificate subject to security being given—Appeal:

On a contested application for a succession certificate under Act VII of 1889, an order was made for the issue of the certificate on security being furnished by the applicant. The opposite party preferred an appeal against the order:—*Held*, that the appeal was maintainable.

Ariya Pillai v. Thangammal 442

SUITS VALUATION ACT, 1887—Suit for partition of family property—Valuation of, for purposes of jurisdiction—Court Fees Act, 1870, s. 7, clause (iv) b:

In a suit by a member of a joint Hindu family praying for a partition of the family property and for the delivery to the plaintiff of his share, the value of the suit for the purposes of jurisdiction is the amount at which the plaintiff values his share.

Velu Goundan v. Kumaravelu Goundan 289

TRANSFER OF DECREE—Subsequent attachment in execution against transferor

A transferred a decree to B who recovered part of the amount due under it and was prevented from recovering the rest by an attachment of the decree in execution proceedings against A:—*Held*, that A was liable to pay compensation to B.

Puthiandi Mammed v. Avalil Moidin 157

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 53—Transfer in fraud of creditors—Good faith:

When it is said that a deed is not executed in good faith what is meant is that it was executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself.

Ramasamia Pillai v. Adinarayana Pillai 465

2. _____, s. 85—Civil Procedure Code, s. 43—Ejectment suit by a mortgagor's vendee against the purchaser under a mortgage decree—Subsequent suit to redeem:

Certain land mortgaged to A was sold to B. A brought a suit on his mortgage without joining B as a party, obtained a decree for sale and became the purchaser under the decree. B then sued to eject him praying for a declaration that the sale was not binding on him. The suit having been dismissed, he now sued to redeem:—*Held*, that the suit was not barred under Civil Procedure Code, section 43, and the plaintiff was entitled to redeem.

Kuppu Nayudu v. Venkatakrishna Reddi 82

3. _____, s. 86—Suit by sub-mortgagee—Decree for sale:

A sub-mortgagee is entitled to a decree for the sale of the original mortgagor's interest in cases and in circumstances which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief.

Muthu Vijaya Baghunatha Rarachandra Vacha Mahali Thurai v. Venkatachellam Chetti 35

4. _____, ss. 88, 99—Form of decree:

In November 1882 a decree was passed on a hypothecation bond for the payment of the secured debt and it contained the following words:—"the property hypothecated in the bond being also held liable for the whole amount thus awarded":—*Held*, that the decree was in reality a decree for sale and could be executed as such.

Anna Pillai v. Thangathanmal 78

5. _____, s. 101—Mortgage—Renewal of mortgage—Priority over subsequent incumbrance:

Where a mortgagee, subsequently to the execution of the mortgage deed, takes another mortgage in renewal of the former deed, he has priority over incumbrances subsequent to the first deed.

Alangaran Chetti v. Lakshmanan Chetti 274

6. _____, s. 127—Onerous gift to an infant—Acceptance:

Land was given by the defendant to the wife of the plaintiff burdened with an obligation. She accepted the gift and died in infancy leaving the plaintiff her heir. The plaintiff now sued to make good his title to the

land against the donor:—*Held*, that the gift was complete as against the donor and that the plaintiff was entitled to a decree.

Subramania Ayyar v. Sitha Lakshmi 147

TRUSTEE OF COMPOSITION DEED—*Managing member of a firm appointed as trustee—Right of suit after dissolution of the firm:*

Certain traders having been adjudicated bankrupts in the Court of Mauritius, the creditors agreed to a composition deed which was sanctioned by the Court, whereby the present plaintiff therein described as the managing member of the firm of S. and Company was appointed trustee and his firm guaranteed the payment of a dividend of 50 per cent. The firm was subsequently dissolved and its assets were assigned to a third party. The plaintiff now sued to recover costs decreed to him in his capacity as trustee in various suits in Mauritius, and it was objected that he was precluded from suing by the dissolution of his firm and the assignment away of its assets:—*Held*, that the plaintiff was entitled to maintain the suit.

Subbaraya Pillai v. Vaithilingam 91

TRUSTEES' SUIT BETWEEN—LIMITATION ACT—ACT XV OF 1877, s. 10—

Breach of trust—Court Fees Act—Act VII of 1870, s. 5—Objection as to Court fee paid on appeal:

The plaintiffs and defendants, together with one Subbaraya Pai who died in 1884, were trustees of a temple, having been appointed by the committee under Act XX of 1863. For some years before his death, Subbaraya Pai was left in exclusive management. Subsequently the defendants were in sole management of the temple until 1891, when the plaintiffs brought the present suit charging that the defendants had excluded them from the right of management, and claiming that they should make good sums lost to the institution by reason of breaches of trust alleged to have been committed by them. Some of the breaches of trust took place before 1884. Of the others, which took place subsequently, some consisted in improper dealings with the temple property to the detriment of the temple and to the advantage of certain relatives of the defendants. The plaintiffs also asked for an injunction to restrain the defendants from excluding them from management:—*Held*, (1) that in the absence of evidence of an absolute denial by the defendants of the plaintiffs' right to act as trustees, the suit for an injunction was not barred by limitation; (2) that the suit could not be regarded as a suit by the beneficiaries and was not within the operation of Limitation Act, section 10; (3) that the suit was not maintainable in respect of breaches of trust committed in the lifetime of the deceased manager, as being to that extent barred by limitation, and also for the reason that such breaches were not more imputable to the defendants than to the plaintiffs; (4) that even if it had been proved that the community interested in the temple had sanctioned the acts of the defendants now complained of, that circumstance would not suffice to excuse the defendants; (5) that the defendants were liable to make good the loss occasioned by any breach of trust committed within six years of the date when the suit was instituted even in the absence of fraud, and that in estimating such loss prospective loss should be assessed:—*Held further*, that an objection taken on behalf of respondents at the hearing of an appeal as to the amount of Court-fee stamp affixed to the petition of appeal to the High Court, cannot be entertained.

Ranga Pai v. Baba 398

VILLAGE COURTS ACT—ACT I OF 1889 (MADRAS), s. 13, proviso 3—Civil Procedure Code, ss. 617, 647—'Land' includes 'house':

In Act I of 1889, section 13, proviso 3, the word 'land' includes land covered by a house and consequently a suit for house-rent unless due under a written contract signed by the defendant is not cognizable in a Village Munsif's Court.

Narayanamma v. Kamakshamma 21

WARRANTS ISSUED UNDER ACT XIII OF 1859—Execution outside jurisdiction—Criminal Procedure Code, s. 83:

Section 83 of the Criminal Procedure Code applies to warrants issued under section 1 of Act XIII of 1859, and consequently such warrants may be executed outside the local jurisdiction of the Magistrates issuing them.

Queen-Empress v. Kattayan 235

WILL—CONSTRUCTION [OF—Appointment of executors by implication—Civil Procedure Code, ss. 27, 53—Amendment of plaint by bringing on a new plaintiff on second appeal:

Plaintiffs sued in 1894 to recover property belonging to the estate of a testator, claiming to be his executors under a will. The property was alleged to have been entrusted by the testator in 1893 to the defendant. The will contained no express appointment of executors, but it provided that the plaintiff should take care of the estate during the minority of a son who was to be adopted to the testator, and imposed upon them the duty of providing for the maintenance of persons therein named:—*Held*, (1) that the plaintiffs were not appointed executors by implication; (2) that, under the circumstances of the case, the plaint should be amended on second appeal in 1897, by substituting the adopted son as plaintiff, with one of the present plaintiffs as his next friend.

Seshamma v. Chennappa 467