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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

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Chief Justice.

Hon'ble Sir ARTHUR J. H. COLLINS, K.T., Q.C.

„ H. H. SHEPHARD (*Offg. from 7th May to 6th November, 1898*).

Puisne Judges.

Hon'ble H. H. SHEPHARD.

„ S. SUBRAMANIA AYYAR, C.I.E.

„ J. A. DAVIES.

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„ L. MOORE (*Offg. from 11th July to 6th November, 1898*).

Advocate-General.

Hon'ble V. BHASHYAM AYYANGAR, C.I.E. (*Offg. to 20th March 1898*).

„ C. A. WHITE, *Advocate-General (from 21st March 1898)*.

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THE
INDIAN LAW REPORTS,
Madras Series.

APPELLATE CIVIL.

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

VISVALINGA PILLAI (PLAINTIFF), APPELLANT,

v.

PALANIAPPA CHETTI AND OTHERS (DEFENDANTS NOS. 1 TO 3),
RESPONDENTS.*

1897.
September
9, 10.

Transfer of Property Act—Act IV of 1882, ss. 68, 98—Anomalous mortgage—Right to possession.

Two out of three co-parceners executed in favour of a creditor in respect of land belonging to the co-parcenary an instrument which contained the following terms: "As we have received Rs. 500, you will, in lieu of the said amount and interest, enjoy the said property for three years by virtue of Arakattu otti . . . on the condition that, on the expiry of the said three years, we should redeem the land without paying either principal or interest. You will, on the expiry of the said period, deliver possession of the said immovable property without raising any objection." The creditor obtained possession of only part of the land:

Held, that the instrument was an anomalous mortgage and that the mortgagee was liable to ejectment after the expiry of the three years.

SECOND APPEAL against the decree of T. M. Horsfall, District Judge of Tanjore, in Appeal Suit No. 481 of 1895, affirming the decree of S. Dorasami Ayyar, District Munsif of Tanjore, in Original Suit No. 521 of 1894.

Suit to recover possession of certain land with arrears of rent. The land in question previously belonged to the family of defendant No. 1, and it was comprised in an instrument therein described as an Arakattu otti deed, dated 27th January 1895, and

* Second Appeal No. 47 of 1897.

SVALINGA
PILLAI
v.
PALANIAPPA
CHETTI.

executed by the father and brother since deceased of defendant No. 1 in favour of defendant No. 2. This instrument was filed in the suit as exhibit I and was in the following terms:—

“We have mortgaged to you the undermentioned immovable properties as described herein below belonging to us and in our enjoyment and borrowed thereon Company’s current Rs. 500, the particulars of the receipt whereof by us are as follows: for the purpose of paying off Rs. 500 the decree amount due from one of us, the said Kuppuzami Chettiar, the second defendant in Original Suit No. 156 of 1882 on the file of Kumbakonam District Munsif’s Court to Muruga Pillai, son of Kuppaya Pillai, the plaintiff in the said suit residing in Panjukara street, Pattai, Kumbakonam, we have already received from you Rs. 325 and paid the same to the said Muruga Pillai; we have received from you on this date Rs. 175 for discharging the said decree. As we have received Rs. 500 the total amount of the two items as above, you will, in lieu of the said amount and its interest, enjoy the said properties for three years in virtue of Arakattu otti from the current fasli 1294 to fasli 1296, yourself paying the Sircar cist, &c. As extensive properties are hereby mortgaged to you which could yield an income by which you can completely recover the said principal money and its interest within the said period, and as we have executed this Arakattu otti deed on the condition that, on the expiry of the said three years’ term, we should redeem the land without paying you either the said principal money or interest, you will, on the expiry of the said period, deliver possession of the said immovable properties without raising any objection. We have herewith given the copy of the decree in the said suit No. 156. We shall get the plaintiff in the said suit Muruga Pillai to present a petition in the said Kumbakonam Munsif’s Court to the effect that the decree in the said suit had been discharged.”

The plaintiff subsequently purchased the two-thirds share of the executants of that instrument at a Court-sale held in execution of the decree in Original Suit No. 214 of 1888 on the file of the District Munsif of Tanjore.

Defendant No. 1 had refused on demand to divide the property. Defendant No. 2 stated that he was in possession of part of the land mortgaged under the above instrument and further that he had no objection to give up possession on being redeemed.

Defendant No. 3 was the widow of the brother of defendant No. 1.

The District Munsif held that the plaintiff’s purchase was subject to the rights of defendant No. 2 under exhibit I, and dismissed the suit on the ground that the plaintiff was not entitled to recover without redeeming which he had not offered to do.

The District Judge on appeal affirmed this decision.

Plaintiff preferred this second appeal.

Sivasami Ayyar for appellant.

Venkatasubbaramayya for respondent No. 2.

JUDGMENT.—On the whole, though not without hesitation, we think that the instrument may be considered to be a mortgage, but we are of opinion that it falls within section 98 of the Transfer of Property Act, and that the rights and liabilities of the parties must be determined by the contract itself. The contract does not provide for the contingency which has occurred. No special usage applicable to the present circumstances is set up. It is, however, contented that, under section 68 of the Transfer of Property Act, it was open to the mortgagee to sue for the mortgage money as possession of part of the mortgaged property had not been delivered to him or to acquire a charge on the part which had been delivered to him until he was repaid the mortgage money. It appears to us, however, that section 68 does not apply to a case like this. That section contemplates cases where the mortgagee is entitled to claim repayment of the mortgage money before redemption. In the present case, however, the contract gives no right to claim repayment, but in terms denies it. The only right the mortgagee had was to remain in possession for the stipulated period and to recover damages for the breach of contract by the mortgagor in not delivering possession of the whole of the land to him. We think, therefore, that the Lower Courts were wrong in holding that exhibit I was an usufructuary mortgage and gave the second defendant the right to remain in possession of the part he had after the expiry of the three years agreed upon.

We must, therefore, reverse the decrees in both the Courts below and decree possession of the property sued for to the plaintiff with Rs. 9 for past mesne profits and with future mesne profit also. The defendants must pay the plaintiff’s costs throughout.

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PILLAI
v.
PALANIAPPA
CHETTI.

APPELLATE CIVIL.

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

THE MUNICIPAL COUNCIL, TANJORE (DEFENDANT),
APPELLANT,

v.

VISVANATHA RAU (PLAINTIFF), RESPONDENT.*

*District Municipalities Act—Act IV of 1884 (Madras), s. 11—Interference with a
public drain.*

The owner of a house in a street at Tanjore renewed without the sanction of the Municipal Council the masonry covering of a drain in front of his house :

Held, that the act of the plaintiff did not constitute an interference with the drain within the meaning of District Municipalities Act, section 211.

SECOND APPEAL against the decree of F. H. Hamnett, Acting District Judge of Tanjore, affirming the decree of Syed Tajuddin Sahab, District Munsif of Tanjore, in Original Suit No. 249 of 1895.

The plaintiff was the owner of a house in Tanjore, in front of which was a Municipal drain. He rebuilt his house and also the masonry which covered the drain in front of it. The Municipal Council of Tanjore had the covering of the drain removed on the ground that it was constructed without their sanction and was objectionable for sanitary reasons. The plaintiff now sued the Municipal Council for damages, and the main question was, whether the act of the plaintiff constituted an interference with the drain within the meaning of section 211 of the District Municipalities Act IV of 1884. The District Munsif answered this question in the negative and passed a decree in favour of the plaintiff, which was affirmed on appeal by the District Judge.

The defendant preferred this second appeal.

Kristnasami Ayyar for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—The fact that section 212 of the District Municipalities Act refers only to new buildings and not to repairs, is highly significant and clearly indicates that a distinction was intended to be drawn between the two classes of cases.

* Second Appeal No. 1638 of 1896.

In the present case there was no erection of any new building over the drain. There was only a repair of the existing covering which had been there for the past 40 years.

We do not think that such repair can be said to be interference with the drain within the meaning of section 211. The interference referred to in that section is, as the District Judge remarks, interference similar in character to the kinds of interference specifically referred to in the earlier part of the section.

We, therefore, conclude that the decision of the Courts below is correct, and we dismiss this second appeal with costs.

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COUNCIL,
TANJORE
v.
VISVANATH
RAU.

APPELLATE CIVIL.

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

MUNICIPAL COUNCIL, COCANADA (DEFENDANT),
PETITIONER,

v.

ROYAL INSURANCE COMPANY, LIVERPOOL
(PLAINTIFF), RESPONDENT.*

*District Municipalities Act—Act IV of 1884 (Madras)—Profession tax—English
Insurance Company carrying on business by agents in India.*

The plaintiff was an English Insurance Company which carried on business at Cocanada by its agents, merchants of that place, at the business premises of the agents. The Municipal Council of Cocanada having levied profession tax on the plaintiff, this suit was brought in 1896 to recover the amount :

Held, that the tax had been illegally levied, and that the plaintiffs were entitled to a decree for its refund.

PETITION under Small Cause Courts Act, section 25, praying the High Court to revise the proceedings of K. Krishna Rao, Subordinate Judge of Cocanada, in Small Cause Suit No. 81 of 1896.

The plaintiffs were the Royal Insurance Company, Liverpool. They had no place of business of their own at Cocanada, but Messrs. Wilson & Co., merchants of that place, acted as their

1897.
Septemb
10, 24.

* Civil Revision Petition No. 245 of 1896.

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agent there. Defendants were the Municipal Councillors, Cocanada, who had levied from the plaintiffs Rs. 50 on account of profession tax under the District Municipalities Act (Madras), Act IV of 1884.

The present suit was brought to recover the amount so levied. The Subordinate Judge passed a decree in favour of the plaintiffs.

The defendants preferred this revision petition.

Mr. N. Subramaniam for appellant.

Mr. R. A. Nelson and Mr. R. F. Grant for respondent.

JUDGMENT.—The decision of the Subordinate Judge is right. The case is exactly similar to that reported as *Corporation of Calcutta v. Standard Marine Insurance Company*(1), which construes the substantially similar provisions of Bengal Act II of 1888. We concur in the reasoning of the learned Judges in that case and must hold that the plaintiff company was not liable to any tax under schedule A of the Madras District Municipalities Act IV of 1884.

We can only gather the intention of the Legislature from the language it uses in its enactments, and that language does not make the plaintiff company liable to the tax levied from them by the defendant Municipality.

We may observe that, in the recent revision of the Act by Madras Act III of 1897, the schedule has been amended so as to include every company, no matter what may be the business carried on by it; but this revision cannot have retrospective effect so as to legalize the levy of the tax under the former Act. On the contrary, the change of language is significant as indicating that the Legislature considered the provisions of the old Act defective.

We dismiss the petition with costs.

(1) I.L.R., 22 Calc., 581.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

THEYYAVELAN (PLAINTIFF), APPELLANT,

v.

KOCHAN AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 317—Certified purchaser—Assignment from a certified purchaser.

A person taking an assignment from a certified purchaser at a Court sale is not entitled under Civil Procedure Code, section 317, to object to the maintainability of a suit to recover the land purchased, on the ground that the purchase was made benami.

SECOND APPEAL against the decree of J. H. Munro, Subordinate Judge of Calicut, in Appeal Suit No. 358 of 1895, modifying the decree of V. Ramasastri, District Munsif of Temelprom, in Original Suit No. 424 of 1893.

The plaintiff was the undivided brother of defendant No. 1, and he brought this suit for partition of their property including, among the properties to be divided, certain lands which were in question in this second appeal. The case of defendant No. 1 was that they were his self-acquisitions, he having obtained them by assignment from one Pangi who had purchased them at a Court sale held in execution of a decree against the plaintiff's family. The plaintiff alleged that the purchase by Pangi was made benami for the family with family funds, and that they were bought back by defendant No. 1 on account of the family.

The District Munsif decided in favour of the case set up by the plaintiff, but the Subordinate Judge on appeal expressed the view that the rights of defendant No. 1 were identical with those of his assignor, and that as his assignor was the certified purchaser, Civil Procedure Code, section 317, prevented the title from being impugned on the ground that the purchase was benami. He modified the decree of the District Munsif accordingly.

The plaintiff preferred this second appeal.

Ryru Nambiar for appellant.

Subramania Ayyar for respondents.

THEYTA-
VELAN
v.
KOCHAN.

JUDGMENT.—Section 317 of the Code of Civil Procedure debars a suit against a 'certified purchaser' by a person claiming to be the real purchaser or deriving title from the real purchaser.

The contending parties here do not occupy the positions contemplated in the section, as the first defendant is not the certified purchaser, but an assignee of the certified purchaser. The assignment by the certified purchaser to the first defendant does not clothe him with the certified purchaser's right to object to the maintainability of a suit as if it had been brought against himself. The protection given to the certified purchaser cannot be transferred by him. The first defendant did not therefore stand in the certified purchaser's shoes as the Subordinate Judge has held. We must accordingly reverse his decree and remand the appeal for disposal upon the merits.

Costs will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

1897.
October 21.

KRISHNAN NAMBIAR AND OTHERS (DEFENDANTS NOS. 2, 7),
AND 9 TO 12), APPELLANTS,

v.

KANNAN AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 8),
RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, arts. 115, 116—Covenant implied in registered sale-deed—Transfer of Property Act—Act IV of 1882, s. 55—Implied covenant for title—Damages for breach—Civil Procedure Code, s. 13—'Res judicata'.

On 8th February 1889 the defendant sold to the plaintiff, under a registered conveyance containing no express covenant for title, land of which he was not in possession, and the purchase money was paid. The plaintiff and the defendant sued to recover possession, but failed on the ground that the vendor had no title. The plaintiff now sued on 7th February 1895 to recover with interest the purchase money and the amount of costs incurred by him in the previous litigation:

Held, that the suit was not barred by limitation, that the defendant was not entitled to give evidence of his alleged title, and that the plaintiff was entitled to the relief sought by him.

SECOND APPEAL against the decree of B. Macleod, Acting District Judge of North Malabar, in Appeal Suit No. 344 of 1895,

* Second Appeal No. 1138 of 1896.

modifying the decree of P. J. Itteyerah, District Munsif of Cannanore, in Original Suit No. 49 of 1895.

On 8th February 1889 the plaintiff purchased certain land from defendant No. 2 as karnavan of the tarwad, to which he and the other defendants belonged. The land was then in the occupation of third parties. Accordingly the vendor and purchasers jointly sued for possession, but they failed to prove that the vendor had any title to the land, the issue being finally determined on 19th December 1892.

The plaintiff instituted the present suit on 7th February 1895 to recover the purchase money with interest, and the amount of costs incurred by him in the previous suit, and the amount recovered from him in execution of the decree therein.

The District Munsif dismissed the suit as being barred by limitation. On appeal the District Judge passed a decree for the purchase money with interest only.

The defendants preferred this second appeal.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) for appellants.

Sankaran Nayar and *Ryru Nambiar* for respondent No. 1.

JUDGMENT.—The learned Advocate-General on behalf of the appellants argues that, as the covenant of title was not embodied in words in the sale-deed, but is implied by law under section 55 of the Transfer of Property Act, it cannot be regarded as a contract in writing registered, and therefore does not fall under article 116 of the second schedule of the Limitation Act, but under article 115.

With that contention we cannot agree. The contract of sale being in writing and registered, all terms which the law implies, or reads as part of the contract, must also be regarded as part of the registered writing.

This view was that adopted by Parker, J., in *Chinna Narayana Reddi v. Peda Rama Reddi* (1). The suit was therefore not barred by limitation.

The only other ground urged is that the Lower Courts were wrong in deciding that the tarwad's title to the property was not a question to be gone into in the present suit, as it had been decided in the former litigation.

(1) Appeal against Order No. 82 of 1890 reported in 1 Mad. L.J., 479.

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v.
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NAMBIAR
v.
KANNAN.

In that litigation the present plaintiff and the second defendant (as representing the tarwad) were joint plaintiffs, and it was then found as between each of them and the persons in possession of the property that the second defendant and his tarwad had no title to the property. The title to the property is therefore *res judicata* as between the persons in possession and the second defendant and his tarwad. It is idle to contend that, in these circumstances, and useful purpose was, or could be, served by admitting evidence as to the tarwad's alleged title. On both grounds then the second appeal fails and is dismissed with costs.

The plaintiff files a memorandum of objections to so much of the decree as disallows his claim for costs of the former litigation, viz., Rs. 527-15-2 *plus* Rs. 69-11-0 and for interest on the purchase money prior to the plaint.

On both points we think the objections are valid. The costs of the litigation which resulted from the breach of covenant of title are proper damages and not too remote. The omission as regards interest is clearly a clerical error. We allow the memorandum of objections with costs in the Lower Appellate Court and in this Court, and modify the decree accordingly. The rate of interest will, however, be 6 per cent. as allowed by the District Judge, not 12 per cent. as claimed. We allow interest at 6 per cent. on the costs of the former litigation.

APPELLATE CIVIL.

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

GANAPATI AYYAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SAVITHRI AMMAL AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Agreement on adoption—Charitable endowments—Civil Procedure Code, s. 30—Interest sufficient to support a suit relating to charity.

A Hindu shortly before his death directed his wife and mother to employ part of his property for the maintenance and upkeep of a charitable institution, being a choultry where Japta Brahmans and travellers were fed, and at the same time empowered his wife to make an adoption, declaring that the adopted son should have no interest in the property devoted to the charitable purpose. On

* Appeal No. 90 of 1896.

his death the widow and mother executed a document, relating to the property, to give effect to the wishes of the deceased for the benefit of Brahmans; and three years later the widow took in adoption a boy whose father acquiesced in the deceased man's dispositions. The charitable trust having been neglected and the adoptive son having taken possession in his own right of the lands constituting the endowment, two Brahman residents of the neighbourhood who had obtained leave under section 30, Civil Procedure Code, instituted a suit as representing the Brahman community at large to remove the widow from the office of trustee, to have the adopted son declared ineligible for that office and for the appointment of a new trustee:

Held, that the plaintiffs possessed sufficient interest in the charity to enable them to maintain the suit, and that they were entitled to the relief claimed by them.

APPEAL against the decree of C. Vencoba Chariar, Subordinate Judge of Tanjore, in Original Suit No. 18 of 1895.

The plaintiffs, two Brahman residents of Mannargudi taluk, having obtained permission of the Court under Civil Procedure Code, section 30, brought this suit as representing the Brahman community for the removal of defendant No. 1 from the trusteeship of a charity founded by her late husband, as it was alleged, for the benefit of Brahmans generally, and secondly for a declaration that defendant No. 2 was not eligible for the office of trustee, and thirdly for the appointment of a new trustee.

The plaintiffs' case was that the deceased husband of defendant No. 1 had some years before his death established and endowed a choultry at Nagai for the feeding of Brahmans, and had performed the charity until his death in November 1878: that shortly before his death he had directed his mother to continue the charity and arranged that with the profits of part of the land constituting the endowment, defendant No. 1 should maintain another choultry which he desired her to establish at Adhichapuram: and that after the death of his mother all the endowments should go to the benefit of the new choultry, the charity at Nagai being discontinued. At the same time he empowered defendant No. 1 to make an adoption on the understanding that the adopted son should have no interest whatever in the charity properties. It was stated that, after the founder's death, the charity at Nagai was carried on by his mother only until she died in 1890, since when the choultry at that place had fallen into decay, and that defendant No. 1 had taken defendant No. 2 in adoption and allowed him to take possession of the properties devoted to the charity neglecting to carry out the trust.

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AMMAL.

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September
17.
October 5.

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Ammal.

It appeared that shortly after the founder's death his mother and his two widows, including defendant No. 1, had executed a deed of settlement, dated 15th November 1878 (exhibit A), embodying the directions of the deceased founder and that, at the time of the adoption of defendant No. 2, a similar agreement was drawn up and executed by his natural father ratifying those directions, and agreeing that after the death of defendant No. 1 defendant No. 2 should be the trustee and manager of the charities and otherwise should have no claim on the properties constituting the endowment. Defendant No. 1 admitted the trust and stated that she had performed it in part and would have done so completely but for a suit instituted in 1886 on behalf of the adopted son by his natural father as next friend which she had been compelled to compromise with the result that she lost possession of the properties.

The Subordinate Judge held that all the plaintiffs' averments were established by the evidence, but he dismissed the suit on the ground that the plaintiffs were not beneficiaries possessing an interest in the charity sufficient to support the suit. "The plaintiffs described themselves," he said, "as permanent residents of Nemmeli in the taluk of Mannargudi. The simple fact that they are Smarta Brahmans is not, I think, a sufficient qualification to enable them to come in as beneficiaries. The charity according to the evidence was confined to Japta Brahmans and travellers, including perhaps pilgrims to Rameswaram, if any. The plaintiffs are neither the one nor the other."

The plaintiffs appealed.

Sundara Ayyar and *Ramachandra Ayyar* for appellants, contended (1) that the appellants had sufficient interest to sue, and (2) that there was a trust created by the deceased, and cited *Bhaskar v. Saraswati* (1).

Srinivasa Ayyangar for respondent No. 1.

Pattabhirama Ayyar and *Ranga Ramanuja Chariar* for respondent No. 2 contended that no trust or alienation of any sort had been effected, and that, if there was any alienation, the adopted son was entitled to set it aside.

SHEPARD, J.—After deciding all the other issues in the appellants' favour, the Subordinate Judge dismissed the suit on the

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ground that they had failed to prove such an interest in the subject-matter as to entitle them to maintain it. It is first to be observed that this point was not taken in the written statement and was not included in any of the thirteen issues, though it was taken and overruled in the proceedings before the Collector when sanction to prosecute the suit was asked for and granted to the plaintiffs. It has been repeatedly held in this country that such a suit as the present may be instituted by any member of the class intended to be benefited by the charity for the support and preservation of which the aid of the Court is invoked. According to the document which evidences the institution of the charity the class for which it was intended comprised Brahmans generally. The document does not restrict the charity to any particular sect, nor does the oral evidence show that the alleged founder Gopalakrishna Ayyan excluded from his bounty such Brahmans as the plaintiffs might properly be taken to represent. The circumstance that the Brahmans entertained by him were ordinarily Japtas or travellers does not, especially when taken with the language of the instrument of dedication, indicate any intention to restrict the charity to Brahmans answering to one or other of those descriptions. For these reasons, I think the Subordinate Judge was wrong in dismissing the suit on the ground of want of interest in the plaintiffs. I have now to consider the several points raised on behalf of the respondent, Gopala Ayyan, who is the adopted son of the alleged founder of the charity. It was first contended that the story told by the plaintiffs' witnesses and recited in the instrument of 1878 and again in the agreement of 1881 relating to the adoption, was a pure invention, that Gopalakrishna Ayyan never made any arrangement or gave any instructions such as are attributed to him, and that his widows and mother never had any real intention of dedicating property to charitable purposes. Although the instrument of 1878 was executed only ten days after his death and actually written by the second respondent's father, although the same facts are recited in the agreement of 1881 to which the second respondent's father was a party, and although the same individual representing one of the widows, insisted before the tahsildar in 1883 that the charity should be maintained as it had been instituted by the adoptive father of the second respondent, we are asked to say that the idea of dedicating property to charity originated solely in the minds of the widows, and was carried out

(1) I.L.R., 17 Bom., 486.

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merely as a scheme for preserving to them as against a child who might be adopted some control over the property of their deceased husband. A more hopeless contention can hardly be conceived. It seems necessary to observe that there is a strong presumption in favour of the truth of statements recorded in writing by persons who are under no disability, and that the Court is most reluctant to hold that the parties did not mean what they said. I think there can be no doubt that the widows intended to create or confirm a valid trust, and further I agree with the Subordinate Judge in finding that they acted in conformity with directions given by their deceased husband. The question then is whether the evidence justifies the finding that there had been a previous declaration of trust by the husband. The plaintiff alleges that fifteen years before his death he had set apart certain lands for charitable purposes and there is some general evidence in support of the allegation. It certainly is proved that, for some years, he had been carrying on the charities which are mentioned in the instrument of 1878, and it is probable that he did so with the proceeds of the Adhichapuram lands. But I do not think it is proved that he dedicated any particular lands or even any particular share to this purpose. The evidence is wholly wanting in the precision and detail requisite for the proof of such a dedication, when no written instrument executed by the alleged founder is produced. It is not unimportant that he did execute a registered deed for the benefit of a Siva temple.

But I think there is another ground on which the plaintiffs' claim may be supported. As an act done by the widows in pursuance of the instructions of their husband, the deed of settlement of 1878 would be inoperative as against the adopted son. Regarded as an incomplete gift made by the husband and carried out by the widows, it could not stand on a higher footing than would a will executed by Gopalakrishna Ayyan, and the interest of the adopted son clearly could not be defeated by a will. But if the directions given by Gopalakrishna Ayyan to the widows regarding his charities, and the mode of maintaining them are associated with the direction to take a child in adoption, it may fairly be inferred that he did not intend an adoption to take place, except on the condition that his directions as to the charities are observed. This is the view of the matter which the widows actually took, for the father admits that they would not have taken

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his son unless he had consented to maintain the charities. The written agreement made in respect of the adoption shows that the adoption was made on that condition and on the other terms mentioned in the instrument of 1878. If the condition had been originated by the widows, it might not have been binding on the adopted son, but seeing that the husband's authority was qualified by a condition which he was at liberty to impose, and that the condition was insisted on when the authority was exercised, I think the adopted son is in no other position than he would be, if Gopalakrishna Ayyan himself had taken him in adoption, at the same time declaring that he did so only on the condition of certain property being set apart for charity. As there would have been no adoption if the requisition of the widows had not been obeyed, and as the widows were entitled and indeed bound to make that requisition, I do not think it is open to the adopted son, now to repudiate the condition. In this view of the facts, the decision in *Lakshmi v. Subramanya*(1) applies.

The decree of the Subordinate Judge will be reversed. It being necessary to provide for the conduct of the charity and the second defendant having, in consequence of his conduct, forfeited his right to act as trustee, we must direct the Subordinate Judge to inquire and submit the name of some competent person willing to accept the office. The trustee when appointed will be subject to the superintendence of the Tanjore District Board, and his accounts will be open to the inspection of the managing member of the founder's family for the time being. The Subordinate Judge will also ascertain the probable average income of the endowments and submit a scheme for the disposal of the income in accordance with the wishes of the founder. On the occasion of a vacancy, the President of the Local Board to appoint a successor out of the founder's family, if possible. The Subordinate Judge will be at liberty to apply for further directions. The second defendant must pay the plaintiffs' costs in this and in the Lower Court.

The report is to be submitted within three months from the date of the receipt of this order, and seven days will be allowed for filing objections after the report has been posted up in this Court.

SUBRAMANIA AYYAR, J.—I wish to make a few observations only, with reference to the contention urged on behalf of the second

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defendant, that the dedication of the lands to the charity in question is not binding upon him.

The evidence clearly proves that the second defendant's adoptive father Gopalakrishna Ayyan, shortly before his death and during the illness which terminated fatally, directed his widows to make the dedication referred to and authorized the adoption of a son to him. Accordingly ten days after his death, they executed exhibit A and handed over possession of the property dedicated to the person who was entrusted with the management of the affairs of the charity, and about two or three years after exhibit A the second defendant was adopted. It is also established that the natural father of the second defendant gave him in adoption with the full knowledge of the alienation and acquiescing in it and that, but for such acquiescence, the second defendant would not have been adopted.

The contention on behalf of the second defendant was twofold, first, that though the second defendant was adopted in 1881, yet his title related back to the date of the adoptive father's death, and as exhibit A was later, the alienation is not binding on him; secondly, even if his rights accrued from 1881, still he is entitled to set aside the alienation. The first part of the contention may be dismissed from notice, for it is too late to question the doctrine that the adopted son's rights arise from the time of the adoption (*Bamundoss Mookerjee v. Mussamut Tarinee*(1)). The second part of the contention alone requires some consideration. Now under the nuncupative will of Gopalakrishna Ayyan—such in my view do the instructions evidenced by exhibit A amount to (compare *Hari Chintaman Dikshit v. Moro Lakshman*(2)), the direction that the property be devoted to the charity and that the authority to adopt, both should be given effect to only after his death. Though in fact the second defendant was adopted two or three years subsequent to the execution of exhibit A, yet his case cannot possibly be put on a higher footing than if he had been adopted at the moment of the adoptive father's death. Let us, for argument, suppose that such was the case. It is clear that the direction as to the allotment of the property to the charity was an oral devise, which became operative the moment the testator died and as *ex hypothesi*, the second defendant's title to his adoptive father's

(1) 7 M.I.A., 169.

(2) I.L.R., 11 Bom., 89.

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estate accrued then and not earlier, it is difficult to see how on principle the defendant could be entitled to question the alienation. For, unlike the case where the adoption takes place before the will comes into force, the adopted son's right, according to the supposition, comes into existence simultaneously with the right of the charity. How then can the former derogate from the latter right? Even if the above view were unsustainable (though it is not easy to see how it could be), the second defendant must nevertheless be held bound by the alienation. For the circumstances in which the adoption took place rendered it conditional on the alienation not being challenged by the adopted son, and the case would then be clearly governed by the decision in *Lakshmi v. Subramanya*(1), *Narayanamsami v. Ramasami*(2), and *Basava v. Lingangauda*(3).

If, from the hypothetical case, we turn to the actual facts of the case before us, there is no doubt that the title of the adopted son could not affect the right of the charity for the latter right had vested long before the adopted son's right arose. The second defendant's rights must therefore be held to be subject to that created in favour of the charity by the oral devise, and it is hardly necessary to point out that exhibit A does not evidence an alienation by the widows, but is a mere formal declaration executed by the persons appointed by the testator to bring into existence such written evidence of his disposition and who held possession of the property devised till they transferred the same, to the duly constituted manager of the charity only as the trustees for the charity. Compare *Bhaskar Purshotam v. Sarasvatibai*(4).

In the view I have taken of the case, it has become unnecessary to consider, supposing that the direction to transfer to the charity amounted not to a devise, but to a mere power to transfer at the discretion of the widows, whether the execution of such power, before the power to adopt was exercised, would not disentitle the adopted son to question the alienation.

I, therefore, concur in the conclusion arrived at by my learned colleague.

(1) I.L.R., 12 Mad., 490.
(3) I.L.R., 19 Bom., 428.

(2) I.L.R., 14 Mad., 172.
(4) I.L.R., 17 Bom., 486.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

NAINAPPA CHETTI (DEFENDANT No. 1), APPELLANT,

v.

CHIDAMBARAM CHETTI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 2 TO 9), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 12, 13—‘Res judicata’—Transfer of Property Act—Act IV of 1882, ss. 91, 95—Redemption—Ejectment suit by mortgagor—Subsequent suit for redemption.

A zamindar mortgaged his estate under four successive instruments to the same creditor who was subsequently placed in possession. On the death of the mortgagor, his son, claiming to have succeeded by the law of primogeniture to the zamindari as an impartible estate, sued to eject the mortgagee; and a decree was passed declaring what was the sum due on a date named and how far it was binding on the estate, and decreeing that, on payment of what might be due on taking an account, the mortgagee should give up possession. Many years later the zamindar applied to the Court to carry out this decree, and a like application was put in by the present plaintiff to whom seven-eighths of the equity of redemption had been assigned. Both of these applications were rejected in the High Court as barred by limitation, and the applicants applied for leave to appeal to the Privy Council against the order of the High Court. Meanwhile the plaintiff brought the present suit to redeem the mortgages of the late zamindar:

Held, (1) that the suit was not barred under Civil Procedure Code, section 12, by reason of the pendency of the application for leave to appeal to the Privy Council;

(2) that, as there was no decree for foreclosure passed in the previous suit which had been treated as a suit for redemption, the present suit was not precluded by the decree therein;

(3) that the findings in the previous suit as to the amount of the debt and the extent to which it bound the estate were *res judicata*;

(4) that the plaintiff was entitled to redeem the whole mortgages, although he was assignee of only seven-eighths of the equity of redemption, as the owner of the remaining one-eighth was joined as defendant and did not apply to be made plaintiff.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in Original Suit No. 45 of 1895.

Suit for redemption. The Subordinate Judge's statement of the facts giving rise to the litigation, which is referred to by the High Court was to the following effect:—

On the 1st December 1862, the then Zamindar of Varapur, who was the father and predecessor in title of defendant No. 4, mort-

gaged his estate to the father of defendant No. 1 for Rs. 32,000 under an instrument filed as exhibit A, by which “it was stipulated,” as the Subordinate Judge said, “that all the incomes from the village should be paid to the mortgagee after collecting money in the presence of his men; that the mortgagee should deduct Rs. 1,895-14-6 for peishoush, as also Rs. 360 for the mortgagor's domestic expenses and the salary as per mohini list furnished of the establishment of his Karaivasal; and that he should, out of the amount left, pay towards interest for each fasli on the amount of this bond and enter payment on the same of the remainder towards the principal due thereunder. “It was further provided that counter-interest would be allowed on the principal so paid and that, when payment was made in the manner aforesaid, if income fell short to meet the interest of each year, the balance should be made good by the mortgagor out of his private funds.” On 10th September 1863, the mortgagor by exhibit B further charged the estate in favour of the same mortgagee to secure Rs. 3,000 and interest, and on 11th August 1864, the mortgagor, by exhibit C, further charged the estate in favour of the same mortgagee to secure Rs. 7,397-7-0 with interest. “This was followed,” as the Subordinate Judge said, “by a simple bond (exhibit D) between the same parties, dated 25th June 1867, whereby fourth defendant's father bound himself to pay, with the same rate of interest a sum of Rs. 1,767-5-8 being balance of interest on the first three bonds after deducting payment towards interest out of the income from the village and sundry other sums received. First defendant's father was never put in possession of the zamindari under any of the above documents; but on the 3rd December 1868 he and fourth defendant's father entered into an agreement (exhibit E), whereby in consideration of the amount of the four bonds and for the interest settled therefor, he was allowed to enjoy all the villages incurring certain specified expenses for the fourth defendant's father and for the up-keep and improvement of the village.”

The mortgagor having died in 1870, his son and successor, the present defendant No. 4, instituted Civil Suit No. 118 of 1874 against the son of the mortgagee, the present defendant No. 1, for possession of the estate with mesne profits alleging that the zamindari was impartible, that he had succeeded to it under the

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law of primogeniture on the death of his father who had merely a life interest, that the mortgages were not necessary for the family and that the late zamindar had been induced to execute them by the fraud of the mortgagee, and that they had been discharged.

Issues were framed in that suit as to the amount of the debt and as to "the extent, if any, to which the estate is liable."

In the result the estate was found to be impartible and the High Court in Appeal No. 98 of 1880 passed a decree declaring that there was due to the defendant on the 24th March 1880 a sum of Rs. 54,697-4-6 and that the defendant was, on the one hand, entitled to further interest and was, on the other hand, liable to account and ordering that on the plaintiff paying to the defendant the balance so found to be due on the taking of the accounts, the defendant should deliver up possession of the estate.

During the pendency of these proceedings, viz., on 27th March 1896, the zamindar mortgaged the estate for Rs. 4,000 and interest to the present defendant No. 2. The estate was afterwards brought to sale in execution of the decree in Original Suit No. 24 of 1879, and purchased by V. R. Alagappa Chetti. This sale was made subject to the mortgage of 1876, and the mortgagee brought a suit on his mortgage against the zamindar and his son (the present defendant No. 5) and the purchaser, and obtained a decree for Rs. 7,828-14-4 in Original Suit No. 20 of 1884.

The zamindar then leased the estate on 1st March 1892 for 15 years to Mari Chetti, the present defendant No. 6, who applied to the District Court on 29th June 1892 by Civil Revision Petition No. 100 of 1892 to enforce the decree of the High Court, above-mentioned offering to pay the balance, if any, which might be found due to the mortgagee in possession. On 30th July 1892 the zamindar made a like application "without prejudice to the lessee's rights" alleging that the claim of mortgagee in possession had been satisfied by the rents and profits. These applications were resisted on the ground that the zamindar had no further interest in the estate which had been sold in execution of the decree in Original Suit No. 20 of 1884 and purchased by the decree-holder, viz., the present defendant No. 2. This objection was overruled, because the holder of the decree of 1884 had no *locus standi* in these proceedings. "Commissioners were then appointed," said the Subordinate Judge, "to investigate the accounts, and the

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"present District Judge, hearing the objections thereto, passed an order (exhibit No. 4), on the 2nd May 1893, declaring that the sum of Rs. 1,339-7-3 was due to the first defendant on the 1st July 1892, and that, on payment of the said amount, the fourth defendant was entitled to recover possession of the zamindari and all its appurtenances. First defendant appealed against this order to the High Court in Civil Miscellaneous Appeal No. 58 of 1893, and it was held that the decree, being a final one so far as it went, was capable of immediate execution and that no steps having been taken by the decree-holder since the passing of the decree in 1882, its execution was time-barred. They accordingly allowed the appeal and dismissed the original application for execution. During the pendency of the second defendant's appeal against order No. 8 of 1893, he and his son, third defendant herein, conveyed to the present plaintiff their seven-eighth share in the zamindari purchased by second defendant in execution of the decree in Original Suit No. 20 of 1884 on the file of this Court and the latter was, therefore, allowed to join as a supplemental appellant with that defendant, and the present first defendant had also made him a respondent in his appeal against the order of the District Court in No. 58 of 1893. The High Court's order on the latter petition being adverse to the claim of both the plaintiff and the fourth defendant, he has also joined the fourth defendant in applying to the High Court for leave to appeal against it to the Privy Council (exhibit 11) and while that application was pending, the present suit was brought by him praying judgment (1) that, on payment to the first defendant of the sum of Rs. 1,339-7-3 found due to him by the District Judge's order (M4), dated 2nd May 1893, and now deposited in Court or such further or other sum as may be found payable to the first defendant, the defendants do deliver up to the plaintiff all documents in their possession or power relating to the mortgaged property, and do transfer the mortgaged property free from the mortgage and from all encumbrances created by the defendants or any person claiming under them, and put the plaintiff in possession of the property, (2) for mesne profits from the date of the suit till the date of plaintiff being put in possession, (3) for costs of the suit, and (4) for such other relief as, upon the facts, the plaintiff may be entitled to. The plaintiff refers to the various documents A, B, C, and D and states that,

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"as purchaser of the seven-eighth share of the properties, he was
"entitled to redeem the mortgage and to recover possession of the
"said properties on payment of Rs. 1,339-7-3 or such further or
"other sums as may be found due to the first defendant on taking
"an account, and the defendants Nos. 6 to 9 are impleaded as
"they set up a right to hold possession of the properties in suit
"under leases alleged to have been executed in their favour by
"the fourth defendant."

Defendant No. 1 defended the suit on the ground *inter alia*
that it was not maintainable by reason of Civil Procedure Code,
section 12. This plea was dealt with by the Subordinate Judge in
paragraph 9 of his judgment, which is referred to in the judgment
of the High Court as follows:—

"The first objection is that, the plaintiff having joined the fourth
"defendant in making an application to the High Court for leave
"to appeal to the Privy Council against the decree in Civil Miscel-
"laneous Appeal No. 58 of 1893 on the file of that Court, he is
"not entitled to prosecute the present suit under section 12 of
"the Civil Procedure Code. But, in the first place, the mere apply-
"ing for, or obtaining, leave to appeal to the Privy Council cannot
"of itself amount to the pendency of an appeal till such appeal
"is actually filed, for it may happen that the parties, who obtain
"such leave, may never appeal at all against such decree or order.
"In the next place, that order of the High Court was in an
"execution case and refused execution of the decree on the ground
"that the application was barred under Article 179 of the Limita-
"tion Act, while the present is a suit for redemption based on the
"original relation of mortgagor and mortgagee; and since there
"is no previously instituted suit or appeal now pending nor is the
"Court asked to try any suit in which the matter in issue is also
"directly and substantially in issue in a previously instituted suit
"between the same parties, section 12 of the Code of Civil Pro-
"cedure can be no bar to its trial. Thirdly, the present plaintiff
"or second defendant never joined in those proceedings, except
"with a view of preventing the fourth defendant from executing
"the decree and took no steps to execute it for themselves, and
"the High Court has also refused to allow them to intervene in
"those proceedings to execute the decree, as they were no parties
"thereto, and also because no application has been made on the
"ground that they were assignees by operation of law and as such

"entitled to execute the decree, and the zamindar had, therefore,
"no subsisting right. On all these grounds, I overrule the first
"objection."

The Subordinate Judge passed a decree for the plaintiff,
against which five appeals were preferred. Of these, the above
appeal by defendant No. 1 was determined by that portion of the
judgment of the High Court which is given below.

Sankaran Nayar, Narayana Rau and Subramania Ayyar for
appellant.

*The Acting Advocate-General (Hon. V. Bhushyam Ayyangar),
Krishnasami Ayyar, Sundara Ayyar, and Sessa Chariar* for
respondent No. 1.

Seshagiri Ayyar for respondent No. 4.

Tirumalaisami Chetti for respondent No. 6.

JUDGMENT.—Plaintiff, as purchaser of the equity of redemption
of a certain village, sued to redeem on payment of the mortgage
money.

Various objections were raised by the contesting defendants,
but they were disallowed by the Subordinate Judge, who gave
plaintiff a decree for redemption. Against this decree the first,
sixth, fifth, and fourth defendants separately appeal in Appeal
Suits Nos. 75, 92, 145 and 146 of 1896. The plaintiff also
appeals (Appeal Suit No. 62) against a small part of the decree.

The facts, out of which the litigation has arisen, are compli-
cated, but they are fully stated in paragraph 1 of the Subordinate
Judge's judgment and need not be repeated here.

The main appeal is that of the first defendant. His chief con-
tention before us is that the only remedy of the mortgagor, or
of the plaintiff, as assignee of the equity of redemption, was to
have executed the decree in Appeal Suit No. 98 of 1880, and that,
as execution of that decree is now barred, he has lost the right to
redeem and cannot fall back on the original mortgages (A, B, C
and E) and sue to redeem them. He contends that those mort-
gages are merged in the decree in Appeal Suit No. 98 of 1880.
He further contends that, as the plaintiff in the present suit
claims to redeem on payment of the sum of Rs. 1,339-7-3, which
was the sum found to be due to first defendant up to 1st July 1892
on the basis of that decree, the suit is really one based on that
decree not on the prior mortgages, and that it is therefore not
sustainable. He relies on the decision of the Privy Council in

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the case reported as *Hari Raji Chiplunkar v. Chapurji Hormasji Shel*(1).

We do not think that these contentions are valid, or that the case is in point. By the decree in Appeal Suit No. 98 of 1880 the fourth defendant was to recover the mortgaged property provided he discharged the mortgage, but there was no foreclosure clause in the decree. It is a well settled rule of law in this Presidency that such a decree does not of itself operate to foreclose the right of redemption (*Sami v. Somasundara*(2), *Periandi v. Angappa*(3), *Karuthasami v. Jaganatha*(4), and *Ramunni v. Brahma Dattan*(5)), nor does it alter the previously existing legal relation of mortgagor and mortgagee. If the decree-holder fails to exercise the right of redemption given to him by the decree, he, in effect, declines to put an end to the relation, and in time his right to execute the decree becomes barred, but the legal relation of mortgagor and mortgagee continues; and the mortgagor may, in a fresh suit, again assert his right to redeem on payment of such sum as may then be due, which sum may, on taking an account, be greater or less than the sum which was requisite under the former decree. There is nothing in the Privy Council case of *Hari Raji Chiplunkar v. Chapurji Hormasji Shel*(1) to overrule the established course of decisions in this Presidency. In that case the plaintiff deliberately brought his suit, not on the prior mortgage, but 'on the new basis' of the decree in which he declared that the prior transactions had 'merged,' and the date of the cause of action was stated to be that of the decree. That decree was in accordance with an award of arbitrators, and that was, no doubt, the reason why the plaintiff was particular to base his suit on the decree not on the mortgages. In fact, as their Lordships remark, "he treated the decree as the mortgage which he sought to redeem" and they therefore held that he could not in the course of the appeal fall back on the prior mortgage since that "would be making a different case from that which he made in the Lower Courts, and on which the case had been tried and decided." In the present case it is not suggested that the plaintiff's case in appeal is not that set up in the Lower Court. His suit was, and is, to redeem the prior mortgages, and this he is undoubtedly entitled to do in accordance with the settled

(1) I.L.R., 10 Bom., 401. (2) I.L.R., 6 Mad., 110. (3) I.L.R., 7 Mad., 423.
(4) I.L.R., 8 Mad., 478. (5) I.L.R., 15 Mad., 360.

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course of decisions in this Presidency. Their Lordships refer to the Madras rule without disapproval, merely remarking that the plaintiff could not take advantage of it owing to the form in which his suit had been framed and put forward in the Lower Courts. In the present case the plaintiff no doubt proposed to pay and deposited in Court Rs. 1,339-7-8, the sum due up to July 1892 on the basis of that decree, but he added that he was "ready and willing to pay such further or other sum as may be found payable to the first defendant." The Subordinate Judge, finding that the order (of the District Court on Civil Miscellaneous Petition No. 107 of 1892, which fixed the sum at Rs. 1,339-7-8) had been set aside by the High Court (Civil Miscellaneous Appeal No. 58 of 1893), gave no effect to it. The decree, however, in Appeal Suit No. 98 of 1880 (in execution of which that order had been made), had never been set aside, and the decision in that suit was held by the Subordinate Judge to be a binding adjudication between the parties as to the matters then properly in issue and finally decided between them. In that suit there was a contest as to the validity of the mortgages (A, B, C and E) now sued on, and the binding character of the debts, and, after due enquiry, it was found that only portions of the mortgages were valid and binding on the zamindari. The Subordinate Judge adopted those findings as *res judicata*, and directed that the mortgage money now due should be calculated accordingly. The first defendant objects to this course, and pleads that if the plaintiff now sues not on that decree, but on the original mortgages, the findings in that suit should be wholly ignored, and there should be an enquiry and decision *de novo* as to the validity and binding character of the mortgage debts. The reason for his urging this is that some of the debts which were then held to be not binding on the zamindari would now, under the law as subsequently explained by the Privy Council in *Sartaj Kuari v. Deoraj Kuari*(1), be held to be binding; but we agree with the Subordinate Judge that a change in the law or a different interpretation of it by the appellate authorities cannot operate to re-open matters which had previously become *res judicata*. The former suit, though originally framed as a suit in ejectment, was treated as a suit to redeem the mortgages and was essentially such, as shown by the Subordinate Judge in

(1) I.L.R., 10 All., 272.

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paragraphs 11 to 13 of his judgment. The issues in that suit were:—

(1) In what sum was fourth defendant's father indebted to first defendant's father and what portion if any remains due?

(2) To what extent, if at all, is the estate liable for the sum so remaining due?

It would be contrary to all principle to ignore the findings then arrived at finally between the parties by the decision of the High Court. We think, therefore, that the Subordinate Judge was right in accepting that decision not only as declaring the legal relation between the parties, but also as determining on what conditions redemption should be decreed, and the principles on which the accounts should be taken on foot of the mortgages and the sum due thereunder up to the date of that decree.

It remains to briefly notice some minor contentions of the first defendant.

It is contended that, as the plaintiff purchased only seven-eighths of the equity of redemption, he cannot sue for redemption without giving the owner of the remaining one-eighth the option of joining as plaintiff. The plaintiff sues to redeem the whole mortgage, and he is entitled to do so under sections 91 and 95, Transfer of Property Act. By so doing, he puts himself in the place of the mortgagee redeemed, and may himself be redeemed by his co-mortgagor in respect of the proportionate share (*Asan-sab Ravuthan v. Vamana Rau*(1) and *Moidin v. Oothumanganni*(2)). In the present case we may add that neither in the Lower Court nor before us did the second and third defendants, who hold the remaining one-eighth share, apply to be joined as plaintiffs. For both reasons the objection fails. Lastly, it is contended that the steps taken by the plaintiff with a view to appeal to the Privy Council against the order in Civil Miscellaneous Appeal No. 58 of 1893 constitute a bar to the present suit under section 12 of the Civil Procedure Code. This plea is invalid for the reasons stated by the Subordinate Judge in paragraph 9 of his judgment.

We have now dealt with all the matters urged before us in these appeals. The result is that we confirm the decree of the Subordinate Judge and dismiss these appeals with costs.

(1) I.L.R., 2 Mad., 223.

(2) I.L.R., 11 Mad., 416.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

MIR ALLI HUSSAIN AND ANOTHER (PLAINTIFFS NOS. 1 AND 2),
APPELLANTS,

v.

SAJUDA BEGUM AND OTHERS (DEFENDANTS NOS. 1, 2 AND 3),
RESPONDENTS.*

Muhammadan Law - Shiya - Inheritance by childless widows.

The childless widow of a Muhammadan of the Shiya school is not entitled to any share in the land left by her husband.

SECOND APPEAL against the decree of M. B. Sundara Rau, Subordinate Judge of Chittoor, in Appeal Suit No. 75 of 1893, modifying the decree of A. F. Elliot, District Munsif of Vellore, in Original Suit No. 20 of 1891.

The plaintiff sued to recover possession of a share in the property of Mir Abbas Mirza Sahab, deceased, an adherent of the Shiya sect.

The District Munsif passed a decree for plaintiff which was modified by the Subordinate Judge on appeal.

Plaintiff preferred the second appeal.

Pattabhirama Ayyar for appellants.

Mr. Ramasami Raju for respondent No. 1.

JUDGMENT.—The authorities in support of the Munsif's finding that a childless widow of the Shiya school is not entitled to any share in the land of her husband are to be found in *Mussamut Asloo v. Mussamut Umdutoonnissa*(1) and *Mussumat Toonanjan v. Mussumat Mehndee Begum*(2). We see no reason to differ from those decisions. Elborling's work referred to by the Subordinate Judge in support of the contrary view is no authority.

We, therefore, reverse the Subordinate Judge's decree and restore that of the Munsif, with this modification that, in place of the sum of Rs. 125 to be divided between the parties in the proportions stated, the sum of Rs. 218 be inserted.

* Second Appeal No. 298 of 1896.

(1) 20. W.L., 297.

(2) 3 Agre High Court Reports, 18.

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We make this modification in the Munsif's decree in accordance with the findings of the Subordinate Judge which were overlooked in the passing of his decree. We also modify the decree of the Munsif as to costs by directing that the costs of the parties be borne by themselves throughout.

APPELLATE CIVIL.

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

SAMI AYYANGAR (DEFENDANT No. 2), APPELLANT,

v.

PONNAMMAL (PLAINTIFF), RESPONDENT.*

Hindu law—Mortgage—Loan at time of mortgage—Whether mortgage binding on the property of the mortgagor's undivided son.

In order to justify a sale or a mortgage by a father so as to bind his son's share of the property, there must be in fact an antecedent debt, i.e., a debt prior to the mortgage or sale.

SECOND APPEAL against the decree of T. M. Horsfall, District Judge of Tanjore, in Appeal Suit No. 594 of 1894, affirming the decree of A. Sambamurthi Ayyar, District Munsif of Valangiman, in Original Suit No. 358 of 1889.

The appellant (defendant No. 2) was the undivided son of defendant No. 1 who in 1883 executed a hypothecation bond to the husband (since deceased) of the plaintiff who brought this suit on the bond, it having fallen to her share on a razinama entered into between her and another widow of her husband.

Both the lower Courts gave a decree for the amount claimed on the security of the mortgaged property including the second defendant's share. Hence this appeal.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and Gopalasami Ayyangar for appellant.

Sankaran Nayar for respondent.

JUDGMENT.—As regards the liability of the son's share for the debt of the father as a mere money claim, there can be no question, since it is found that the mortgage was for consideration and was not illegal or immoral.

* Second Appeal No. 1597 of 1895.

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The next question is whether the mortgage is binding on the son in respect of his share. It is argued for the appellant that, the father having borrowed money not prior to the mortgage but only at the time of the mortgage, the debt cannot be considered to be an antecedent debt so as to come within the rule in the Privy Council case *Suraj Bansi Koer v. Sheo Persad Singh*(1). This is the view taken by this Court in *Srinivasa Ayyangar v. Ponnammal*(2) and *Chinnayya v. Perumal*(3). The respondent refers us to the case reported as *Khatilul Rahman v. Govind Pershad*(4) in which it was held that even in circumstances such as those of the present case, the mortgage will be enforced against the son's share as well as against that of the father. We do not find any sufficient grounds for differing from the rule hitherto followed by this Court, viz., that in order to justify a sale or a mortgage by a father so as to bind the son's share, there must be, in fact, an antecedent debt, i.e., a debt, prior to the mortgage or sale.

We must, therefore, allow the appeal with costs, and modify the decree of the Lower Appellate Court accordingly, but this will not affect the right of the plaintiff to proceed against the son's share in execution of the decree, treating it as a mere money decree. We make no order as to costs in the Lower Appellate Court.

APPELLATE CIVIL.

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

ABDUL RAHIMAN AND OTHERS (PLAINTIFFS), APPELLANTS,
v.

MAHOMED KASSIM (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 244, 337 (a)—Order directing the release of judgment-debtor—Appeal.

A judgment-debtor, who had been arrested in execution of a decree of a District Munsif, made an application for his release under Civil Procedure Code, section 337 (a), and his application was granted:

Held, that an appeal lay against the order granting the application.

(1) I.L.R., 5 Calo., 148. (2) Letters Patent Appeal No. 12 of 1893 unreported.
(3) I.L.R., 13 Mad., 51. (4) I.L.R., 20 Calo., 328.

* Appeal against Appellate Order No. 1 of 1897.

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August 6.

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v.
MAHOMED
KASSIM.

APPEAL against the order of W. J. Tate, District Judge of Salem, in Appeal No. 161 of 1894, which was preferred against the order of J. M. Nallasami Pillai, District Munsif of Tiruppattur, made on execution petition No. 161 of 1894.

The petitioner was the judgment-debtor in Original Suit No. 681 of 1888, and he applied under sections 337 and 337 (a) for an order directing his release and staying the execution of the decree, pending a second appeal which had been preferred to the High Court. The District Munsif made an order directing the applicant's release under Civil Procedure Code, section 337 (a). The decree-holder appealed to the District Judge, who held that no appeal lay.

The decree-holder preferred this appeal to the High Court.

Seshagiri Ayyar for appellant.

Sivasami Ayyar for respondent.

JUDGMENT.—Though the order of the District Munsif was passed under the authority given to him by section 337 (a), Civil Procedure Code, yet it was none the less an order in a question arising between the parties to the suit and relating to the execution of the decree so as to fall within section 244 (c), Civil Procedure Code. Such order is a decree under section 2 of the Code, and is therefore open to appeal.

We must, therefore, set aside the order of the District Judge, and remand the appeal for disposal on the merits. Costs will abide and follow the order of the Lower Appellate Court.

APPELLATE CIVIL.

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

BOJJAMMA (PLAINTIFF No. 2), APPELLANT,

v.

VENKATARAMAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Negotiable instrument—Benami transaction—Right of benamidar to sue.

The payee and holder of a promissory note is not debarred from suing on it by reason of the fact that a third person is really interested in it.

* Second Appeal No. 400 of 1896.

SECOND APPEAL against the decree of W. G. Underwood, District Judge of Cuddapah, in Appeal Suit No. 24 of 1895, affirming the decree of V. G. Narayana Ayyar, District Munsif of Cuddapah, in Original Suit No. 608 of 1893.

This was a suit on a promissory note executed by defendant No. 1 to plaintiff No. 1 for Rs. 448, dated 14th November 1890. The plaintiff stated that the money was advanced by one Chin-tapalli Kristnavadhanulu, though the note was in his name.

Both the Courts dismissed the suit.

Plaintiff No. 2 appealed.

Subramania Ayyar for appellant.

Etiraja Mudaliyar for respondents.

JUDGMENT.—It is not quite clear that this really was a benami transaction; but, assuming that it is we do not think that the payee and holder of a promissory note is debarred from suing on it by reason of the fact that a third person is really interested in it. No doubt it has been often held in suits relating to land that a benamidar is not competent to sue in his own name. But there is a great distinction between cases of that sort and the case of negotiable instruments. The distinction between suits relating to immovable property and suits on contracts appears to be recognized by the Privy Council (*Gopeerkrist Gosain v. Gungapersaud Gosain*(1) and *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar*(2)). In the case of negotiable instruments especially it would be most mischievous in our opinion to hold that the holder and payee of an instrument may be put to proof as to whether the money advanced was his own. We can find no reported authority in favour of the plea now suggested. We entirely disagree with the unreported decision in *Ganapati Naicken v. Saminatha Pillai*(3).

We must reverse the decrees of the Courts below and the plaintiff must have a decree against the first defendant as prayed with costs throughout.

(1) 6 M.I.A., 72.

(2) I.L.R., 16 Cal., 364.

(3) Civil Revision Petition No. 578 of 1895 unreported.

APPELLATE CIVIL.

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

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POKREE SAHEB BEARY (PLAINTIFF), APPELLANT,

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POKREE DEARY AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 72—Mortgage accounts—Costs incurred by mortgagee.

Land, having been mortgaged to the defendant, was let by him for rent to the mortgagor. The rent fell into arrear and the mortgagee sued and obtained a decree for the rent in arrear and for possession. Subsequently after the mortgagor's death, her heir, the present plaintiff, unsuccessfully resisted execution of the decree obtained against her, asserting that she had no right to mortgage the property which, it was alleged, had belonged to his father. The plaintiff now brought a suit for redemption:

Held, that in taking the account the defendant was entitled to have credit for the costs incurred in the proceedings between him and the plaintiff, but not in the proceedings between him and the original mortgagor.

SECOND APPEAL against the decree of W. C. Holmes, District Judge of South Canara, in Appeal Suit No. 7 of 1894, modifying the decree of S. Raghunathayya, District Munsif of Mangalore, in Original Suit No. 20 of 1892.

The plaintiff sued to recover possession of land which had been mortgaged by his mother and predecessor in title to the defendant. The suit was treated as a redemption suit, and the chief question was as to whether, in taking the mortgage account, the mortgagee was entitled to credit for the costs of certain litigation. The circumstances relating thereto were stated by the District Munsif as follows:—

“Pathumma appears to have obtained back on chalongi the entire property mortgaged to first defendant (*vide* exhibits II and V). In 1884 first defendant sued plaintiff's mother to recover possession of the said mortgaged property with arrears of rent, and also future rent, and got a decree (*vide* exhibit V). In executing this decree, first defendant was resisted by plaintiff, who contended that the property was his father's, but his contention was disallowed, the property being held to be his mother

“Pathumma's property (*vide* exhibits V and VII, the judgment “in the Court of First Instance and in Appellate Court, respectively, “the latter of which had been passed on 9th September 1886). “At about the close of 1887, first defendant appears to have “applied for execution of his decree by arresting the plaintiff, “son of Pathumma, who was then dead; but the Court appears to “have declined to arrest him, until after the attachment and sale “of debtor's property should take place.”

The present appeal was preferred by the plaintiff.

Pattabhirama Ayyar for appellant.

Narayana Rau for respondents.

JUDGMENT.—The Lower Court have properly held that exhibit III is not binding upon the plaintiff, and that the first defendant is not therefore entitled to the sum therein mentioned.

The next question is whether the first defendant is entitled to all or any of the sums allowed by the District Judge as payable by the plaintiff before he can recover possession of the mortgaged property. The sums are claimed as due in respect of costs incurred by the first defendant in certain suits (exhibits V, VI and VII). The sum in exhibit V represents costs incurred by first defendant in a suit for rent due by the original mortgagor as a tenant of the first defendant. The tenancy was created subsequent to the mortgage, and the rent was not made a charge on the property by the contract between the parties. Moreover, the decree in the suit was only a personal decree. In these circumstances, we are unable to hold that these costs were incurred for the due management of the property, and the collection of the rents within the meaning of section 72 (a) of the Transfer of Property Act, 1882. To hold otherwise would, in many cases, enable the mortgagee to recover from the mortgagor the expenses incurred by the former in attempting to recover rents from tenants put into possession by himself. Should such tenants fail to pay, there is no reason why the mortgagor should be responsible for the expenses of the litigation, unless, of course, he has entered into any contract with the mortgagee to be responsible. The fact that, in the present case, the mortgagor is the tenant can make no difference in principle, since she was sued as tenant, not as mortgagor. The first defendant is not entitled to make these costs a charge on the property. As regards the costs incurred in the other suit to which exhibits VI and VII relate, we observe that in that suit the mortgagor's title

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was impeached by the present plaintiff, and the costs were incurred by the first defendant, the mortgagee, in defending the mortgagor's title. Such costs are clearly within the rule in section 72 (c) of the Transfer of Property Act.

The law to this effect was laid down long ago in *Godfrey v. Watson*(1) and *Parker v. Watkins*(2) is no exception to the rule. For all that was there decided was that "if some litigious person chooses to contest his (the mortgagee's) title to the mortgage, that should not affect the parties interested in the equity of redemption." The Vice-Chancellor, however, expressly observed that "where a mortgagee has been put to expense in defending the title to the estate, the defence being for the benefit of all parties, he is entitled to charge those expenses against the estate." The latter is precisely the present case.

The District Judge was therefore right in allowing these costs.

The District Judge has not given any finding as to the amounts to be allowed with reference to the repairs of the embankment and the trees cut, but the sum is trifling, and the respondents' vakil does not press to have the case sent back for a finding on these matters.

Both parties have, to some extent, failed to establish their respective contentions.

We shall, therefore, allow the first defendant only half the costs throughout. The plaintiff must bear his own.

The decree for redemption will be modified in accordance with these findings, and the time for redemption will be three months from this date.

(1) 3 Atk., 517.

(2) John, 133.

APPELLATE CIVIL.

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

ACHUTA MENON (PLAINTIFF), APPELLANT,

v.

ACHUTAN NAYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 373—Suit withdrawn without liberty to bring a fresh suit—Subsequent suit for the same matter.

In 1893 the plaintiff sued to eject the defendants alleging that they were in occupation of the land in question under a lease of 1880 from the late Zamorin of Calicut. The plaintiff's title rested on an instrument executed by him in 1892. It was objected that the instrument was not binding after the death of the grantor. The plaintiff thereupon withdrew his suit without obtaining leave to sue again. He subsequently obtained a like instrument from the present Zamorin and sued again to eject the defendants:

Held, that the second suit was not maintainable by reason of Civil Procedure Code, section 373.

SECOND APPEAL against the decree of J. A. Davies, District Judge of South Malabar, in Appeal Suit No. 245 of 1895, reversing the decree of P. Raman Menon, District Munsif of Nedunganad, in Original Suit No. 495 of 1893.

Suit for land. The facts of this case as far as material for the purposes of this report were stated by District Munsif as follows:—

"The lands are the jenm of the fifteenth defendant and are held by defendants on Tiruvazhutu right. Plaintiff obtained a melcharth from the fifteenth defendant's predecessor and sued on it in Original Suit No. 189 of 1893. The fifteenth defendant denied the validity of the melcharth on the ground that the Melcharth was given before the expiry of the term and by the time the term expired the grantor of the melcharth died. Plaintiff then applied for permission to withdraw the case with leave to sue again. The suit was allowed to be withdrawn, but the leave to sue again was refused. Plaintiff then obtained a fresh melcharth from fifteenth defendant and sues. Defendants contend that the suit is barred by the provisions of section 373, Civil Procedure Code. I do not think the contention is good. No doubt both suits are upon the same

* Second Appeal No. 772 of 1896.

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"demise, but it must be remembered that plaintiff's right to bring the former suit was different from the one on which this suit is based. If, for instance, the plaintiff's former suit had been dismissed on the ground that the melcharth was invalid, would the fifteenth defendant be barred from recovering the lands in a fresh suit? I think not, and I do not see why plaintiff should be barred from suing on a melcharth given by the fifteenth defendant. Since the authority on which the plaintiff now sues is different from the one on which the former suit was brought, the provisions of section 373, Civil Procedure Code, are not applicable. The accident of the same man being plaintiff in both cases, cannot bar the second suit inasmuch as the right on which the former suit was brought was different from the one now alleged. I find the seventh issue for plaintiff."

The District Munsif passed a decree as prayed.

The District Judge reversed his decree on the ground that the suit was barred under section 373, Civil Procedure Code. He said:—"In this case the plaintiff here had been the plaintiff in Original Suit No. 189 of 1893, which was a suit for ejectment against the same defendants as in this suit and upon the same lease, and he withdrew that suit without permission of the Court. The only difference here is that the melcharth which clothes plaintiff with the right of suit is not the same melcharth upon which he is entitled to bring the former suit. The cause of action is the same, but the plaintiff's particular right to sue is based on a different document. The individual is the same, but he has put on new apparel for old apparel. It seems to me clear that the words 'the plaintiff' in section 373 must refer to the individual, and that a penalty is intended for that particular person who sets a Court of Law in motion and then wantonly stops the machinery. He is not to be allowed to sue in Court again in any guise for the same matter. That the matter is the same here as in that suit is not disputed, and the person suing now is the same individual who was plaintiff in that suit."

The plaintiff preferred this second appeal.

Sankaran Nayar and Ryrn Nambiar for appellants.

Sundaru Ayyar and Govinda Menon for respondents.

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JUDGMENT.—Prior to the institution of the present suit, the plaintiff had instituted another, viz., Original Suit No. 189 of 1893, against these same defendants who are contesting this suit. In that suit he sought to compel these defendants to surrender certain plots of land on receiving from him the value of improvements, if any, made by them. He then alleged that the said defendants held the lands as tenants under the lease of the 10th October 1880, which was to endure for twelve years and which was granted to the first defendant by the late Zamorin, to whose 'stanom' or dignity the lands are attached. As to the right to claim the surrender of the lands, the plaintiff relied on a demise by the same Zamorin, dated 28th July 1892. The present Zamorin, who was also one of the defendants in the case, contended that the demise of the 28th July 1892 was not granted under circumstances which, in law, rendered it binding on him as the present holder of the stanom. The present contesting defendants denied their liability to surrender the lands, and alleged that the tenancy under which they held was a permanent one, or that they were entitled to hold for a further period.

The plaintiff on or about the 12th December 1893 withdrew the suit without leave to sue again. Having, however, on the 16th idem obtained a demise from the present Zamorin himself, the plaintiff brought this suit for the surrender of the same property alleging it, in this suit also, to be in the occupation of the defendants under the lease of 10th October 1880 relied on by the plaintiff in the prior suit.

The Lower Appellate Court was of opinion that the plaintiff was precluded by section 373 of the Civil Procedure Code from maintaining the present suit, and it was accordingly dismissed. It was urged before us on behalf of the plaintiff that the Lower Appellate Court was wrong in holding that the present suit was for the 'same matter' within the meaning of section 373 of the Civil Procedure Code as that involved in the previous suit, and that consequently that section ought not to be held applicable.

Now the term 'matter' in a context like that in the above-mentioned section means clearly "the subject of legal action, consideration, complaint or defence or the fact or facts constituting the whole or a part of a ground of action or defence" (See Anderson's 'Dictionary of Law'). The point, then, for determination is whether there exists in the present instance the identity

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of 'matter' required by law in order to make the section applicable.

Now, taking first for convenience sake the defence or the facts constituting the basis of the right set up by the contesting defendants, the case is doubtless the same now as it was in the earlier suit.

Turning next to the nature of the plaintiff's claim or the facts constituting the basis of his right and its infraction, or, in short, his cause of action, it is equally clear that there is identity at all events with regard to that portion thereof which relates to the alleged liability of the defendants to surrender the lands, since the contract by virtue of the provisions of which it was alleged they had to surrender the property is one and the same, viz., the lease of 10th October 1880 granted by the late Zamorin. As to the remaining portion of the plaintiff's own case, no doubt, there is some difference, inasmuch as the demise relied on in the former suit was one granted by the late Zamorin, while that now relied on is one granted by the present Zamorin. The question whether, in these circumstances, the matter constituting the cause of action is the same or different is one of considerable difficulty, and must depend on the facts of the two suits as pointed out by West, J., in *Girdhar Manordas v. Dayabhai Kalubhai*(1)—a case relating to section 13 of the Civil Procedure Code, in which section also the term 'matter' seems to be used in the sense explained above. In that case West, J., observed that the authorities cited therein showed that "where there has been a real separateness of the legal relations and of the evidence necessary to establish it in two successive suits between the same parties, the second is not barred by the first" (*Girdhar Manordas v. Dayabhai Kalubhai*(1)). In *Shridhar Vinayak v. Narayan Valad Babaji*(2) the same learned Judge expressed himself in connection with that very point thus: "The matter must be regarded as essentially different when it did not originate in the same transaction and when it constituted, as averred, a wholly different right in the plaintiff giving rise to a different duty on the part of the defendant," or again, as West, J., himself put the question in another aspect of it in *Naro Hari v. Anpurnabai*(3), "the cause of action is to be regarded as the same if it rests on facts which are integrally connected

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"with those upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference" and *Haji Hasam Ibrahim v. Mancharam Kaliandas*(1). What is the conclusion which the facts in the present case suggest in the light of the above statements of the law? Now, in the present, as well as in the previous suit, the allegation that the defendants held under the self-same lease of 1880 was an essential part of the plaintiff's cause of action. Consequently in our opinion, it cannot properly be said that there is no integral connection whatever between the plaintiff's allegations in the two suits, that there is a complete difference between the cause of action alleged before and that alleged now, and that the transaction of 1893 between the plaintiff and the present Zamorin, which is the only distinguishing circumstance relied on, imposed on the defendants a duty wholly or to any extent different from that to which they were subject before that transaction took place. It follows, therefore, that that part also of the matter in issue in the two suits which had or has reference to the plaintiff's case by itself is substantially the same within the meaning of the authorities cited above, and section 373 must, therefore, in our opinion, be held to be applicable. Suppose, however, that the plaintiff's cause of action in the previous suit was different from that in the present suit. Nevertheless, the suit must be held to be unsustainable for the simple reason that the identical defence raised by the contesting defendants in the two suits is of such a nature as would, if it had been established in the previous suit, have precluded the plaintiff from maintaining this suit even on the demise of 1893. It is scarcely necessary to say that one of the objects of section 373 is to protect a defendant from being harassed by repeated litigation with reference not only to the allegations constituting the plaintiff's case, but also as to those which constitute the defence or any part of it. The defendants here are, therefore, under the section in question, entitled successfully to contend that the plaintiff having once, without obtaining the necessary leave, withdrawn from the contest respecting the tenancy set up by them is now prevented from agitating that question in this suit, or, in other words, his claim completely fails.

For these reasons, agreeing with the conclusion arrived at by the Lower Appellate Court, we dismiss the second appeal with costs.

(1) I.L.R., 8 Bom., 174.

(2) 11 B.H.C.R., 224.

(3) I.L.R., 11 Bom., 180.

(1) I.L.R., 3 Bom., 137.

APPELLATE CIVIL.

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

ARUNAGIRI MUDALI (DEFENDANT), APPELLANT,

v.

RANGANAYAKI AMMAL AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

Hindu Law—Succession—Illegitimate children—Property of mother.

A Hindu woman having daughters by one paramour and a son by another died leaving a house. The daughters sued for possession of the house in succession to their mother. It was *inter alia* pleaded for the defence that the plaintiffs could not recover the house for the reason that it had been derived from the putative father of the first defendant, but this was not proved:

Held, that the plaintiffs were entitled to recover.

Seemle: that the decision would have been the same even if the allegation on which the above plea was based had been established.

APPEAL against the decree of P. Sreenivasa Rau, Judge of the City Civil Court, Madras, in Original Suit No. 37 of 1895.

The plaintiffs were the illegitimate daughters of the mother of defendant No. 1, who was her son by another paramour, and they sued to recover possession of a house to which they claimed to be entitled in succession to their mother. Defendant No. 1 had mortgaged the house to defendant No. 2. It was sought to be proved for the defence that the mother had derived the property from the putative father of defendant No. 1, and that the mortgage to defendant No. 2 was in any event binding upon the interest of the plaintiffs, because the amount secured thereby had been advanced from time to time for purposes binding on them. The latter contention forms the subject of the fourth issue. Both these points were decided in favour of the plaintiffs to whom the Judge gave the decree.

Defendant No. 2 preferred this second appeal.

Krishnasami Chetti, Sankaran Nayar and K. N. Aiyar for appellant.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and Etiraju Mudaliar for respondents.

JUDGMENT.—Two main contentions are urged by the appellant before us. The first is that the money with which Chinnathayammal purchased the house was derived by her from her first paramour, the father of the first defendant, and that therefore, as a matter of law, the house devolves on the first defendant rather than on the plaintiffs who are the woman's daughters by another paramour. In support of this proposition of law, the appellant's *vakil* relies on the text in 'Manu,' chapter 9, section 191 (see page 389, Max Müller's 'Sacred Books of the East'). The text is as follows:—

"But if two (sons) begotten by two (different men) contend for the property (in the hands) of their mother, each shall take to the exclusion of the other, what belonged to his father."

In regard to this we may observe that the section appears to refer not to the devolution of the property of a concubine or prostitute, but rather of a woman married in succession to two husbands, and it is so understood by the commentators Kullukha and Nandana. Moreover it would seem that section 191 must be read in connection with the section which immediately precedes it, and that it should then be understood not as referring to the self-acquired property of the woman, but to the property of the deceased father of the children in her hands. Thus it would seem that the text has no application to the present case, where the competition is between the daughters of a prostitute by one paramour and her son by another paramour. We do not, however, think it necessary to discuss the legal question more fully, as we are of opinion that the first defendant has not satisfactorily shown that his mother in fact derived the property from his putative father.

The story of the jewels being taken from him when a child is improbable, and there is no documentary evidence, such as might certainly have been expected, to support the allegation of his witnesses that his mother sold a house previously given to her by his father.

For all these reasons the first ground urged before us fails.

The second ground urged is that the money was borrowed by first defendant as *de facto* manager of the plaintiff's family and was expended for their benefit, and the plaintiff's estate is, therefore, bound by the mortgage. Here again we are unable to find the fact on which the argument depends. Exhibits F, G and J show that, so long ago as 1887, the first defendant claimed the house as

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AMMAL.

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* City Civil Court Appeal No. 14 of 1896.

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AMMAL.

his exclusive property, and his claim was resisted on plaintiff's behalf by their putative father and next friend, and the Collector refused to admit the first defendant's claim. The second defendant by his own admission knew of this contest and doubted the first defendant's title, yet he says he lent on the security of the house. This, we think, is highly improbable.

The only transaction said to be prior to those documents F, G and J is the promissory note (exhibit II), but we are not satisfied that it was executed on the date it bears or that the money was really paid as recited therein. On the whole we conclude that the decision of the Court below on the fourth issue is right.

Both the grounds urged in appeal having thus failed, we confirm the decree of the Lower Court and dismiss this appeal with costs.

APPELLATE CIVIL.

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

ATHIKARATH NANU MENON AND OTHERS (PLAINTIFFS),
APPELLANTS,

v.

ERATHANIKAT KOMU NAYAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Specific Relief Act—Act I of 1877, s. 42—Suit for declaration—Laches and delay on plaintiffs' part.

Inasmuch as in this country a period of limitation is prescribed even for suits where the grant of relief sought is within the discretion of the Court, and lapse of time short of the period of limitation should not ordinarily be held good ground for refusing relief to a plaintiff.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of South Malabar, in Appeal Suit No. 468 of 1895, reversing the decree of A. Venkataramana Pai, Subordinate Judge of Calicut, in Original Suit No. 4 of 1893.

The plaintiffs (fifteen in number), who, with the first three defendants, constitute a Marunakkatayam tarwad, sued for a declaration that a mortgage executed in 1889 by the first defendants

in favour of one Kunju Menon, the predecessor in title of defendants Nos. 4 to 24, was not binding on the mortgaged properties belonging to the tarwad.

The Subordinate Judge found that the mortgage in question was not binding on the plaintiffs and made the declaration asked for.

Against his decree appeals were preferred to the District Court who dismissed the suit.

The facts found by both Courts were that the property belonged to the tarwad, and had been held since 1867 by the first defendant under a registered karar, which only entitled her to mortgage it for certain specified debts, and that the debts for which the mortgage in question was granted were not those specified. The defendants raised a plea of estoppel and pointed to the plaintiffs' delay in suing. As to this the District Judge said:—

"The Subordinate Judge has himself found that the karnavan and the senior anandravan of the tarwad, third defendant and first plaintiff by their conduct led the creditors to believe that they had no objection to the debt being charged upon the property. It may, doubtless, be, as the respondents' pleader urges, that the mortgagee having the means at any rate of ascertaining the provisions of the karar ought to have known that, as a matter of law, the karnavan and the senior anandravan had no power to set it aside. It is pointed out, however, that the plaintiffs were no parties to the karar, and that the cases to which a family karar has been held not to be liable to be set aside except by all the members of the tarwad, have been cases in which the karar was executed in order to restrain the karnavan himself which is not the case here. Here all the actual parties to the karar were assenting to the mortgage deed. Without going so far as to say that the case is one to which the legal doctrine of estoppel strictly applies, I have come to the conclusion that the Lower Court ought not, in the circumstances, to have granted the relief sought. The case is an extremely hard one as far as the defendants are concerned, and there seems little doubt that money was *bona fide* lent by their ancestor for debts, which, if not strictly within the terms of karar, were yet either expressly or tacitly allowed by the other members of the tarwad to be proper and binding debts. As long as the original mortgagee Kunju Menon was alive, no attempt was made to set

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v.
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KOMU
NAYAR.

1897.
August 11.

* Second Appeal No. 1639 of 1896.

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KOMU
NAYAR.

"aside the mortgage, but as soon as he was dead, and no longer
"capable of bearing testimony as to the circumstances under
"which the mortgage was created, this suit is filed against his
"heirs. A period of not less than four years elapsed from the date
"of mortgage to the filing of the present suit, and there were ten
"years between the date of the suit and that of the prior mort-
"gage, which represented nearly one-half of the mortgage amount
"now in suit."

In the result he reversed the decree and dismissed the suit upon the ground that the plaintiffs had disentitled themselves to equitable relief by reason of their laches.

Plaintiffs preferred this second appeal.

Ryru Nambiar for appellants.

Govinda Menon for respondents.

JUDGMENT.—The District Judge, although finding that the mortgage was not binding on the plaintiffs, refused to give them a declaratory decree to that effect on the ground of their delay in bringing this suit for four years.

No doubt the grant of the relief herein prayed was within the discretion of the Court, but the question is whether mere delay, so long as the suit is brought within the prescribed period of limitation, was a good ground for withholding the relief to which the plaintiffs were *prima facie* entitled. Inasmuch as in this country a period of limitation is prescribed even for suits where the grant of relief sought is within the discretion of the Court, mere lapse of time short of the period of limitation should ordinarily be held not to be a good ground for refusing relief. Even according to the English decisions, in following which we should be cautious for the reasons pointed out by Frere and Holloway, JJ., in *Peddammuthulaty v. Timma Reddy*(1), mere delay is not a sufficient cause. To operate as a bar to relief the delay should be such as to amount to waiver of the plaintiffs' right by acquiescence, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted (*Erlanger v. New Sombrero Phosphate Company*(2))—vide the remarks of Lord Penzance at page 1231 and of Lord Blackburn at page 1279). When such is not the case any lapse of

(1) 2 M.H.C.R., 270.

(2) L.R., 3 App. Cas., 1218.

time should not disentitle a claimant to relief to which he has otherwise shown his title.

Of this, the recent case of *Rochevoucauld v. Bonstead*(1) is a good illustration. The same principle has been acted upon by the Bombay High Court with reference to mandatory injunctions (*Jamnadas Shankarlal v. Atmaram Harjivan*(2)). Examining the present case in the light of these observations, we find no adequate ground for holding that there was waiver or such conduct or neglect as would justify us in refusing the plaintiffs the declaration they are otherwise found to be entitled to, nor should it be overlooked that in this case the party through whom the defendants' claim entered into the transaction with his eyes open and at his own risk, as he was aware of the arrangement by which his mortgagor's power was limited. He could, therefore, claim no indulgence.

For these reasons must reverse the decree of the District Judge and restore that of the Subordinate Judge. The appellants' costs in this and the Lower Appellate Court must be paid by respondents Nos. 1 to 21.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

GADICHERLA CHINA SEETAYYA (PLAINTIFF), PETITIONER,

v.

GADICHERLA SEETAYYA (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 244 (c)—Party to the suit.

A defendant who had been exonerated from a suit is not a party within the meaning of Civil Procedure Code, section 244 (c), and a suit by the plaintiff for contribution for his share of the costs of execution is not barred under that section.

PETITION under Presidency Small Cause Courts Act, section 25, praying the High Court to revise the decree of N. Saminadha Ayyar, Subordinate Judge of Kistna, in Small Cause Suit No. 753 of 1895.

(1) L.R., 1897, 1 Ch. D., 196.

(2) I.L.R., 2 Bom., 133.

* Civil Revision Petition No. 339 of 1896.

ATHIKARATH
NANU
MENON
v.
ERATHANIKAT
KOMU
NAYAR.

1897.
October 15.

GADICHERLA
CHINA
SEETAYYA
v.
GADICHERLA
SEETAYYA.

The Subordinate Judge said: "Claim for Rs. 311-15-5 alleged to be due by the defendant in contribution for his one-sixth share of the costs of execution incurred by plaintiff in Original Suit No. 3 of 1867 on the file of the late Principal, Sadar Amin's Court of Rajahmundry.

"The defendant contends among others that no separate suit lies, as the matter in question falls within clause (c) of section 244 of the Civil Procedure Code.

"My finding is in the negative. This defendant was admittedly a party to the suit in which the decree was passed, and the question whether this defendant should pay to the decree-holder a portion of the execution costs is one relating to the execution of the decree. Consequently, clause (c) of section 244 does apply, and no separate suit can be brought. The decree-holder wanted to get the whole costs from the first defendant, who undertook to put the decree-holder in possession of his one-sixth share, but failed to do so. The District Judge of Godavari ordered the first defendant to pay the same, but on appeal the Madras High Court held that the first defendant should be liable only to his one-sixth share of the costs. But it does not follow therefrom that a separate suit lies for the remainder of costs."

In result he dismissed the suit with costs.

Plaintiff preferred this petition.

Sriranga Chariar for petitioner.

Elitaja Mudaliar for respondent.

JUDGMENT.—We think the Subordinate Judge was wrong in holding that the defendant who had been exonerated from the suit was a party within the meaning of section 244 (c) of the Civil Procedure Code, and, therefore, that the plaintiff could not bring a separate suit against him, but was bound to proceed in execution (see *Mukarrab Husain v. Hurmatunnissa*(1)).

The fact that the plaintiff's claim arises out of expenses incurred in the course of executing the decree makes no difference. We express no opinion as to the merits of the plaintiff's claim. We, therefore, reverse the decision of the Subordinate Judge and direct him to restore the suit to his file and dispose of it according to law.

The respondent must pay the appellant's costs.

(1) I.L.R., 18 All., 52.

APPELLATE CIVIL.

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

DHARANIPRAGADA DURGAMMA (PLAINTIFF), APPELLANT,

v.

KADAMBARI VIRRAZU AND OTHERS (DEFENDANTS
Nos. 1, 2 and 4), RESPONDENTS.*

Service inams—Enfranchisement of the inam in favour of a widow.

Lands constituting the emoluments of the office of Karnam were enfranchised in favour of a widow who had been in possession since the death of her husband which took place about 18 years previously. They were subsequently sold by her:

Held, that the vendee's title was good against the reversionary heir of the husband.

SECOND APPEAL against the decree of K. Krishna Rau, Subordinate Judge of Cocanada, in Appeal Suit No. 196 of 1895, reversing the decree of V. V. S. Avadhani, District Munsif of Amalapur, in Original Suit No. 668 of 1893.

Suit for land. The plaintiff sued as the daughter and heiress of one Papayya who died about 1853 to recover certain land which had been sold by his widow, Atchamma, who died in 1892, to the defendants. The District Munsif passed a decree as prayed. The Subordinate Judge reversed the decree and dismissed the suit on the ground that the property was the property of the widow. He said:—"The question is whether the land in dispute belonged to Papayya's widow, Atchamma, in absolute right, so that the alienation made by her is valid against Papayya's reversioner, the plaintiff. The defendants contend that the lands were emoluments for Karnam's office until 1870, and were in 1871-72 enfranchised in the name of Atchamma, and that, by this arrangement, the property became Atchamma's absolutely. Plaintiff's pleader argues that though, it is true, the lands were service inam and were enfranchised in Atchamma's name, still she got by such enfranchisement no more than the widow's estate, which she had been holding ever since her husband's death some forty years ago. I think this plea is untenable according to the principle adopted in *Venkatarayadu v. Venkataramayya*(1). The

* Second Appeal No. 1400 of 1890.

(1) I.L.R., 15 Mad., 284.

1897.
August 16.
September 1.

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"ground of the decision in that case is that the old rights connected with the land are altogether abrogated by the enfranchisement, and the person who is constituted owner takes it free from the fetters, if any, which the property may have been bound by before the enfranchisement. This is the reason why one of the two undivided brothers having joint right to the mirasi and the karnamship, would be deprived of both when the enfranchisement takes place in favour of the other brother. If one of the two co-parceners who are in actual possession can be so deprived of his interest, surely a reversioner after a widow's death can also be.

"The grant of the plaint land in question here to Atohamma was not a grant for the benefit of the reversioners of her husband, but was a grant to her 'personally', and she could therefore dispose of the property as she liked."

Plaintiff preferred this second appeal.

Narayana Rau for appellant.

Venkatarama Sarma for respondent.

JUDGMENT.—It is contended for the appellant that the decision of the Lower Appellate Court is opposed to the ruling in *Narayana v. Chengalamma*(1).

It may perhaps be that the contention is well founded, but it is not necessary for us to consider the question, as it is clear that the decision is in accordance with the decision of the Full Bench in the case of *Venkata v. Rama*(2). This decision of the Full Bench was not referred to in the case on which the appellant now relies, and we are bound to follow the ruling of the Full Bench. Under that ruling the widow must be held to have acquired the land under the inam title-deed as her own absolute property by grant from Government. That decision proceeded on the broad ground that the plaintiff did not hold the office of karnam at the time of the enfranchisement and, therefore, had no title to sue for the lands and that the land when enfranchised was at the disposal of Government and alienable to whomsoever the Government pleased. It regarded the inam title-deed as evidence of a grant of the land personally to the grantee, and that was the view followed in the case on which the Subordinate Judge relies *Venkatarayadu v. Venkataramayya*(3). Following, then, the principle of the Full

Bench case we are of opinion that there was an absolute grant by Government to the widow and that the appellant cannot question her alienations. There was no reason why Government should grant her only a widow's estate, rather than an absolute estate.

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

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APPELLATE CIVIL.

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

TIRUPATHI GOUNDAN (PLAINTIFF), APPELLANT,

v.

RAMA REDDI (DEFENDANT), RESPONDENT.*

1897.
March 30.

Negotiable Instruments Act—Act XXVI of 1881, s. 4, promissory note.

A debtor signed and delivered to his creditor an unstamped document as follows:—"The account executed on . . . by . . . to . . . The amount which I have this day received from you in cash is Rs. 700. This sum I am bound to pay you. Therefore, adding to this sum interest at 8 annas per cent. per mensem, I am liable to pay. This is the account in this manner executed with my consent":

Held, that the document was not a promissory note and was admissible in evidence.

SECOND APPEAL against the decree of W. J. Tato, District Judge of Salem, in Appeal Suit No. 47 of 1895, affirming the decree of K. Krishna Ayyangar, District Munsif of Krishnagiri, in Original Suit No. 56 of 1894.

The plaintiff sued to recover money lent. One of the pleas raised was that the instrument relied upon by the plaintiff in proof of the loan was really a promissory note, and not having been stamped was inadmissible in evidence.

The translation of the instrument in question in paragraph 2 of the judgment of the District Judge was as follows:—"The account executed on . . . by . . . to . . . The amount which I have this day received from you in cash is Rs. 700. This sum I am bound to pay you. Therefore, adding to this (sum)

* Second Appeal No. 12 of 1896.

(1) I.L.R., 10 Mad., 1. (2) I.L.R., 8 Mad., 249. (3) I.L.R., 15 Mad., 281.

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"interest at . . . , I am liable to pay. This is the account in
"this manner executed with my consent."

The District Munsif upheld his plea and ruled that the plaintiff was not entitled to adduce further evidence of the loan, and he accordingly dismissed the suit.

The District Judge on appeal affirmed his decision.

Plaintiff preferred this second appeal.

Sivasami Ayyar for appellant.

Mr. E. B. Porrell for respondent.

JUDGMENT.—The question is whether the document of the 2nd February of 1891 relied on by the plaintiff is a promissory note within the meaning of section 4 of the Negotiable Instruments Act, 1881, or a mere acknowledgment of liability falling under Article 1 of Schedule 1 of the General Stamp Act, or an agreement.

If it is a promissory note, the suit must fail as rightly decided by the Lower Courts. The correct translation of the document is set out in paragraph 2 of the judgment of the Lower Appellate Court. The only question is whether the words therein "I am liable to pay" can be held to be an "undertaking" to pay within the meaning of section 4 of the Act. The construction depends on the actual words used rather than what their effect may be as regards the rights of the parties. Examining the document in this light, we are of opinion that the words do not amount to an undertaking to pay, but constitute only an acknowledgment of liability to pay.

The words "I am liable to pay" do not, in fact, mean anything more than the previous words in the document "I am bound to pay" which clearly do not constitute an undertaking to pay.

We must, therefore, hold that the document is not a promissory note and the plaintiff's claim as a suit for money lent is sustainable.

We set aside the decrees of the Courts below and remand the suit for disposal according to law. Costs hitherto incurred will abide and follow the result.

APPELLATE CIVIL.

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

ATHAPPA CHETTI (AUCTION-PURCHASER), APPELLANT,

v.

RAMAKRISHNA NAYAKAN (COUNTER-PETITIONER No. 1),
RESPONDENT.*

*Civil Procedure Code—Act XIV of 1882, ss. 311, 314—Court sale—Irregularity—
Right of holders of other decrees to object.*

A zamindar mortgaged his estate to a bank and the mortgagee obtained a decree in the High Court, in execution of which it was ordered that the zamindari should be sold village by village. Other persons held money decrees against the zamindar. One of them in execution of his decree had the zamindari put up for sale in one lot, subject to the bank mortgage, and with the leave of the Court purchased it himself. The other decree-holders applied to have the sale (which had not been confirmed) set aside on the ground of material irregularity in publishing the sale by which substantial injury was caused to them. The irregularities relied on were that the proclamation was not issued in the prescribed form, and did not state the extent of the property and the revenue assessed on it, or the amount of income derived from it, and no mention was made of the order of the High Court:

Held, that the sale should not be confirmed.

APPEAL against the order of W. Dumergue, District Judge of Madura, in Civil Miscellaneous Petition No. 242 of 1895.

This and certain other petitions were preferred under Civil Procedure Code, sections 311 and 314, by persons holding money decrees against the Zamindar of Guntamanayakanur, who desired to have cancelled the sale of the zamindari which had taken place in execution of a money decree obtained by one Athappa Chetti for Rs. 2,537 in Original Suit No. 65 of 1894 on the file of the Subordinate Court of Madura (West). The sale was held subject to a mortgage of the Commercial and Land Mortgage Bank, and the decree-holder, who was the present counter-petitioner No. 1, having obtained leave to bid, became the purchaser for the sum of Rs. 1,500. The bank had previously obtained a decree upon the mortgage, in execution of which it had been ordered that the zamindari should

* Appeal against Order No. 84 of 1896.

ATHAPPA
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be sold village by village. On the close of the first day of the sale held in execution of the decree of the Subordinate Court, the Central Nazir reported that there were no bidders except the first counter-petitioner, who made a bid of Rs. 1,500, and the sale was ordered to be continued next day. This was done, but no other bidders appeared, and the sale was closed. On both days the second counter-petitioner's agent, one Makka Ravuthan, was present. On the third day, that is to say, on the 3rd October 1895, after the sale, the first counter-petitioner executed an agreement in favour of the Zamindar of Doddapanayakanur, who is related to the judgment-debtor. In this agreement the first counter-petitioner stated that he has received from the Zamindar of Doddapanayakanur the sum of Rs. 1,500 deposited as the purchase money for the zamindari and "undertakes on the confirmation of its sale to reconvey or "transfer the zamindari at the cost of the Zamindar of Doddapanayakanur to any person the said zamindar may name, without "the slightest stipulation even as to the balance of the decree "amount." This agreement was attested by Makka Ravuthan, the judgment-debtor's agent, who was present at the Court sale.

The District Judge set aside the sale making *inter alia* the following observations:—

"The petitioners being entitled to rateable distribution, have "the right to apply under section 311 to set the sale aside on the "ground of material irregularity (*Lakshmi v. Kuttummi*(1)), and it "has therefore to be seen whether there was any material irregu- "larity in publishing the sale, no irregularity in conducting it "having been alleged. Then as to the proclamation of sale "framed on information supplied by the judgment-creditor, the "form prescribed required that the extent of the property to be sold "and the revenue or rent assessed on the land shall be specified. "But neither of these particulars was given in the present instance, "and the proclamation itself was not issued in the form required by "the High Court—*Vide* page 64, Part II, Civil Rules of Practice. "Moreover, the last column of the proclamation ought to contain "any other facts material to be known relating to the property, "and I think there is no doubt that the fact of the High Court "having, in separate proceedings, ordered the zamindari to be sold

(1) I.L.R., 10 Mad., 57.

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"village by village was a very material fact which should have "been mentioned together with particulars of the income derived "from the zamindari in gross and in lots. All these points were "ignored, and the application for the sale of the whole estate in "one lot practically gave the go-by to the orders of the High "Court. Intending purchasers would inevitably feel apprehensive "as to the legal effect of a sale in gross by a District Court when "the High Court had ordered the sale to be in separate lots, and "their apprehension would be increased by all allusion to the "order of the High Court being suppressed. The omission to "notify the facts which I have now mentioned was, in my opinion, "a material irregularity which has resulted in substantial injury to "the petitioners."

The purchaser preferred this appeal.

Pattabhirama Ayyar, Sundara Ayyar and Sessa Chariar for appellant.

Respondent was not represented.

JUDGMENT.—We agree with the District Judge that there were material irregularities in publishing the sale and that these irregularities caused substantial injury to the respondents, who are decree-holders, within the meaning of section 311, Civil Procedure Code (*Lakshmi v. Kuttummi*(1)).

We, therefore, dismiss the appeal.

APPELLATE CIVIL.

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

CHOKKALINGA NAICKEN (PLAINTIFF), APPELLANT,

v.

MUTHUSAMI NAICKEN AND OTHERS (DEFENDANTS),
RESPONDENTS.*

*Limitation Act—Act XV of 1877, schedule II, Arts. 142, 144—Adverse
possession—Acts of ownership.*

The defendant had used as a backyard a small piece of land situated between his house and that of the plaintiff, who was his brother, for a period of more than

(1) I.L.R., 10 Mad., 57.

* Second Appeal No. 1170 of 1896.

1897.
August 9.

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NAICKEN.

twelve years. In 1894 the defendant began to build on it, whereupon the plaintiff protested and now sued for possession:

Held, that the suit was not barred by limitation.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in Appeal Suit No. 3 of 1896, reversing the decree of S. Ramasami Ayyengar, District Munsif of Madura, in Original Suit No. 342 of 1895.

Plaintiff sued to recover a small piece of land. The defendants raised *inter alia* a plea of limitation. The District Munsif passed a decree for plaintiff. The District Judge, on appeal, held that the suit was barred. He said:—"It has to be decided whether the plaintiff was, as he alleges, dispossessed only in 1894, or whether the suit is barred by limitation. The facts are that the plaintiff built a house on the disputed site, that the house was burned down in 1876, that the plaintiff had migrated to Sivagunga shortly before the fire, that the house-site has been vacant since the fire and that the first defendant came out of jail in 1878, built a house on the sixth defendant's portion of land about 1880, and has since then used the disputed site as his backyard.

"Here, there is no doubt that the first defendant has been in possession of the disputed land for more than twelve years on his own behalf, and not on behalf of the true owner, the plaintiff, and has used the land as an appurtenance of his house. In *Framji Cursetji v. Goculdas Madhorji*(1) it was held, upon the facts, that there had been no user intended to denote or understood as denoting a claim to ownership, but here the first defendant clearly intended to claim ownership. It cannot be supposed that the plaintiff was ignorant of the fact that the first defendant had occupied the land, and I would, therefore, hold that his suit is barred under article 144 of the second schedule of the Indian Limitation Act. But that article applies only when there is no other article which specially provides for the case, and this case is, in my judgment, specially provided for by article 142. Mere absence of possession by the plaintiff would, of course, not be sufficient to bar his suit, because 'the statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out, and another in, for the prescribed time'

(1) I.L.R., 16 Bom. 222

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"(per Parke, *B. Smith v. Lloyd*(1)), and the term discontinuance of possession, used in article 142, means abandonment of possession by one person followed by the actual possession of another person. This is precisely the state of things in this case. And in *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi*(2), the Privy Council held that a case in which the plaintiff alleges that he was dispossessed and sues to recover possession, falls within article 142 and that, in such a case, the plaintiff must show that he has had possession within twelve years before suit. The present plaintiff has not shown such possession, and I am of opinion that the suit is barred by limitation under article 142. For these reasons I must reverse the Lower Court's decree and direct that the suit be dismissed with costs throughout."

The plaintiff preferred this second appeal.

Desikachariar for appellant.

Seshachariar for respondents.

JUDGMENT.—We are unable to agree with the District Judge that the principle in the Caloutta case quoted by him is applicable to the present case.

There the suit was for a large area of land paying rent. Here the suit is for a few square yards of vacant land used as vacant house-site or backyard in a town. The acts necessary to establish adverse possession in the two cases are very different. The use of the land by the defendant for the purposes of a backyard would not, under the circumstances, be sufficient to constitute adverse possession, especially when it is remembered that the parties are brothers. The case reported as *Framji Cursetji v. Goculdas Madhorji*(3) is in point. Plaintiff having the title to the land must be held to have been in possession until first defendant began to build on it in 1894. Plaintiff then immediately protested and brought this suit in 1895. Plaintiff's suit is not barred by limitation.

We must reverse the decree of the District Judge and restore that of the District Munsif with costs throughout in favour of plaintiff.

(1) 9 Ezch., 562.

(2) I.L.R., 16 Calo., 472.

(3) I.L.R., 16 Bom., 222.

APPELLATE CIVIL.

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

RANGA AYYAR (PLAINTIFF No. 1), APPELLANT,

v.

SRINIVASA AYYANGAR (DEFENDANT), RESPONDENT.*

*Vendor and purchaser—Want of consideration for deed of sale—Evidence that
a deed is not intended to have the ordinary operation.*

The plaintiffs sued for certain land which they claimed in succession to Rathai Ammal deceased. The defendant who was in possession had executed a sale-deed, comprising the property now in question, in favour of the deceased. But it was pleaded by him and found by the Court of first appeal that the sale-deed was *benami*, and no consideration had passed, and a decree was passed dismissing the suit:

Held, on second appeal, that the decree should be reversed.

Per curiam: When a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof, it needs to be shown for what purpose other than the ostensible one the deed was executed.

SECOND APPEAL against the decree of D. Broadfoot, Acting District Judge of Trichinopoly, in Appeal Suit No. 9 of 1895, reversing the decree of A. Ramalingam Pillai, District Munsif of Srirangam, in Original Suit No. 240 of 1893.

Plaintiffs Nos. 1 and 2 were the brothers of one Krishnayyan deceased, and plaintiffs Nos. 3 and 4 were the sons of another brother. Krishnayyan died fifteen years before the suit, leaving a widow Rathai Ammal, the daughter of the defendant. In February 1888, the defendant executed a sale-deed in respect of the property now in question in favour of Rathai Ammal and her mother Ammani Ammal. The mother predeceased Rathai Ammal who died two years before the suit. The plaintiffs claimed to be entitled to the property under the Law of Succession. The defendant pleaded that the sale-deed was a nominal one and conveyed no rights on the vendees.

* Second Appeal No. 488 of 1896.

Issues 1 to 3 were as follows:—

Whether the sale by defendant is true (or colorable)?

Whether Rathai Ammal and Ammani Ammal enjoyed?

Whether plaintiffs are their heirs and entitled to the property?

The District Munsif said, "I think it probable that the sale-deed was not a document thoroughly devoid of consideration, and I find that the vendees derived ownership to the property conveyed to them thereby," and in the result passed a decree in favour of plaintiff.

The District Judge on appeal held that the sale-deed was *benami*, and that the property never left defendant nor passed Ammani Ammal or Rathai Ammal and he reversed the decree and dismissed the suit.

Plaintiff No. 1 preferred the second appeal.

Sundara Ayyar for appellant.

S. Subramania Ayyar for respondent No. 1.

R. Subramania Ayyar for respondent No. 2.

Pattabhirama Ayyar for respondents Nos. 3 and 4.

JUDGMENT.—The District Judge's finding that the transaction was *benami* and his reason for it do not commend themselves to us.

Presumably he means to find that Srinivasa Ayyangar, when executing the sale-deed (exhibit I), never intended it to have any operation and he relies on the fact that Srinivasa Ayyangar remained in possession, did not have the patta transferred and retained the instrument of sale. He also refers to the fact that no valuable consideration passed.

We are of opinion that these circumstances afford no evidence of the supposed intention of Srinivasa Ayyangar, when considered in connection with the relationship of the parties and the previous circumstances. On the contrary, those circumstances are all consistent with the intention on the donor's part, which is otherwise clearly established, to benefit his wife and daughter and to save the property from falling into the hands of his next heir who was his enemy. But for the fact that his wife and daughter predeceased him, he would never have disputed the validity of the deed.

We must observe that when a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not

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intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof it needs to be shown for what purpose other than the ostensible one the deed was executed. In our opinion, there was in the present case no such proof and, therefore, the Lower Appellate Court ought not to have reversed the judgment of the District Munsif.

The Lower Appellate Court not having decided the third issue, which was also raised in the third ground of appeal, namely, as to the right of the plaintiffs to represent the two donees, we must call for a finding on that question.

The finding is to be submitted within one month from the date of the re-opening of the Court after the recess. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

1897.
September
21.
November 3,
23.

MUTHAPPUDAYAN AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
APPELLANTS,

v.

AMMANI AMMAL (PLAINTIFF), RESPONDENT.*

Hindu Law—Law of Succession—Stridhanam property—Right of daughter to succeed.

In a suit for land it appeared that it had been given to one Sellayi, deceased, after her marriage by her father. The donee died leaving her brother, defendant No. 1, her son (since deceased) the husband of defendant No. 2, and the plaintiff her daughter. Defendant No. 1 was in joint possession on behalf of defendant No. 2:

Held, that the plaintiff was entitled to the land.

SECOND APPEAL against the decree of K. Ramachandra Ayyar, Subordinate Judge of Salem, in Appeal Suit No. 97 of 1896, affirming the decree of V. K. Desikachariar, District Munsif of Namakkal, in Original Suit No. 241 of 1895.

The plaintiff sued to recover certain land in succession to her deceased's mother Sellayi. The land had been given to Sellayi

by her father Nallappa, after her marriage, and she died in 1876, leaving her son Nainappa, and her daughter, the plaintiff, both minors. The son died shortly before the suit, leaving defendant No. 2, his widow, who was the daughter of defendant No. 1, the brother of the original donee.

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

Defendants Nos. 1 and 2 preferred this second appeal.

Sivasami Ayyar for appellants.

Sundara Ayyar for respondent.

JUDGMENT.—Certain property was given to one Sellayi by her father after her marriage. She died leaving a son and a daughter her surviving. Both the Courts below have held that the plaintiff, who is the daughter of Sellayi, was entitled to the inheritance to the exclusion of her brother.

The rule of succession for such a case is clearly stated in the Mitakshara. The author, after mentioning the various sorts of woman's property recognized by Manu and others, and referring particularly to gifts made after marriage, proceeds to discuss the distribution of such property. "In all forms of marriage," he says, "if the woman leave progeny, that is, if she have issue, her property devolves on her daughter or her daughters." Then he explains the matter further, declaring that unmarried daughters are to take first, but on failure of them, married daughters. He cites Gautama as an authority: "A woman's property goes to her daughters unmarried or unprovided." Then he gives the exception from the rule "But this is exclusive of the fee or gratuity. For that goes to brothers of the whole blood, conformably with the text of Gautama: 'The sister's fee belongs to the uterine brothers after the death of the mother.'" (Chapter II, section 11, verse 14.) In the woman's property governed by the general rule is included that which is bestowed after marriage. And thus if the authority of the Mitakshara is to prevail, judgment has been rightly given in the plaintiff's favour whether or not the gift in this particular case is correctly denoted by the name Anvadheya.

Looking to the work of Yajnavalkya which forms the subject of Vijnaneswara's commentary, we find ample foundation for the view taken by him. "After the death of the parents the sons should divide equally their wealth and debt. The daughters

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* Second Appeal No. 488 of 1897.

"share the residue of their mother's property after the payment of her debts, and the issue succeed in their default." (Verse 117, Mandlik's translation, page 214.) And again "The property of a childless woman married in the Brahma or any other of the four approved forms of marriage goes to her husband; in the remaining four forms of marriage, it goes to her parents. But if she leave issue, it will go to her daughters." (Verse 145, *ib.* page 224.) Among the Smriti writers there is further in support of the same view the text of Gautama already cited (Chapter XXVIII, verse 24, Sacred Books of the East, Vol. II, page 302) and the text of Vishnu which runs as follows: Chapter XVII, verse 18, "What has been given to a woman by her father, mother, sons, or brothers, what she has received before the sacrificial fire, what she receives on supersession, what has been given to her by her relatives, her fee (sulka) and a gift subsequent, are called woman's property (Stridhana)." Verse 19, "If a woman married according to one of the first four rites, beginning with the Brahma rite, dies without issue, that (Stridhana) belongs to her husband." Verse 20th, "If she has been married according to one of the other rites, her father shall take it." Verse 21, "If she dies leaving children, her wealth in every case goes to her daughter"; (Sacred Books of the East, Vol. VII, pages 69 and 70), and lastly Narada, Chapter XIII, verse 2, says: "Let daughters divide their mother's wealth; or, on failure of daughters, their male issue." Coming now to the other commentators whose treatises are current in Southern India, though not carrying the weight which is due to the Mitakshara (Strange's Hindu Law, page 11) we find that it is only in the Smriti Chandrika that a view directly opposed to that already stated is put forward. According to the Sarasvati Vilasa in which the subject is discussed at length it is to the daughters that woman's property is to go; and the same reason is given as is put forward in the Mitakshara (Chapter I, section 10), "because of the preponderance of the woman's members in the daughters" (section 138). The exception in the case of sulka is recognized (section 311; see section 136, &c., section 332). The same view seems to be taken in the Madhaviya so far as gifts from the father and his family are concerned. (See section 11, page 10, Burnell's translation and section 50.) The text of Manu, "On the mother's death let all the uterine brothers and sisters divide equally the maternal wealth" is explained to mean, not that

sons and daughters jointly succeed, but that there is to be an equal division if the sons do succeed. A similar construction is put on the text in Sarasvati Vilasa (paragraph 310, page 62). Varadaraaja's Commentary is perhaps not quite so clear. Dealing with the same text, after citing the text of Gautama and that of Yajna-alkya, he says with reference to the latter: "In default of daughters the descendants, *i.e.*, sons should take it, such is the meaning"—and then cites Narada's text. Further he contrasts yautaka, that which is received by the mother from her family and which the daughters share, with stridhana received from her husband's family. As to this latter he says: "The sons and daughters are equal because of their sapindaship." He draws the same distinction as Madhaviya between what is received from the husband's family and that received from her own family.

So much for the commentaries which have been translated. Dr. Jolly observes that the unpublished Digests of the Mitakshara school agree more or less with the Mitakshara (Jolly's Tagore Lectures, page 268). In spite of this consensus of opinion it is urged upon us that we ought to follow the Smriti Chandrika and recognize the distinction which is there made between three classes of stridhanam. One class is that called "yautaka" property given by any one to the bride and bridegroom while seated together at a marriage or the like when unmarried daughters alone succeed. The second class includes what a woman has received after marriage (anvadheya) and what her lord may have given her through affection (prithidatta). For that class the devolution is prescribed in § 6 (Chapter IX, section III). Thirdly, there is maternal property not included in the above kinds which devolves on the daughters only in the first instance. According to the commentator it is to this class only that the text of Gautama applies Chapter IX, section III, § 16. It is by no means clear that the property in the present case can be accurately called anvadheya—the doubt is as to whether the term includes property given by the father as well as property given by the father's family (Manu, Chapter IX, verse 195, and verse 5, Chapter IX, section 1, Banerjee, page 278). We think we may pass by that question as also the question whether Devanda Bhatta's interpretation of the text of Manu is or is not the more correct one. It may be that his view represents a re-action against the admission of women to the enjoyment of proprietary right (see Jolly's Tagore

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Lectures, page 262). Certainly the Smriti Chandrika is far less favourable to women than the Mitakshara. And it was argued that because the Courts have refused to follow the latter in dealing with the case of property inherited by a woman, we should therefore give preference to the authority of the Smriti Chandrika in the present instance. The grounds, however, on which the cases deciding the point proceed (*Bachiraju v. Venkatappadu*(1) and *Sengamalathammal v. Valayuda Mudali*(2) other cases in Mayne's Hindu Law, section 567) do not affect the general authority of the Mitakshara on the question of stridhana. They afford no reason why in the present instance in which the Mitakshara does not stand alone and unsupported the views propounded in it should give way to those expressed in the Smriti Chandrika. A practical objection to the latter is that the adoption of them would complicate the law of inheritance and render the solution of many questions more difficult than would be the case if the Mitakshara were followed, for in dealing with anvadhoya and prithidatta, the author of Smriti Chandrika contents himself with stating how it shall devolve in the first instance and makes no provision for the case in which there is a failure of sons as well as daughters (see Tagore Lectures, Banerjee, page 398).

We have been unable to find any decided case in which the question has been expressly raised. In *Bhujanga v. Ramayamma*(3), however the point might have been but was not taken. There a village had been given by a husband to his wife as a mark of affection (prithidatta) and on the death of the parents the question arose whether the daughter or the son in whose favour the mother had made a gift by will was entitled. Other questions were argued, but it was assumed that the daughter was the heir of her mother and the suit was decided in her favour. This was a case in which, according to the Smriti Chandrika, section 6 (Lecture III, Chapter IX), the son and daughter should unquestionably have taken together, because the property came within the second of the classes mentioned above.

We think the question has been rightly decided, and therefore dismiss the appeal with costs.

(1) 2 M.H.C.R., 402. (2) 3 M.H.C.R., 312. (3) I.L.R., 7 Mad., 387.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS,

v.

MAHALINGAM SERVAI AND OTHERS.*

1897.
November
23.

Abkari Act (Madras)—Act I of 1886, ss. 56, 64—Holder of a license and his servants.

The words "being holder of a license" in Abkari Act, section 56, must be taken to include any person in the employ, or for the time being acting on behalf of the holder of a license.

APPEAL on behalf of Government under Criminal Procedure Code, section 417, presented against the judgment of acquittal pronounced by T. Kothandaramayya, Second-class Magistrate of Ramnad, in Calendar Case No. 549 of 1896.

The accused was charged under section 56 of the Abkari Act of 1886, with exposing for sale toddy mixed with patnini, and he was acquitted on the ground he was not the holder of the license, but only the servant of the holder of the license.

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

Accused were not represented.

JUDGMENT.—In these cases the Government appeals against the acquittal of certain accused persons who were guilty of certain acts in breach of the Abkari licenses granted to their employers.

The Second-class Magistrate has acquitted the accused on the ground that, under section 56 of the Abkari Act I of 1886, only the holder of the license, but not his servants or employees can be convicted.

This view is erroneous. It was held by this Court in Criminal Revision Case No. 639 of 1886 (1) that sections 56 and 64 of the

* Criminal Appeals Nos. 581 to 583 of 1897.

(1) Case referred for the orders of the High Court by the Acting District Magistrate of Tinnevely, being Calendar Case No. 131 of 1886, on the file of the Second-class Magistrate of Satur, in which two persons were convicted under section 56 (b) of Act I of 1886. The Acting District Magistrate said:—"The second accused is the licensee and his conviction is legal under the provisions of section 61, paragraph 2. The first accused not being the licensee does not come within section 56, which relates only to the holder of a license. I cannot interpret the words 'as well as the actual offender' used incidentally in section 64 as justifying his conviction, because the words imply that the person has already committed an offence, i.e., an act punishable." Muthusami Ayyar and Brandt, JJ., delivered the following judgment:—

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Abkari Act must be read together and that the words "being the holder of a license" in section 56 must be taken to include any person in his employ and acting on his behalf for the time being, as otherwise the words in section 64 "for any offence committed by any person in his employ and acting on his behalf under section 56" would have no meaning or application. This view of the law is, in our opinion, correct.

We set aside the acquittal in each case and we convict each of the accused Mahalingam Servai and Venkatachalam Servai of offences punishable under sections 56 and 64 of Madras Act I of 1886, and we sentence Mahalingam Servai to pay a fine of Rs. 15 (fifteen rupees) or in default to suffer rigorous imprisonment for three weeks, and Venkatachellam Servai to pay a fine of Rs. 10 (ten rupees) or in default to suffer rigorous imprisonment for fourteen days.

As regards Ramasami Servai, accused in Criminal Appeal No. 583, we direct that he be re-tried in accordance with law, as the Magistrate does not appear to have gone into the facts in his case.

APPELLATE CIVIL.

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

SIVATHI ODAYAN AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

RAMASUBBAYYAR (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, s. 85—Mortgagee's Suit—Parties—Redemption.

A mortgaged lands X, Y and Z to B for Rs. 5,000. Lands X and Y were sold and the proceeds applied towards the discharge of the mortgage. Land Z was sold to C for Rs. 990, which was not so applied. C transferred his rights to the

JUDGMENT.—We do not consider that the construction suggested by the District Magistrate can be adopted. Section 56 and section 64 of the Abkari Act must be read together, and if, as suggested by the District Magistrate, no offence could be committed under section 56 but by the holder of the license, the words "for any offence committed by any person on his employ and acting on his behalf under section 56" would be insensible. The words "being the holder of a license" in section 55 must be taken to include any person in his employ and acting on his behalf for the time being. We decline to interfere.

* Second Appeals Nos. 905 and 906 of 1896.

present defendants. B brought a suit on the mortgage joining A and C but not C's transferees as defendants. C did not appear and a decree was passed by consent for Rs. 1,050, and land Z was brought to sale and purchased for Rs. 270 by the plaintiff who now sued the defendants separately for possession:

Held, that the defendants not having been joined in the previous suit were entitled to redeem on payment of Rs. 1,050 and interest.

SECOND APPEALS against the decree of W. Dumergue, District Judge of Madura, in Appeal Suits Nos. 574 and 575 of 1895, modifying the decrees of S. Ramasami Ayyangar, District Munsif of Sivaganga, in Original Suits Nos. 169 and 170 of 1895, respectively.

These were suits by the same plaintiff to recover possession of land under the following circumstances:—

On 3rd July 1885, Nagasundram Chetti and his son mortgaged three items of property to Chidambara Chetty to secure Rs. 5,000 and interest. In 1886 the mortgagors sold the third item of the mortgage premises, being 2½ pangus in a certain village, to Arulananda Odayar for Rs. 990, and he transferred his right in 2½ pangus to the present defendants in 1888 and 1890. Chidambara Chetty sued on the mortgage in Original Suit No. 4 of 1891, on the file of the Subordinate Court of Madura, West, joining as defendants the mortgagors and also Arulananda Odayar (who did not appear), but not the present defendants. Part of the mortgage debt had been discharged by the proceeds of the sale of other two items of the mortgage premises before the suit, and while the suit was pending, the mortgagee purchased part of the mortgage premises. A decree was passed by arrangement for Rs. 1,050 against the mortgagors personally and the 2½ pangus above referred to. In execution of the decree the 2½ pangus were brought to sale and purchased for Rs. 270 by the present plaintiff, who now brought these two suits to recover the 2½ pangus transferred to the defendants.

The District Munsif by his decrees ordered that unless in each case the defendants within three months paid to the plaintiff the sums of Rs. 108 and Rs. 162, respectively, being two-fifths and three-fifths of the purchase money paid by him, the plaintiff should obtain possession.

The District Judge on appeal passed an unconditional decree for the plaintiff holding that the defendants had not proved title.

The defendants preferred these second appeals.

Sundara Ayyar for appellants.

Mahadeva Ayyar for respondent.

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JUDGMENT.—If the District Judge intended to find that there was no transfer to Arulananda at all, it is clear that he was in error, and that on a matter about which there was no contest.

Arulananda was impleaded in the former suit (Original Suit No. 4 of 1891) as the transferee, and the plaintiff does not in these suits deny that transfer. Arulananda has transferred his right thereunder to defendants Nos. 1 and 2 and whether there was consideration for that transfer is a question that does not arise in these suits between the plaintiff and defendants Nos. 1 and 2. As the equity of redemption had thus vested in defendants Nos. 1 and 2, they should have been made parties to Original Suit No. 4 of 1891, and as they were not made parties, their rights are not affected by the decree. They are entitled to have the opportunity of redeeming the mortgage on the land.

We must, therefore, ask the District Judge for a finding on this issue, viz.:—What is the amount due by defendants Nos. 1 and 2 to plaintiff in respect of such redemption. Fresh evidence may, if necessary, be taken on this issue, and a return is to be made within two months of the receipt of this order.

Seven days will be allowed for filing objections after the finding has been posted up in this Court.

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

Defendants are willing to pay Rs. 270 to redeem. Plaintiff, I presume, would have been willing to take a decree for Rs. 1,050, but he now argues through his vakil that he is entitled, as a matter of law, to a proportionate share of the original mortgage and that, in general, is the view which I hold. The principle laid down in *Daloba Arjunji v. Damodar Raghunath*(1) is, I think, applicable to the present case. The defendants are allowed to redeem, because they were no parties to Original Suit No. 4 of 1891. Had they been parties, their right to redeem would have been on condition of paying what was then due on the mortgage. The amount, that plaintiff paid as a purchaser in execution, has nothing to do with the matter. . . . The decree for Rs. 1,050 in Original Suit No. 4 of 1891 was the balance—by consent of parties—then due on the mortgage. The defendants, had they been parties to Original Suit No. 4 of 1891, could have redeemed

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on paying Rs. 1,050 on the date of the decree in that suit. They are now entitled to redeem on the same terms that they could have redeemed, had they been parties to Original Suit No. 4 of 1891—in fact, they are entitled to be put into the position they would have been in, had they been parties to Original Suit No. 4 of 1891. A proportionate share of the mortgage—on this date—is practically the same as the amount decreed in Original Suit No. 4 of 1891 with interest. The calculation would be as follows:—Total amount due on mortgage up till this date is Rs. 12,181-10-8. Deducting payments of interest, namely, Rs. 535-0-9 plus Rs. 1,436-10-8, the balance is Rs. 10,209-15-3 or roughly Rs. 10,210. I take the value of 2½ pangus, which plaintiff sues for, to be Rs. 900 and the total value of the mortgaged property to be Rs. 8,141. The proportion is about Rs. 1,500 in round numbers. I am of opinion, for the reasons mentioned above, that plaintiff is entitled to a decree for Rs. 1,050 plus interest on that amount at 10 annas per cent. from the date of the decree till the date of payment and this is my finding on the point referred by the High Court.]

These second appeals came on for final hearing the 26th October 1907. The parties were represented as before.

JUDGMENT.—We cannot accede to the contention that the District Judge is wrong in holding upon the issue remitted to him that the sum payable by the appellants to the respondent is not Rs. 270, the price paid by the latter for the property when he purchased it at the Court sale held in execution of the decree obtained by the mortgagee, but Rs. 1,050, which the Judge found, to be the proportion of the mortgage debt chargeable in respect of the property.

The decision is in accordance with the principle stated in Fisher on Mortgages in the following words:—“The assignee stands in “the place of the assignor; and as the latter might have assigned “to him *gratis*, it is but just that the measure of the allowance “should be what was due and not what was paid. The assignee “taking the hazard should also have the benefit of the bargain, of “which neither the mortgagor nor any subsequent incumbrancer “can have any equity to deprive him.” (5th Edition, section 1734.) *Davis v. Barrett*(1) is one of the modern cases in which the above

(1) L.L.R., 16 Bom., 480.

(1) 11 Beav., 542.

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principle was acted upon. There A devised an estate to his heir who in his own right had a charge on it. The heir bought up an incumbrance on the estate amounting to £11,555 for £2,000. Sir John Romilly, M. R., held that the heir was entitled to the full amount as against other incumbrancers on the estate. In dealing with the contention that the owner of the second charge was entitled to have an account of what was actually paid for the purpose of getting in the former mortgage and of making it stand simply as security for that amount, the Master of the Rolls said: "I am of opinion that the second mortgagee has no such equity against any stranger who might purchase the first charge, and that the owner of the reversion not having created the first or second charge, is, in this respect, entitled to stand in the place of a mere stranger. It would be, as I believe, a new equity, and productive of the most injurious consequences, if a second mortgagee were entitled, as against the *bona fide* assignee of a first mortgage, to insist on an account being taken of what was actually paid for the first mortgage." In *Macrae v. Goodman* (1) the Judicial Committee held similarly.

There are, no doubt, exceptions to the rule stated above as when the purchaser occupies a fiduciary position or when there is fraud or collusion. In the present case however the respondent was a *bona fide* purchaser at a Court sale which vested in him the right of the mortgagee in so far as the property in dispute was concerned. The finding of the District Judge must therefore be accepted.

The decrees of the Lower Appellate Court are reversed and those of the District Munsif restored with the modification that the amount payable by the appellants to the respondent is (instead of Rs. 270) Rs. 1,050 with interest thereon at 10 annas per cent. per mensem from the date of the decree to the date of payment. Each party will bear his own costs in this and in the Lower Appellate Court.

(1) 5 Moo. P.C. 315.

APPELLATE CIVIL.

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

SUBRAMANIA AYYAR (DEFENDANT), APPELLANT,

v.

SAMINATHA AYYAR (PLAINTIFF), RESPONDENT.*

1897.
October 15,
22.
November
16.

Transfer of Property Act—Act IV of 1882, s. 119—Exchange—Mutual covenants subsequently entered into to support title—"Expressum facit cessare tacitum."

The plaintiff and defendant effected an exchange of land; subsequently they executed to each other documents of which that executed by the defendant recited the exchange and continued "if any claim or dispute arises I hereby bind myself to settle it. If I do not so get the dispute settled I hereby bind myself to pay an amount not exceeding Rs. 4,014-8-6 at the rate of Rs. 1-4-0 per kuli of land for lands which go out of your possession." The plaintiff, alleging that he had been ousted from the land conveyed to him, now sued to recover the land which he had given in exchange:

Held, that the operation of Transfer of Property Act, section 119, was excluded by the express covenant in the document quoted above.

SECOND APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 219 of 1896, reversing the decree of C. Venkata Rau Sahab, District Munsif of Mayavaram, in Original Suit No. 191 of 1895.

The plaintiff sued to recover from the defendant together with mesne profits certain land which he had given to the defendant in exchange for other lands in March 1891. The plaintiff alleged that he had been evicted from the lands transferred to him. In June 1891 the defendant had executed to the plaintiff a document called a security bond to the effect stated in the judgment of the High Court. This document comprised a postscript signed by the defendant which was as follows:—"I also bind myself to the extent of Rs. 350 for expenses towards claims or disputes. Thus the whole security is for Rs. 4,364-8-6." The plaintiff had similarly executed a security bond in favour of the defendant. The first part of the fourth issue was framed with reference to these documents as follows:—"Whether plaintiff has got cause of action for the suit in the face of the indemnity bonds that were passed between the parties." The District Munsif passed a

* Appeal against Order No. 35 of 1897.

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decree dismissing the suit, holding on this issue, that the plaintiff was not entitled to the relief sought by him.

The Subordinate Judge on appeal was of opinion that the instrument of the 7th June would not debar the plaintiff from the right to recover either the lands conveyed by him on the exchange or compensation on proof that he had been ousted. He accordingly made an order remanding the case to be disposed of on its merits. The defendant preferred this second appeal.

Krishnasami Ayyar for appellant.

Ramachandra Rau Saheb and *Rangaramanuja Chariar* for respondent.

JUDGMENT.—On the 1st March 1891 the plaintiff and the defendant executed an instrument of exchange and mutually transferred possession of the respective lands comprised in the instrument. It contains no provision by way of covenant for title, for quiet enjoyment or for re-entry, in case either party be evicted. On the 7th June 1891, however, the parties executed to each other documents styled “security bonds.” The bond executed by the defendant to the plaintiff on that date, after reciting the exchange which had taken place, runs: “If any claim or dispute arises I hereby bind myself to settle it. If I do not so get (the dispute) settled I hereby bind myself to pay an amount not exceeding Rs. 4,014-8-6 at the rate of Rs. 1-4-0 per kuli of land for lands which go out of your possession. This security bond shall be sustainable for twelve years from this date.” The plaintiff, alleging that he was induced to enter into the transaction of exchange by certain untrue representations of the defendant and that he had been evicted from the lands transferred to him, instituted the present suit praying for the recovery of the lands which he gave in exchange to the defendant. The material allegations in the plaint were traversed by the defendant, and a number of issues were framed. The District Munsif, however, without trying the questions of fact as to which the parties were at issue, dismissed the suit, recording a finding upon the first part of the fourth issue. That part, though not clear and definite, appears to have been understood in the Lower Courts to raise the question whether the right to re-enter which, in the absence of a contract to the contrary, the plaintiff would possess under section 119 of the Transfer of Property Act, was affected by the security bond obtained by the plaintiff from the defendant. The District Munsif

held that that instrument restricted the plaintiff's remedy in case of eviction to compensation at the rate agreed, and, therefore, the claim for the recovery of the land was unsustainable, and dismissed the suit. On appeal the Subordinate Judge was of opinion that the instrument in question modified the plaintiff's right in so far as the amount of compensation was concerned, provided he chose to ask for compensation; but that it did not take away his right to recover the lands themselves, if he elected to claim such restoration. The Subordinate Judge set aside the District Munsif's decree and remanded the suit in order that the other points in dispute may be tried.

The question for determination now is whether the construction put by the Subordinate Judge upon the security bond is right. In supporting that construction the learned vakil for the plaintiff strenuously argued that, on eviction, the plaintiff's right to re-enter upon the lands given by him in exchange must be taken to remain quite unaffected inasmuch as it is not expressly taken away by the security bond. We cannot accede to this contention. The rule applicable in such cases was long ago stated by Chancellor Kent in the following few words:—“An express covenant will do away the effect of all implied ones: *Nokes v. James*(1); *Hayes v. Bickerstaff*(2); *Browning v. Wright*(3).” (*Frost v. Raymond*(4)). Of those cited by the Chancellor the language of two of the authorities might be quoted here. Referring to an implied warranty, Butler said:—“The insertion of any express covenant on the part of the grantor, would qualify and restrain its force and operation within the import and effect of that covenant, as the law, when it appears by express words how far the parties designed the warranty should extend, will not carry it farther by construction.” (Butler's Notes on Coke upon Littleton, page 384., Note 332.) And in *Browning v. Wright*(3) Buller, J., observed “The words ‘grant and enfeof’ amount to a general warranty in law, and have the same force and effect. The covenants, therefore, which have been introduced in more modern times, if they have any use besides that of swallowing a quantity

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(1) 4 Co. Rep., 80; s.c., 1 Cro. Eliz., 674-5.

(2) Vaugh., 126.

(3) 2 Bow. and Pull. 13; s.c., 5 R.R., 521.

(4) 2 Calnes., 168; s.c., 2 American Decisions, 228, at p. 231.

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"of parchment, are intended for the protection of the party conveying; and are introduced for the purpose of qualifying the general warranty, which the old common law implied. "This has been clearly settled ever since *Nokes's case*(1)." The same view has been often affirmed since and among these later cases it is sufficient to refer to *Lins v. Stephenson*(2) and *Dennett v. Atherton*(3). In other words, the rule is that inasmuch as covenants in law are intended to be operative only when the parties themselves have omitted to enter into any contract respecting matters to which the covenants in law relate, the latter cease to have any force the moment such a contract is entered into, even though the contract expressly provides only for some of the matters covered by the covenants in law and is silent as to the rest. In such a case it is the contract alone that regulates and governs the nature of the party's obligation and the extent of his liability. The reason for this conclusion cannot be better expressed than in the language of Lord Denman, C.J., in *Aspulin v. Austin*(4) quoted with approval by the Judicial Committee in *Pallikela-gatha Marcar v. Sigg*(5). He points out "where parties have entered into written engagements with expressed stipulations, it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument . . . and it is one thing for the Court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the Court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written; the latter adds to the obligations by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application." It follows, therefore, that even if the security bond were entirely silent with reference to the question of the right to take back

the land given in exchange by the plaintiff that right was lost when the security bond was taken. But the bond is not quite silent on the point. On the other hand, the instrument by clear inference seems altogether to deprive the plaintiff of the right to recover the land. For the undertaking given by the defendant that he shall pay at Rs. 1-4-0 per kuli for so much of the land as the plaintiff might be evicted from distinctly suggests that the statutory covenant which would have enabled the plaintiff to recover the whole of the land given by him, even if he had been evicted from but a small portion of what he got in exchange was not intended to be enforced. Further, the terms of the bond, read as a whole, seem to lead to the conclusion that they entirely supersede the rights given by sections 119 and 120. The provision that the bond shall be in force only for twelve years unquestionably shows that after the lapse of that period the defendant was to be under no responsibility for the consequences of any defect in his title to the land conveyed by him and this is inconsistent with the contention that the right to recover the land given by section 119, was left intact. Again, the covenant to settle any claim or dispute that might arise, respecting the land transferred by the defendant is much wider than the covenants arising under sections 119 and 120. In short, there is such substantial difference between the express covenants in this case and the covenants implied by law that it would be quite unreasonable to impute to the parties an intention that the latter should have operation to any extent. The Subordinate Judge's construction of the document cannot, therefore, be sustained, and the plaintiff's prayer for the restoration of the lands sued for must fail, if the covenant as to it under section 119 were the only ground on which it was based. As, however, the plaintiff has alleged in support of it other grounds also, which have not been tried, the order remanding the suit for their trial must be upheld notwithstanding our having arrived at a conclusion different from that of the Subordinate Judge as to the effect of the security bond on the plaintiff's alleged right to the possession of the lands sued for.

The costs will, however, abide and follow the result.

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(1) Co. Rep., 80, s.c., 1 Cro. Eliz., 674-5.

(2) 4 Bing. N.C., 678.

(4) 5 Q.B., N.B., 671, at p. 684.

(3) L.R., 7 Q.B., 216.

(5) L.R., 7 I.A., 82.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar,
Mr. Justice Davies and Mr. Justice Boddam.

YALLA GANGULU

v.

MAMIDI DALI.*

Criminal Procedure Code, s. 545—Death caused by negligence—Compensation to widow.

A Magistrate imposed a fine in addition to a sentence of imprisonment on a conviction for the offence of causing death by a rash and negligent act and gave compensation to the widow of the deceased out of the fine imposed:

Held, that compensation could not be given to the widow under Criminal Procedure Code, section 545.

CASE of which the records were sent for by the High Court under section 435.

The Head-Quarter Deputy Magistrate of Godavari convicted a person charged before him in Calendar Case No. 16 of 1897 of an offence under the Indian Penal Code, section 304-A, and he directed compensation to be given to the widow of the deceased man out of a fine imposed by him on the prisoner.

The prisoner appealed to the Sessions Judge who affirmed the conviction, but set aside the order of compensation as being illegal.

The records were called for by the High Court as above.

The matter having come for disposal before Benson and Boddam, J.J., they referred to the Full Bench the question stated by Benson, J., as follows:—

BENSON, J.—I find much difficulty in accepting *In re Lutchmaka*(1), as correct. No doubt it follows earlier rulings *In re Roop Lal Singh*(2), *Reg v. Shivbasappa*(3), but they proceeded on the words of section 44 of Act XXV of 1861 which differ most materially from section 545 of the present Criminal Procedure Code. In section 44 the words are “the loss appearing to be caused “to the person who has suffered by such offence, and any special “damage of a pecuniary nature that may have resulted to such “person by such offence.” The words “the person,” not “any

“person” clearly indicate that that section had in view only the person primarily injured by the offence; but in section 545 the language is wholly different. It is “in compensation for the “injury caused by the offence committed, where substantial compensation is, in the opinion of the Court, recoverable by civil “suit.” I think the word “where” means “in cases in which, and by persons by whom,” compensation is recoverable.

Now under Act XIII of 1855 (founded on Lord Campbell's Act) compensation in such cases is recoverable by the “wife, “husband, parent and child, if any” of the deceased.

Section 545 (b) seems to me to have been framed so as to admit of compensation being given in cases where it is recoverable under Act XIII of 1855, and on principle I should think it very desirable that the Courts should have such power. Why should a poor widow be driven to a civil suit in a case like this?

The case of *In re Lutchmaka*(1) was not argued, and I do not know if the learned Judges considered the remarkable change in the language of the present section.

My view seems to receive support from the corresponding section 308 of the Criminal Procedure Code (Act X of 1872) which was intermediate between the Code of 1861 and the present Code. It provides for payment of compensation “for the offence complained of, where such offence can, in the opinion of the Court, be “compensated by money,” and allows the payment to be made to or for the benefit of the complainant or the person injured or both. This allowed compensation to be given to a person other than the person primarily injured provided he or she complained. This, however, went far beyond Act XIII of 1855, since it allowed compensation to be given to any person who complained, however remote the injury to him. The present wording seems to me to have been adopted in order to restrict compensation to those cases where it could be claimed under Act XIII of 1855, i.e., to the husband, wife, parent or child, except, of course, where death was not caused, in which case the injured person alone could claim. I would refer the matter to a Full Bench.

[The case then came on for hearing before a Full Bench constituted as above.

The parties were not represented.]

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GANGULU
v.
MAMIDI
DALI.

1897.
June 12.
November
5, 18, 30.

* Criminal Revision Case No. 218 of 1897.
(1) I.L.R., 12 Mad., 352. (2) 10 W.R., O.R., 80. (3) 7 Bom. H.C.R., Ori., 78.

(1) I.L.R., 12 Mad., 352.

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SHEPHARD, J.—The question is whether, out of the fine imposed on a man convicted under section 304-A of the Penal Code, compensation can be given by the Magistrate to the widow of the person whose death by drowning was brought about by the prisoner's act.

The question turns on the construction of section 545 of the Criminal Procedure Code. To render clause (b) of that section applicable it must appear that an "injury caused by the offence committed" has been suffered, and further that the injury is one for which substantial compensation might be given in a civil suit. The term "injury" is defined in the Penal Code as follows:—
"The word denotes any harm whatever illegally caused to any person in body, mind, reputation or property;" and this definition holds good for the interpretation of the Criminal Procedure Code, section 4.

The question then is whether the widow of a man who has been drowned by the criminal act of another can be said to have suffered an injury in that sense of the word. In my opinion it is impossible to answer that question in the affirmative. She has certainly not suffered in body, or reputation, nor has she suffered any injury in mind for which an action would lie, and I do not think it can be said she has suffered in property. I take it that the term "property" means something in existence and that it cannot, with any propriety, be applied to the reasonable expectation of pecuniary benefit for the loss of which an action is maintainable by the representative of a deceased person. Such a claim on behalf of a widow is analogous to that which may be made by a master in respect of wrongful acts done to his servant. He is entitled in such case to recover damages for the loss of service. There is no question of loss of property. If the claim of the widow in such a case as the present is maintainable, it must follow that the master of a servant, who has been disabled or put in wrongful confinement, may equally apply for compensation to be paid out of the fine inflicted on the offender. In my opinion it would be putting an undue strain on the language of the section to hold that it refers to and includes actions which may be brought on account of loss of service. It appears to me very unlikely that the Legislature should have intended claims of this sort involving somewhat difficult questions to be adjudicated upon by a Magistrate. But if there had been such intention, involving as I shall show,

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an alteration of the law, surely some plain language would have been used to express the intention. There can be no doubt that under the Code of 1861, the claim of a widow could not have been entertained. In this respect I do not think any change was made in the Code of 1872. The "person injured" in section 308 of that Code must, I think, as in the Code of 1861, mean the person against whose body, reputation or property the offence has been committed. To that person only, according to section 308, could any sum be paid in the way of compensation, while to the complainant payment could be made on account of his costs.

The only difference in the language of the section now in force consists in the insertion of the words "the injury caused by." Instead of directing that compensation be given for the offence, the law now directs that compensation be given for the injury caused by the offence. From a change of language which was so obviously required to make the sentence correct, I cannot conceive how any change of intention on the part of the Legislature can be inferred.

I think the decision in *In re Lutchmaka*(1) is right and would answer the question referred accordingly.

SUBRAMANIA AYYAR, J.—I concur.

DAVIES, J.—I agree with Shephard, J. It seems to me clear from the definition of the word "injury" as used in section 545 (b) of the Code of Criminal Procedure that it can apply only to the case of the man whose death was caused. And in Act XIII of 1855 it is the deceased man, and the deceased man alone, who is described as the "party injured." As through his death, he cannot sue for the injury done to himself, that Act allows a suit of another character to be brought on behalf of his widow and other near relatives for compensation—not, be it noted, for the injury caused to the dead man—but for "the loss resulting from such death" to themselves. In other words it is not for the injury caused to the deceased, but for the loss occasioned to the near relatives in consequence of such injury that the action lies. The loss is one quite independent of the injury to the deceased, although it arises out of it, and cannot therefore, in my opinion, be included in the term "injury" as used in a limited sense in the section 545, for it is not "caused by the offence committed," except indirectly.

(1) I.L.R., 12 Mad., 352.

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BODDAM, J.—I agree.

[The case came on for final disposal before Collins, C.J. and Benson, J., who delivered judgment as follows:—]

JUDGMENT.—Under section 413, Criminal Procedure Code, the Sessions Judge was precluded from entertaining the appeal.

We set aside his proceedings.

In exercise of our powers of revision we set aside so much of the Deputy Magistrate's order as awards compensation to the deceased man's widow.

APPELLATE CRIMINAL.

Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

QUEEN-EMPRESS,

v.

TIRUCHITTAMBALA PATHAN.*

1896.
October 16,
29.

Penal Code, s. 183.—Resistance to the taking of property—Attachment of goods not being property of judgment-debtor.

A decree having been passed against the assets of a deceased debtor, execution was taken out and the officer of Court proceeded to seize certain goods. The accused successfully resisted the seizure asserting that the goods seized were his own. He was thereupon charged with having committed an offence under the Penal Code, section 183, but he was acquitted for want of proof by the prosecution that the goods were assets of the deceased:

Held, that the acquittal was wrong and should be set aside.

APPEAL on behalf of the Crown under Criminal Procedure Code, section 417, against the judgment of M. Agnisami, Second-class Magistrate of Mannargudi, in Calandar Case No. 22 of 1896.

A decree having been passed against the assets of a deceased debtor, execution was taken out, and the Amin of the Court attempted to attach and seize a brass plate in the possession of the accused as forming part of the assets of the deceased. The accused wrested it from the hands of the attaching officer stating that it belonged to him and not to the deceased. He was thereupon charged with the offence of offering resistance to the taking of property by lawful authority under Indian Penal Code, section 183, and was tried by the Second-class Magistrate who acquitted him

* Criminal Appeal No. 253 of 1896.

for the reason that it was not shown that the property found part of the assets of the deceased.

The present appeal was filed on behalf of the Crown as above.

Mr. J. G. Smith for the Crown.

Sivasami Ayyar for accused.

SHEPHARD, J.—The question is whether a person charged under section 183 of the Indian Penal Code was rightly acquitted, on the ground that the prosecution failed to prove that the goods seized by the Amin and rescued by the accused were, as being part of the assets of the deceased debtor, liable to be taken in execution of the decree against his representatives. The question is whether the seizure of the goods was an act done by the lawful authority of a public servant within the meaning of section 183. It was argued on behalf of the accused that no offence had been committed in resisting the Amin, because he was acting unlawfully in seizing goods, which could not properly be taken in execution. The Amin, being commissioned to take the goods of the deceased debtor, forfeited the protection of the law, when he proceeded to take the goods of the defendant himself, although he might have acted in good faith.

It appears to me that, in construing section 183, the language of section 99, as well as that of other sections concerning resistance to the acts of public servants, must be borne in mind. Section 99 declares that the protection afforded by the Penal Code to public servants acting in good faith under colour of their office is not lost to them, by reason of any mistake on their part in the exercise of their proper functions. A public servant may do an act of a kind which he has no authority to do. In such case, he could not be acting in discharge of his public functions (sections 186–353) and the lawful authority required by section 183 would be clearly wanting. The cases cited in argument afford instances (*Lilla Singh v. Queen-Empress*(1), *Queen-Empress v. Tulsiram*(2)). Whether or not the public servant in the case supposed could, if charged with any offence, shelter himself under the exceptions enacted in sections 78 and 79 of the Code would depend upon the circumstances.

If, on the other hand, the act of the public servant is an act of the kind which the public servant is authorised to do, it is clear that no miscarriage on his part, due to an honest mistake of fact,

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(1) I.L.R., 22 Calc., 286.

(2) I.L.R., 13 Bom., 168.

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could render him liable to a prosecution. Section 79 would afford him protection. Further more, resistance to such an act or an assault on the public servant in the course of doing the act is made punishable under section 183 and section 353 of the Code, respectively. We are asked to draw a distinction between sections 183 and 186 and to say that there may be obstruction entailing punishment under the latter section, although the lawful authority which section 186 presupposes is absent. It occurred to me at first that there might be some such distinction intended and that if the act of taking exposed the public servant to a civil action, it could not be said to be an act done by lawful authority. Ministerial officers do not enjoy the full protection which is granted to judicial officers by Act XVIII of 1850. Apart from considerations of civil liability, however, I think the object of the legislature as shown in the Code was to facilitate the transaction of public business by affording protection in two ways to public servants acting in the exercise of their duty. They are protected from criminal proceedings by sections 78 and 79. They are insured against resistance by section 99 and other sections of the Code. The intention was to give protection of this latter kind in all the cases in which, but for the immunity specially provided, the act of the public servant would amount to an offence. The phrase "lawful authority" used in section 183 does not oblige us to hold that the cases in which the person charged may have a civil action against the public officer must be excluded from the operation of the section. In the present case, the Amin had lawful authority to take in execution the goods of the deceased. There was no mistake about his authority, but the mistake was in the mode in which he executed his duty and the section does not require that the execution of the authority, as well as the granting of it, must be strictly lawful. To hold that a judgment-debtor might with impunity resist the seizure of goods found in his house, on the mere plea that they belonged to somebody else, honesty and good faith on the part of the attaching officer being presumed, would reduce section 183 to a dead letter. The decided cases support the view which I have adopted.

The acquittal must be set aside and the case disposed of according to law.

SURRAMANIA AYYAR, J.—A decree was passed against the sons (minors) of one deceased Saminatha Pathan, son of the accused,

for a debt due by Saminatha. The minors were under the guardianship of the accused. In execution of the above decree, a warrant was issued for the seizure of certain articles of moveable property of the deceased debtor. When, with this warrant, the Amin went to the accused's house, where the articles were stated to be and had a plate seized, the accused, it is alleged, forcibly wrested the plate and threatened to use violence, if the Amin proceeded further with the execution of the warrant.

Now, supposing that the plate did, in fact, belong to the accused himself as urged by him, the question is whether that circumstance alone rendered the seizure by the Amin an act done without "lawful authority," within the meaning of section 183 of the Indian Penal Code, so as to make the alleged resistance on the part of the accused permissible in law.

The argument in favour of the accused was in substance this: an officer in executing a process of law acts lawfully, only so long as he keeps himself strictly within the directions contained in the process under which he acts. Consequently, when the Amin took the plate which, in fact, did not form part of the estate of the debtor, the former was a wrong-doer and resistance to him was not unlawful, even though the Amin was not aware that the property did not belong to the deceased and even though the officer acted *bonâ fide*. This view of considering an act, which is done by a public servant in the course of his duties and which is not in every way perfectly consistent with what he should have done in the particular case, to have been committed without "lawful authority" has clearly not been adopted in the Indian Penal Code, as will be seen from the provisions of section 99, with which section 183 should be read. Taking the two together, the reasonable construction to be put is that, if the officer acted in good faith under colour of his office, the mere circumstance that his "act may not be strictly justifiable by law" cannot affect the lawfulness of his authority. And the chief reasons for this view are that the likelihood of serious injury resulting from such acts (excepting those tending to cause apprehension of death or grievous hurt) of persons clothed with public authority and subject to public responsibility is so small that the parties, whose rights are thus invaded, would be sufficiently protected by their being left to obtain redress solely by appealing to the constituted authorities in due course and that, in such cases, to secure an easy

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and peaceful execution of legal processes, it is necessary that recourse to self-help on the part of the persons affected should be disallowed. It may not be out of place to observe that in England also, for like reasons, a similar conclusion was arrived at in *Regina v. Allen*(1). Referring to the contention that the illegality of the arrest in question reduced the offence to manslaughter, Blackburn, J., said :—" It was further manifest that . . . they "knew well that, if there was any defect in the warrant or illegality "in the custody, that the Courts of law were open to an application "for their release from custody. We think it would be monstrous "to suppose that, under such circumstances, even, if the justice did "make an informal warrant, it could justify the slaughter of an "officer in charge of the prisoners or reduce such slaughter to the "crime of manslaughter. To cast any doubt upon this subject "would, we think, be productive of the most serious mischief by "discouraging the Police in the discharge of their duties and by "encouraging the lawless in a disregard of the authority of the "law." (Mayne's Criminal Law of India at page 426.) Nor is the circumstance that the irregularity of the particular act of the officer is such as to give rise to a cause of action against him material, since the provisions of section 99 already referred to are not limited only to such acts "not strictly justifiable by law" as do not furnish ground for a civil action.

The cases of *Queen-Emress v. Ramayya*(2) and *Bhairao Jiraj v. Mulji Dayal*(3) fully support our conclusion. *Regina v. Gan Kom Aba Dore*(4) relied upon by the Second-class Magistrate is distinguishable from the present case. There the officer altogether transgressed his powers in breaking open the outer door, which he was not entitled to do, except on conditions that were not shown to have existed. Here, however, the Amin did not transgress an established rule of law as to the limit of his powers, but acted erroneously with reference to a matter, which no doubt renders the particular act invalid, but did not affect the nature of his authority.

I agree, therefore, that the acquittal of the accused should be set aside. The case must be restored to the file and disposed of according to law.

(1) Stephen's Digest of the Criminal Law, 44th Ed., p. 290.
(2) I.L.R., 12 Mad., 148.

(3) 7 Bom. H.C. Rep., Cr., 88.
(4) I.L.R., 12 Bom., 277.

APPELLATE CRIMINAL.

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

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v.

RAMAN AND OTHERS.*

1897.
July 14.

Confessional statements of accused—Subsequent retraction—Criminal Procedure Code, s. 103—Search by Police of stolen property—Charge to Jury.

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. A jury should be asked with reference to such confessions, not whether they were corroborated by independent evidence but whether having regard to the circumstances under which they were made and retracted and all the circumstances connected with them, it was more probable that the original confessions or the statements retracting them were true.

Criminal Procedure Code, section 103, does not justify the view that the persons called upon to witness a search are to be selected by any person other than the officer conducting the search.

If the Sessions Judge considers that the evidence of an Inspector of Police is necessary, he ought not to animadvert on his absence in charging the Jury; but he should intimate his opinion to the Public Prosecutor and give him the opportunity of calling that official.

It is wrong for a Judge in charging the Jury to say that a Head Constable committed a breach of the Police regulations in conducting a search with a loose shirt on, without examining him on the matter and taking evidence as to whether or not his body was examined, before he began the search.

APPEAL on behalf of Government under section 417 of the Criminal Procedure Code against the acquittal of six persons, who were tried on the charge of dacoity by H. H. O'Farrell, Sessions Judge of South Malabar, and the Jury in Calendar Case No. 40 of 1896.

Evidence was given against all the prisoners to the effect that parts of the property stolen had been found in the possession of each of the prisoners. The first and second prisoners had made and retracted confessional statements, as to which the Judge's charge is quoted in full in the judgment of the High Court. As to the discovery of the property he said *inter alia* :—

"I now go to the discovery of the property. It is certain that "a good deal of property was lost that night, and I see no reason to

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"doubt that a list was drawn up next morning embodying the description of the property. That fact is spoken to by the Nambudri and also by the adigari who went there next morning. There is some confusion as to which was the original list, whether the one which the adigari now produces or the one that is marked as A. The vakil who represents the first and second accused seems to suggest that neither of them is the original and there was another original which has been suppressed. I do not quite see the point of his suggestion, because, even supposing that there was another original besides these two lists A and A₁, there appears to be no doubt, that these lists were drawn up long before the prisoners were arrested. This offence took place on the 8th of March, and the first, second and third prisoners were not arrested until 4th June and others later. The accused deny entirely that these properties were discovered in their houses or that they gave them up in any way. With regard to the first and second accused it is said that they gave up two lots of properties which you see before you. For this you have the evidence of the Head Constable and of an adigari. I must remark with regard to many of these searches (if they are to be considered as searches) that they do not seem to have been properly conducted at all. I shall deal more particularly with that point when I deal with the alleged finding of the property in the possession of fourth, fifth and sixth accused. I will here tell you that the law requires at least two respectable inhabitants of the locality to be witnesses of the search. In this case it seems to me very doubtful if any of the persons who are named as witnesses are really inhabitants of the locality. These witnesses should have been selected, as it were, perfectly at random, so that there may be no favouritism or humbug in the search, and there will be every chance of the search being fairly conducted. If, however, the Head Constable or the Inspector is permitted to select any persons that he chooses to be witnesses for the search, then the whole search becomes a farce. There is no certainty of its being properly conducted. It is very much the same thing as if the Public Prosecutor were permitted to select the Jury in every case that comes before the Session. It is not sufficient if the Police got the adigari and two or three men of their own selection to witness the search. The law requires that two respectable persons living in the neighbourhood shall be called upon to witness the search. I cannot say, of course,

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"that, if these precautions are not carried out, the evidence would be inadmissible, but I do say that searches conducted in this manner—where the Police get their own men to witness the search—should be looked upon with the greatest possible suspicion.

"With regard to the first and second accused the statement of the Head Constable Ramunni Nair is that he arrested the first accused on the 4th June and that he brought out a locked box and unlocked it with a key which he had and handed over this first batch of articles which you see before you. I will deal with the identification of them afterwards. The Vellivazhi adigari was present and it is said some neighbours also. When the Head Constable was cross-examined as to the neighbours' whereabouts his answers were extremely vague. As a matter of fact, the whole business of the searches and the selection of the witnesses seem to have been arranged by the Inspector. The usual game of hide and seek is played. The Inspector does not come to this Court to give evidence. However there is very little to show that there were really any neighbours present at the search. There is one Sankunni Nair present at the search; he is said to be a neighbour and lives within a furlong from the accused's house. Even if that is so, the law requires that there should be at least two such persons and not merely one.

"The fourth accused was arrested on the 15th June in his own house. He is said to have gone to a bin which was locked and which was opened with a key that the prisoner's wife brought at the prisoner's request. There was a bag found buried in the paddy and on opening it there were these kindies and other articles which you see here. As to that, a singular circumstance took place. The only witness brought to prove the search was the acting adigari, Venkateswara Pattar, who said before the Magistrate that he did not see the fourth accused arrested and that when he got to the house he found these articles spread out in the verandah. The moment he said that, without hearing anything more the Inspector, who made arrangements for the searches and who was prosecuting the case before the Magistrate, at once jumped up and said that he dispensed with this witness entirely. The Magistrate, however, insisted on this man's evidence being taken and he has given evidence here. I think that there is very little reason to doubt the evidence he has given and that he is a very honest and truthful witness. There seems no reason why

"he should come forward and make these statements in favour of the accused. He seems to have no interest in the prisoners at all and is of quite a different caste. Moreover the evidence is, to a certain extent, against his interest, because he had to admit that he did do an act which was not quite right, viz., to sign the search list as having been present when the articles were actually found. Thereupon the Police Inspector seems to have called a supplemental witness called Kunhi Komu to prove the search and corroborate the Head Constable. This Kunhi Komu was a man who was present at all the three searches. He is not a respectable inhabitant of the locality called in at the time of the search. The Inspector seems to have met him casually in the bazaar and asked him to go with him and witness all the three searches. You noticed that the Inspector took all these witnesses from one house to another—from fourth to fifth and from fifth to sixth just as if they were a theatrical company—to witness the searches. Proceedings of that kind are open to the utmost suspicion. When this witness Kunhi Komu was in the witness box he struck me as an unsatisfactory witness. Of course, it is for you to say what you think of these witnesses, but I am telling you how they struck me. Kunhi Komu was a man who had to admit that he had a larger connection with police cases in the capacity of a witness than falls to the lot of most people. He was prepared to corroborate the Head Constable through thick and thin even to the extent of being able to see through a bamboo ceiling. I do not suppose that for a moment you can place any reliance upon witnesses of this description. However his statement and that of the Head Constable are against the statement of Venkateswara Pattar. Both these witnesses swear that Venkateswara Pattar was present at the time when the fourth accused was arrested and he actually saw the delivery of the property. If Venkateswara Pattar is to be believed, then the Head Constable and Kunhi Komu are lying. It will be for you to choose between these two stories.

"From the house of the fifth accused they went on to that of the sixth. The Head Constable says that he got on to the top of the bamboo ceiling and brought out a bundle which he says he found among the cocoanut leaves. The witness Venkateswara Pattar corroborates that story and says that he (Head Constable) did certainly get on to the ceiling and bring down this bundle, but that he did not, in fact he could not, see how he found it.

"The witness Kunhi Komu corroborates the Head Constable through thick and thin and says that he actually saw the bundle taken out from the cocoanut leaves. In fact his history seems to be that he was able to see through the ceiling. When I directly put him the question whether it was on top of the cocoanut leaves or whether it was buried in them, he at once said he could not say, that of course shows distinctly that he could not see anything of the kind that he professes to have seen and that this witness is prepared to swear to anything that the Head Constable swears to. The bundle, when opened, was found to contain these four articles. It has been pointed out that the articles found in the previous houses were carried about in gunny bags, and the bundle might very easily be concealed in one of the bags. The Head Constable when he went to the attom according to Venkateswara Patter's story, had a loose shirt on. That again is directly contrary to the Police Regulations, because the body of the man who is to search must be examined before he enters upon the search. It is suggested that this bundle might have been smuggled by the Head Constable in his loose shirt when he got up to the attom while the others were busily engaged in searching the other parts of the room. It will be for you to say whether you think it possible in some way or other that this bundle might be smuggled up into the attom at the time of the search. The prisoner denies having been arrested at his house. All the witnesses including Venkateswara Patter say that the accused was arrested at his house."

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

Accused were not represented.

JUDGMENT.—This is an appeal on behalf of Government against the acquittal of six prisoners tried on a charge of dacoity. The appeal is supported on the ground that the Sessions Judge has in several matters misdirected the Jury. As regards the first two prisoners, the evidence consisted of statements made by them shortly after their arrest and the discovery of things said to be part of the stolen property in the houses or under the control of these prisoners. These two prisoners were both arrested on the 4th of June, and they appear to have been brought before the Second-class Magistrate on the 6th. On the 9th of June they were again brought before him, and each of them made a statement implicating himself in a qualified way in the dacoity. They mention the circumstances of their arrest in their houses and admit that they

gave over the things produced at the trial to the Police. The usual certificate is appended by the Second-class Magistrate to the statements made by these two prisoners.

On the 8th of July the first prisoner was again brought before the Magistrate and again admitted that he took part in the dacoity, but pleaded that he did so under compulsion. The other prisoner made a statement on the same day to much the same effect. On the 13th August 1896 when the case was committed for trial by another Magistrate, the first prisoner denied that he had ever made a confessional statement before the original Magistrate and denied the search in the house and the discovery of property in it. The other prisoner on the same occasion said that he had made his confessional statement under the belief that he would be taken as an approver, and denied the truth of the allegations made in it.

The Sessions Judge makes the following observations with regard to these confessions. He says "they have been retracted" and I advise you to pay no attention to them unless you think that "they are corroborated by independent evidence. If you find that "it has been satisfactorily proved that the first and second accused "had in their possession property which was stolen on that night, "that, no doubt, would be a corroboration, and you may rely upon "the confessions although they have been retracted." Exception is taken by the Public Prosecutor to this direction on the part of the Judge. We are aware that language of this sort is frequently used by Judges with reference to confessional statements which have been retracted, and there are, no doubt, cases in which the proposition involved is a correct one. But we are of opinion that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must, it is clear, depend upon the circumstances under which the confession was originally given and the circumstances under which it was retracted including the reasons given by the prisoner for his retraction. It is obvious that a confession in itself reasonable and probable must, if repeated more than once and retracted only at a late stage in the proceedings, have greater weight attached to it than a confession made once only and retracted after a short interval. There are other circumstances which may go to diminish or to increase the weight that should be attached to a confession. In the present case certainly the circumstances under

which the confessions were originally made and the fact of their repetition a few days later are circumstances which clearly ought to be brought to the attention of the Jury. The question which should have been put to them with regard to the confessions was not whether they were corroborated by independent evidence, but whether having regard to the circumstances under which they were made and the circumstances under which they were retracted—having regard to all the circumstances connected with the confessions, whether it was more probable that the original confessions or the statements made before the Committing Magistrate were true. We think that the omission on the part of the Judge to place the circumstances before the Jury and to put this question to them amounts to a misdirection, and the misdirection is the more important, because except in the second paragraph of the summing up—part of which has been quoted—there is no other mention whatever of the confessional statements.

The fourth paragraph of the summing up deals with the subject of the searches, and the Public Prosecutor takes exception to various observations of the Judge made in this and in the fifth, eighth and tenth paragraphs. The Sessions Judge in effect recommends the Jury to regard the evidence respecting these searches with the greatest possible suspicion, being of opinion that the precautions, which the law requires, were not duly observed. The points which he takes are that the persons called upon to witness the searches were selected by the Head Constable and the Inspector, and were not shown to be respectable inhabitants of the locality in which the place of the search was situate. The observations made by the Sessions Judge are, in our opinion, founded on a mistaken view of the law, and were calculated seriously to prejudice the prosecution. Section 103, Criminal Procedure Code, requires the officer about to make a search to call upon two or more respectable inhabitants of the locality in which the place of the search is situate to attend and witness the search. There is nothing in that or in any other section of the Code to justify the notion that the required witnesses are to be selected by any person other than the officer conducting the search. Assuming what is by no means clear that the witnesses to the search of the first and second prisoners' houses were not inhabitants of the locality, we do not think that that circumstance must necessarily expose the conduct of the Police to suspicion, or render the evidence of the search inadmissible.

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In the fifth paragraph of the summing up after referring to the selection of the witnesses by the Inspector, who was present at the time, the Judge observes: "The usual game of hide and seek is played. The Inspector does not come to this court to give evidence." We do not quite understand the force of this observation. If the Sessions Judge had, after the examination of the Head Constable, considered that the evidence of the Inspector was necessary, he ought to have intimated his opinion to the Public Prosecutor and given him an opportunity of calling that official. That course would have been the more advisable having regard to what the Sessions Judge observed in the eighth paragraph of the summing up about the conduct of the Inspector and the inquiry before the Magistrate—an observation which does not appear to be founded upon any evidence before the Judge.

Dealing first with the case of the first and second prisoners, we are of opinion that there have been material misdirections to the Jury as well with regard to the confessional statements made by those prisoners, as with regard to the searches made in their houses and the discovery of property said to be part of the stolen property. As regards the other four prisoners, the case stands on rather a different footing, for none of them made anything in the way of a confessional statement. As against the third and fourth prisoners, there is evidence to the effect that they were identified on the night of the dacoity by some of the witnesses. There is no misdirection in the charge with regard to that part of the case. Against all the four prisoners—prisoners 3, 4, 5 and 6—there is evidence that searches were made in their houses, and parts of the stolen property found therein. We have already dealt with the general observations of the Sessions Judge regarding these searches contained in the fourth paragraph of the summing up; dealing with the case of the fourth prisoner, in the eighth paragraph of the summing up, the Sessions Judge makes other observations to which exception is taken. He refers, as already mentioned, to the conduct of the Inspector and the inquiry before the Committing Magistrate. He speaks to one of the witnesses, Kunhi Komu, in language which would be suitable to the counsel for the defence, but certainly not suitable in the mouth of a Judge directing a jury. But the most serious objection taken to the observations in this paragraph is the reflection on the conduct of the Police in taking the witnesses whom they had summoned from the search of one house to that of another. The Sessions Judge says that the Inspector took these

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witnesses from one house to another "just as if they were a theatrical company. Proceedings of that kind are open to the utmost suspicion." This is an observation which ought never to have been made. The Head Constable testifies to the difficulty of finding respectable persons in the neighbourhood in which the dacoity took place. We can see no reason for supposing that the conduct of the Police in this connection was influenced by any improper motives. In the tenth paragraph of the summing up, the Sessions Judge charges the Head Constable with the direct breach of the Police Regulations in that when he went to the *attom* in the course of the search of the sixth prisoner's house, he had a loose shirt on. It is not apparent even according to Venkateswara Patter's evidence, that there was any breach of the Police Regulations, because he does not say that the Head Constable's body was not examined before he began the search, and that is the effect of the Regulation to which we suppose the Sessions Judge refers. However that may be, the Head Constable was not examined about it, and it was therefore unfair to make this charge against him. We are of opinion that there has been a misdirection by the Sessions Judge with reference to the evidence touching the searches of the houses of the third, fourth, fifth and sixth prisoners, and the misdirection is a material one. We set aside the acquittal of all the prisoners, and direct them to be retried by the Sessions Judge of North Malabar.

APPELLATE CIVIL.

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

ARUNACHALAM CHETTY (PLAINTIFF), APPELLANT,

v.

MEYYAPPA CHETTY AND OTHERS (DEFENDANTS NOS. 1, 3 AND 4),
RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 13, 42, 43, 462—Sanction to compromise a suit against a minor—Suit to set aside a consent decree for want of sanction—Previous suit to set aside decree on the ground of fraud on guardian ad litem.

A suit instituted in 1870 against a minor was compromised by the plaintiff and the guardian ad litem, and a decree for the plaintiff was passed by consent. In 1882 the minor sued by his next friend to have the consent decree set aside

1897.
October
20, 21, 22,
November 16.

* Appeal No. 32 of 1897.

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on the ground that it had been obtained by fraud practised on the guardian *ad litem*. That suit was dismissed. In 1884 an application was unsuccessfully made in the original suit objecting that the compromise had been entered into without the sanction of the Court. The minor having attained majority now sued to have the consent decree set aside on the ground that it had not been sanctioned by the Court under Civil Procedure Code, section 462:

Held, (1) that the Court by passing the consent decree had not, *ipso facto*, sanctioned the compromise under Civil Procedure Code, section 462, and that the present suit was not barred by the order dismissing the application in 1884;

(2) that the suit was barred by the decree in the suit of 1882 for the reason that the want of sanction might and ought to have been made a ground of attack in that suit.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in Original Suit No. 50 of 1895.

The facts of the case appear sufficiently for the purposes of this report from the judgment of Subramania Ayyar, J. The Subordinate Judge dismissed the suit and the plaintiff preferred this appeal.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar), Desikachariar and Ganapathi Ayyar for appellant.

Sundara Ayyar and Venkateshbaramayya for respondent No. 1.

SUBRAMANIA AYYAR, J.—Murugappa Chetti, the deceased father of the present first defendant (first respondent), sued the present plaintiff (appellant) in Original Suit No. 42 of 1879 for a sum of money alleged to be due by the father of the plaintiff, the late Ramasami Chetti. The plaintiff, being then a minor, was represented in the suit by his mother and guardian *ad litem*. At first she contested the suit, but during the trial she entered into a compromise consenting to the sum claimed being decreed against the estate of the plaintiff, the father of the first defendant giving up his costs. A decree was given in accordance with the compromise. In 1882 litigation again arose between the plaintiff and the first defendant's father. One Palaniappa Chetti, as the next friend of the present plaintiff, instituted Original Suit No. 48 of 1882 against the first defendant's father for the purpose of setting aside the decree in the previous suit No. 42 of 1879 on the ground that it had been obtained by fraud practised on the plaintiff's guardian *ad litem*. In the course of the suit Palaniappa Chetti was removed from the position of next friend and the present third defendant was appointed in his stead. The third defendant carried on the litigation with the result that the suit was dismissed, it being found that no fraud was made out. Another attempt to get rid of

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the decree in suit No. 42 of 1879 was made in 1884 by an application purporting to be made in that case itself. In the application the point taken was that the compromise was entered into without the sanction of the Court as required by section 462 of the Civil Procedure Code; but the Subordinate Judge, who heard the application, rejected it holding that, in effect though not expressly, sanction had been given. An appeal was preferred to the High Court against the order rejecting the application. The appeal was, however, dismissed for the reason that against such an order no appeal lay. The plaintiff, having since come of age, has instituted the present suit praying that the decree in suit No. 42 of 1879 be set aside and the sums collected in execution of the decree be made good to him by the first defendant. In the Lower Court the plaintiff relied in support of his case, both on the fraud by which his mother was said to have been induced to enter into the compromise and on the want of sanction. He further alleged that suit No. 48 of 1882 was a mere sham proceeding carried on in collusion between the plaintiff's next friend on the one hand and the first defendant's father on the other, and that, therefore, the adjudication therein was not binding upon the plaintiff. On all the main questions raised, the Lower Court found against the plaintiff and dismissed the suit.

Here on appeal the learned Advocate-General, on behalf of the plaintiff, did not press the ground taken against the finding of the Lower Court that the fraud alleged with reference to the decree in suit No. 42 of 1879 was not established. He contended, however, that the Lower Court was wrong in holding that the compromise had been sanctioned and urged that the decree in suit No. 42 of 1879 should be vacated on the ground of want of sanction.

We agree with the Advocate-General that no sanction was given for the compromise as alleged for the first defendant. There is absolutely nothing to show that any application for sanction was made to the Court. The little evidence that has been adduced upon the point clearly indicates that the decree was passed upon the compromise without the Court considering or determining the question whether sanction should be accorded or refused. It is scarcely necessary to add that the mere passing of the decree on the compromise does not amount to sanction being given within the meaning of the law. And in the circumstances of this case it would be wrong for the Court to presume on the ground of lapse

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of time that sanction was given. The plaintiff would, therefore, be entitled to the principal relief claimed if he is not, as was urged for the respondent, precluded from relying on the absence of sanction either by the order of 1884 already referred to, or by the decision in Original Suit No. 48 of 1882. That the order of 1884 does not operate as a bar is quite clear. The question whether sanction was given or not, being one going to the very root of the decree passed on the compromise, was such as could not be raised in execution of the decree. The order was, therefore, one which did not come under section 244 of the Civil Procedure Code. No doubt if an application for review of the decree, passed on the compromise, had been made to the Judge, who passed the decree, he could have entertained the application and set aside the decree for the reason that the requisite sanction had not been given. But the application, on which the order of 1884 was passed, was made to the successor of the Judge who passed the decree. The successor had, under section 624 of the Civil Procedure Code, no power to entertain an application for review on the ground of absence of sanction. The order thereon was, therefore, manifestly *ultra vires* and could not affect the plaintiff.

The next and the real question in the case is whether the plaintiff is precluded from relying upon the want of sanction by the decision in Original Suit No. 48 of 1882. In arguing that the plaintiff was not so precluded, the Advocate-General questioned the Lower Court's finding that the last-mentioned suit was not a sham and collusive proceeding. We are, however, unable to accede to the contention. The sole evidence on the point is that of the third defendant. The story that, without any intelligible reason for the vile conduct which the third defendant imputes to himself, he joined the first defendant's father and others to defraud the plaintiff, the infant son of the third defendant's late master and kinsman, is so improbable that we cannot but reject it. The Lower Court was, therefore, in our opinion, right in discrediting the third defendant's testimony and coming to a conclusion on the point against the plaintiff.

What then is the effect of the decision in that suit (No. 48 of 1882) upon the plaintiff's right to impeach the decree in suit No. 48 of 1879? Is it a bar to the plaintiff's present suit? In urging that it was not, the Advocate-General contended that the right to avoid the compromise on the ground of want of sanction was

exercisable only by the plaintiff on his ceasing to be a minor, but not by any next friend on his behalf. There is, however, absolutely nothing in the language of section 462 of the Civil Procedure Code to warrant the view that the right to impeach a compromise entered into contrary to its provisions is of the peculiar character contended for. Nor was any authority cited to support that contention. And in reply to the argument that if persons, interested in a minor, were not allowed to question a compromise entered into on his behalf without the requisite sanction, minors would, in general, be very seriously prejudiced, all that the Advocate-General could and did say was that it is perhaps open to Courts to treat such a matter as one involving an election on the part of the minor concerned, and to determine whether in the interest of the minor the compromise shall or shall not be repudiated. It is scarcely necessary to observe that no statutory provision giving to Courts authority to exercise such special and extraordinary power exists, and in the absence of such provision no tribunal in the country can take action of the kind suggested. The Advocate-General next contended that, even supposing the right to impeach the compromise for want of sanction may be exercised by a next friend, such want of sanction was not a matter which might and ought to have been made a ground of attack under explanation II of section 13, Civil Procedure Code. His arguments on this point may be shortly stated thus:— On the analogy of the decision of the Judicial Committee in *Pittapur Raja v. Suriya Rau*(1), relating to the construction of section 7 of the Civil Procedure Code of 1859 corresponding to section 43 of the present Code, a plaintiff is not required under section 13 of the latter Code to combine all the causes of action available at the date of the suit and which would entitle him to the relief therein claimed. What section 13 obliges a plaintiff to do is to rely upon all the grounds necessarily connected with the particular cause of action on which the plaintiff chooses to sue. In determining what such grounds are Courts should have regard to such cases as *Cooke v. Gill*(2) and *Read v. Brown*(3), explaining what constitutes a cause of action. According to them the want of sanction now relied on did not form a constituent part of the cause of action alleged in suit No. 48 of 1882 which was founded

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(1) I.L.R., 8 Mad., 520.

(2) L.R., 8 C.P., 107.

(3) L.R., 22 Q.B.D., 128.

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on fraud alone. The evidence required to sustain such a suit is not the same as that required to support a suit wherein the ground of attack is entirely different, viz., want of sanction. The compromise, though in fact a single act, yet in point of law, amounted to a violation of two distinct rights vested in the plaintiff, and on the authority of *Brunsdon v. Humphrey*(1), the plaintiff must be held not precluded by an adjudication in the suit, instituted with reference to the violation of one of those rights, from maintaining a subsequent suit in regard to the violation of the other right. Lastly, if the want of sanction was a matter which might and ought to have been made a ground of attack in the suit of 1882, still, as it was not adjudicated upon, it could not be held on the authority of *Kailash Mondul v. Baroda Sundari Dasi*(2) to operate as *res judicata*.

The argument on the other side was briefly as follows:—Such cases as *Cooke v. Gill*(3) and *Read v. Brown*(4) deal with what a cause of action is with special reference to questions connected with venue. The definition of a cause of action adopted with reference to such questions is not a proper guide in dealing with matters bearing on *res judicata*. Nor are the cases decided under section 7 of Act VIII of 1859 or section 43 of the present Code pertinent in cases like the present. Even under section 2, Act VIII of 1859, which expressly used the term, 'cause of action' their Lordships of the Judicial Committee put upon that term a wide interpretation in *Woomatara Debia v. Unnopoorna Dassees*(5), where they held that the plaintiff who failed to obtain judgment for the possession of land claimed by her in her first suit as *taufir* or *accretion* could not bring a fresh suit claiming the same land as property belonging to her *taluk* according to the true boundary line. Their Lordships in their judgment referred to the rule that when a man claims an estate and the defendant being in possession resists that claim, he is bound to resist upon all the grounds that it is possible for him according to his knowledge then to bring forward (*Srimut Rajah Mootloo Vijaya Raganadha Bodha Gooroo Saamy Periya Odaya Taver v. Katuma Natchiar*(6)) as one fully applicable to plaintiffs also—a proposition which is adopted in explanation II, section 13. Finally, supposing the narrow view contended for by

(1) L.B., 14 Q.B.D., 141.
(4) L.R., 22 Q.B.D., 128.

(3) I.L.R., 24 Cal., 711.
(5) 11 B.L.R., 158.

(3) L.R., 8 C.P., 107.
(6) 11 M.J.A., 50.

the Advocate-General were correct, still the cause of action alleged in Original Suit No. 48 of 1882 was precisely the same as that now relied on, and that the fraud on which suit No. 48 of 1882 rested and the want of sanction on which stress is now laid were nothing more than different ways of supporting but one alleged infringement of the plaintiff's right.

In support of the arguments urged on both the sides, decided cases other than those referred to in the above summary were also cited. It may be conceded that the language employed by Courts is not always uniform. The diversity which exists is probably due, speaking generally, to the difference in the standpoints from one or other of which the question is dealt with. These are well explained in *Narohari v. Anpurnabai*(1). There, West, J., observes:—
"Under systems such as the Roman Law or the English Common Law, in which the development of legal rights and duties has been greatly influenced by the re-action of a highly artificial mode of procedure, appropriate forms of action can be found for nearly all the ordinary cases which the legal consciousness of the community recognizes as justifying an exercise of the coercive power of the State; but, as the variety of human relations greatly exceeds that of the conceptions, upon which a system of actions can be framed, it happens that the same transaction or group of circumstances may furnish a ground for several different actions. In such cases, different causes of action arise to the party injured; but as it is felt that the same set of facts, which the mind at once grasps as jurally integral, ought not to be made the basis of repeated proceedings; the complaining party is allowed to frame his complaint in various ways, and the rule obtains that all the circumstances, which exists when the former of two actions is brought and can be brought forward in support of it, shall be brought forward then, not reserved for a second action arising out of the same events. The cause of action is regarded as identical, though the form of action differs on the second occasion, and the test applied is whether the evidence to support both actions is substantially the same (*Hitchin v. Campbell*(2); *Martin v. Kennedy*(3)). Under a freer system of procedure, such as that of the Equity Courts in England or of the Civil Courts in India, second suits are to be admitted more sparingly than when the

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(1) I.L.R., 11 Bom., 160 at p. 165. (2) 2 W. Bl., 827. (3) 2 Bos. & Pull., 69.

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"plaintiff has to proceed by set forms of action. As he can bring forward his whole case unfettered by artificial restraints, and seek all remedies that the Court can justly award upon the facts proved, there is no reason why he should be permitted to harass his opponent and occupy the time of the Courts by repeated investigations of a set of facts which ought all to have been submitted for adjudication at once. His cause of action, into whatever Protean forms it may be moulded by the ingenuity of pleaders, is to be regarded as the same, if it rests on facts which are integrally connected with those upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference." The wider view expressed in the latter part of the above quotation is evidently the view which the Judicial Committee had laid down in *Woomatara Debia v. Unnopoorna Dassee*(1) cited for the first defendant, and this is strengthened by the observation made by the same tribunal in *Kameswar Pershad v. Rajkumari Rutlan Koer*(2) that the state of the law at the time section 13 of the present Code was enacted, was that persons should not be harassed by continuous litigation about the same subject matter. There can be no doubt that explanation II to section 13 was put in to emphasize this wider view. And this is rendered as clear as it can possibly be by another section of the Code which, like explanation II, found a place for the first time in the Code of 1877, in which the provisions as to *res judicata* were amplified practically as they are now. That section is section 42 which provides that every suit shall, as far as practicable, be so framed as to afford ground for a final decision upon the subjects in dispute and so to prevent further litigation concerning them. In short, the omission by the Legislature of the term 'cause of action,' upon which the point turned in section 2 of Act VIII of 1859 from the corresponding section of the present Act, the insertion therein of a more definite term, viz., 'matter directly and substantially in issue,' the introduction of the comprehensive words 'subjects in dispute,' in section 42 and the fact, that explanation II to section 13 puts the duty of the plaintiff with reference to the question under consideration on the same footing as that of the defendant, extensive as that had been, as laid down in the Sivaganga case (*Srimut Rajah Moottoo Vijaya*

(1) 11 B.L.R., 158.

(2) I.L.R., 20 Cal., 79.

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Raganadha Bodha Gooroo Sawmy Periya Odaya Taver v. Katama Natchiur(1)),—all these are strong indications to show that the intention was to enlarge the scope of estoppel by record beyond the limits that would be admissible if the term 'cause of action' were construed in its literal and most restricted sense which, in *Krishna Behari Roy v. Brojeswari Chowdranee*(2), the Judicial Committee said should not be done. In this state of the law what matters might and ought to have been brought forward will depend upon the particular facts of each case. One test, as suggested by the Judicial Committee, is whether the matters are so dissimilar that their union might lead to confusion (*Kameswar Pershad v. Rajkumari Rutlan Koer*(3)). In the present instance it is quite clear that no such confusion could have arisen had the want of sanction been brought forward along with fraud in the previous suit, nor has any other valid objection been suggested against the two grounds being then combined. It would follow, therefore, that the want of sanction in question might and ought to have been made a ground of attack in Original Suit No. 48 of 1882 and should be taken to have been in issue in that suit as laid down in explanation II to section 13.

As regards the last argument of the Advocate-General it would be quite permissible to reply that explanation II, in authorizing a fiction that the matter contemplated was in issue, necessarily implies the further fiction that it was also adjudicated upon. But it is more satisfactory to say that the estoppel in question is different from that raised by an actual decision. In truth, the estoppel is that what might and ought to have been relied on in a former suit as a ground of attack or defence but was not, could not, in subsequent litigations between the parties, be brought forward for such purposes; and it is scarcely necessary to add that, notwithstanding the objections taken in some of the cases to the soundness of this doctrine, there is no doubt that it is founded on unquestionable grounds of expediency and public policy.

Before concluding, it is also well to point out that, assuming that the limited construction proposed by the Advocate-General were the correct one, even then, the cause of action on which the suit of 1882 was based, must clearly be held to be identical with that in the present suit. For, looking to the substance of the two actions, the dispute then was and now is as to the validity of the

(1) 11 M.I.A., 50.

(2) I.L.R., 2 I.A., 283.

(3) I.L.R., 20 Cal., 79.

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compromise embodied in the decree in suit No. 42 of 1879. No doubt the invalidity was sought to be established in the suit of 1882 on one ground, while in this suit it is sought to be established on another ground. But these grounds are only different means invoked for making out what is manifestly a single and indivisible infringement of the self-same right.

In either view, therefore, the conclusion must be that the plaintiff is debarred from relying on the want of sanction in question.

It is, therefore, not necessary to discuss the question of limitation. But if it were, we should decide that the suit was instituted within three years from the time the plaintiff attained his majority.

The appeal fails and is dismissed with costs.

DAVIES, J.—I concur throughout.

APPELLATE CIVIL.

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

SALEMMMA (PLAINTIFF), APPELLANT,

v.

LUTCHMANA REDDI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1897.
April 22.
October 23.
November
30.

Hindu Law—Stridhanam—Law of Inheritance—Enfranchisement of service Inam.

Land which formed the emolument of the office of moniegar was enfranchised in favour of a Hindu woman, who died leaving her surviving defendant No. 2 (her husband), the plaintiff (her unmarried daughter), and two sons and two married daughters who were not parties to this suit. The plaintiff sued to recover the land to which she claimed to be entitled under the Hindu Law of Inheritance:

Held, that the property belonged to the deceased as her stridhanam descendible to her heirs, and (without deciding what control, if any, defendant No. 2 had over the property) that the plaintiff was entitled to succeed according to the law of inheritance applicable to such property.

SECOND APPEAL against the decree of E. J. Sewell, Acting District Judge of North Arcot, in Appeal Suit No. 336 of 1895, reversing the decree of T. Swami Ayyar, District Munsif of Chittore, in Original Suit No. 395 of 1894.

This was a suit for land brought by the plaintiff who was the unmarried daughter of one Ellammal, deceased, and defendant No.

* Second Appeal No. 397 of 1896.

2. Defendant No. 1 was the brother of defendant No. 2. The cause of action was stated to be that defendant No. 1, at the instigation of defendant No. 2, had taken unlawful possession of the land in question. This land had originally formed the emolument of the office of moniegar and had been enfranchised, under circumstances which did not appear, in favour of Ellammal, and the plaintiff now sued to recover them as separate property of her mother who left besides the plaintiff two sons and two married daughters. Defendant No. 2 contended that the property for which the inam title deed had been granted to Ellammal could not be regarded as her private property on that account in the sense that the plaintiff could succeed to it, and that it virtually belonged to the family of the defendants and had been enjoyed by them in common for sometime and since been divided between them, and that hence the plaintiff had no right to the recovery of the portion of the share which fell to the first defendant's share.

The only issue that was framed was as follows:—"Whether the disputed lands were the private property of the deceased Ellammal and whether the plaintiff is entitled to succeed to them." The District Munsif answered this question in the affirmative and passed a decree as prayed. On appeal, the District Judge referred to *Venkatarayadu v. Venkataramayya* (1) and Mayne's Hindu Law, § 616, and reversed the decree appealed against and dismissed the suit.

The plaintiff preferred this second appeal.

Jambulinga Mudaliar and *Sivagnana Mudaliar* for appellant.

Tiagaraja Ayyar for respondent No. 1.

JUDGMENT.—The land in dispute formed part of the emoluments attached to the office of *maniem* in a Government village. The second defendant formerly held the office, but having been found guilty of embezzlement he was dismissed. The land was a few years afterwards enfranchised in favour of his wife Ellammal since deceased. With reference to the issue remitted for trial, viz., what right, if any, and under what circumstances the land was enfranchised in favour of Ellammal, the District Judge states in effect that the evidence does not enable him to do more than find that the enfranchisement took place, because Ellammal was in possession of the land at the time.

(1) I.L.R., 15 Mad., 224.

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The District Munsif gave a decree to the plaintiff, being of opinion that she, as the unmarried daughter of Ellammal, was her heir and entitled to the property. But the District Judge, on the strength of an observation contained in section 616 of Mayne's Hindu Law, held that the property, though acquired by Ellammal, became on her death the second defendant's in his sole right and that the plaintiff had no title to it.

The chief authority relied on in support of the Lower Appellate Court's decision is a text of Katyayana(1). As translated it runs thus:—"Wealth acquired by mechanical arts or received through affection from any but the kindred is subject to the husband's dominion. The rest is stridhanam."

Whether an acquisition such as that in the present case falls within either of the two classes mentioned in the text is open to doubt. For it can scarcely be said with any degree of accuracy, that the land was acquired by mechanical arts or was received through affection entertained by the Government towards Ellammal. But it has been suggested that the text was intended to cover all acquisitions which are not stridhana in the technical sense of the term as understood by Smriti writers. We propose, therefore, to deal with the present case on the supposition that it comes within the spirit of the rule laid down by the text.

The first question then that arises is, in whom is the ownership of property of the kind mentioned in the text—is it in both husband and wife or in which of the two?

The language of the text may seem to vest the ownership in the husband. But it being well established that whatever may be the law intended to be laid down by the Smriti writers, that law must be sought for in the writings of the commentators; we have to look to what those commentators, who are authorities in this part of India, have said on the subject.

At the outset we may state that no commentator, known to us by name, has said that the ownership vests in both husband and wife. But Mr. Mayne, in the line of devolution pointed out by him, would seem to assume the joint ownership of both. In support of this, he refers to Jagannatha, Colebrook's Digest, Madras Reprint, Vol. II, page 628. No doubt we find therein a statement that the property goes to the survivor and afterwards passes to his or her heirs. But Jagannatha simply mentions this

(1) Dayabhaga, ch. IV, sec. 1, § 19.

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as the opinion of certain lawyers. Who these are does not appear. Jagannatha's own opinion, as will be shown further on, would seem to be different. Under these circumstances it is not safe to assume the joint ownership so as to allow the survivor to take the property.

If the property does not belong to both, to whom then according to the commentators does it belong? First and foremost comes the Mitakshara. It is significant to note that Vijnaneswara does not refer to the text at all, nor was it necessary for him, in the view he took of the subject of stridhanam, to refer to it. For according to him (chapter II, section 11) whatever is lawfully acquired in any manner by a woman married or not—is her stridhanam. The Smriti Chandrika (chapter II, section 1, § 16), however, does not seem to recognise property of the kind mentioned in the text as her stridhanam. (The translator of the work was evidently of that opinion, page 120.) The Madhaviya (§ 50: Bunnell's translation, page 42), and Varadaraja's Vyvahanirnayam cite the text, but express no opinion on it. The Sarasvati Vilasa like the Mitakshara does not refer to the text and would seem to follow the Mitakshara. The author of the Viramittodaya expressly recognises such property as her stridhanam. For he says (chapter V, Part I, § 2) "the answer is, in the above texts" (one of which is that in question) "the denial is, not of their being woman's property, but of its consequences, such as distribution (by her choice amongst her heirs), &c. Accordingly in "the latter text" (the one in question) "it is said, therein the husband's ownership arises. The meaning is that the husband and not the woman has independence in dealing with such property." (Golapchandrar Sircar's translation, page 222.) In this state of the authorities, when there is not such a consensus of opinion among the commentaries prevalent in this part of India as to suggest that the law of the Mitakshara on the point was not recognised or was departed from, it seems to us to be best to follow the Mitakshara. No doubt, judicial decisions have established that property inherited by a woman is, notwithstanding the opinion of Vijnaneswara to the contrary, not stridhanam. But those decisions do not go the length of holding that Vijnaneswara's doctrine as to stridhanam is otherwise unsustainable.

It is scarcely necessary to say that Vijnaneswara's statement that stridhanam is not to be understood in a technical sense

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(Mitak, chapter II, section 11, §3) was not mere philological observation. By laying down that proposition, Vijnaneswara and other great commentators, who followed him, succeeded in effecting a beneficial change in the archaic Smriti law and placed women almost on a footing of equality with men as regards the capacity to hold property. It is on account of the boldness and reach of mind evinced by Vijnaneswara, as pointed out by Messrs. West and Bühler Digest, page 291, note (a), 3rd edition, in propounding his doctrine of stridhanam and his other theories that property is a matter of secular not of religious cognizance and sapindaship rests on consanguinity that the Mitakshara has become the chief authority on Hindu Law. A departure from the law, laid down by such a high authority, must not be made unless supported by adequate grounds. And as no such grounds exist, we hold that the property in the present case belonged to Ellammal and was her stridhanam descendible to her heirs. This conclusion is in accordance with that of Jagannatha who is relied upon by Mr. Mayne in support of his view. After referring to the opinion of certain lawyers as noticed above, Jagannatha says in the paragraph immediately following, "but, according to Jimutha Vahana Raghunandana and the rest, the wife is the sole owner of wealth acquired by her even during coverture: yet she has not independent power over it so long as her husband lives; for the negative in the text of Manu (Book III, chapter 1, verse 52), conveys the sense of imperfection. Consequently, they have no wealth exclusively their own, and the imperfection of their property consists in the want of uncontrolled power. It must be therefore understood that the legal heirs of a woman's peculiar property succeed also to this wealth." (Colebrook's Digest of Hindu Law, Madras Reprint, Vol. II, page 628. See Banerjee's Marriage and Stridhanam, page 319, 2nd edition, also page 439.)

The next question is who is the heir to the property? No special rule as to the devolution of the property comprised in the text of Katyayana is laid down in any of the commentaries. In this matter of the devolution of stridhana too, as in the comprehensive character of the definition of stridhanam, the superiority of the Mitakshara is evident. While the other commentators, in their attempt to reconcile the various Smritis, complicate the matter by prescribing different lines of devolution—those too not

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REDDI.

complete—according to the class of stridhanam to which the particular property belongs, the Mitakshara lays down rules which are easy of application, complete in themselves and on the whole equitable. We think therefore we ought to follow the Mitakshara and hold that the plaintiff is the heir.

It only remains to observe that though, as we have seen, a wife's earnings and gifts to her by strangers are her stridhanam descendible to her heirs, yet a question may arise whether her husband has any and what control over such property. The question however does not arise in this case and it is unnecessary to consider it.

The decree of the Lower Appellate Court is reversed and that of the District Munsif restored. The Appellant's costs in this and in the Lower Appellate Court must be paid by the firstdefendant.

APPELLATE CIVIL.

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

SRIDEVI (DEFENDANT No. 1), APPELLANT,

v.

KRISHNAN AND OTHERS (PLAINTIFF AND DEFENDANTS

Nos. 2 TO 4), RESPONDENTS.*

*Pensions Act—Act XXIII of 1871, s. 12—Political pension of Zamorin of Calicut—
"Payable"—Power of disposition by will.*

The Zamorin of Calicut, whether he be or not a member of a Kovilagam, is entitled to dispose of his separate property by a will.

The Zamorin, by his will, bequeathed to the plaintiff the malikhana due to him from the Government which might be in arrears at the time of his death. The malikhana was a political pension of Rs. 6,000 a month, payable quarterly. The Zamorin died on the 6th of August 1892. The plaintiff having obtained a certificate under Pensions Act, s. 6, now sued the new Zamorin to recover the proportionate amount of the pension for the current quarter up to the time of the Zamorin's death:

Held, that the plaintiff was not entitled to recover the amount sued for.

APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar, in Original Suit No. 22 of 1895.

The plaintiff sued for Rs. 8,391-9-6, together with interest from the 24th February 1893. The nature of the suit appears from the following passage from the judgment of the Subordinate Judge:—

* Appeal No. 125 of 1896.

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"The late Zamorin, Maharaja Bahadur of Calicut, died on 6th August 1892. The Zamorin, for the time being, enjoys a malikhana of Rs. 6,000 a month, payable quarterly. The late Zamorin died before the quarterly instalment fell due. Rs. 8,391-9-6 represents the proportionate amount due for the portion of the quarter up to the date of his death. After the death of the late Zamorin, the Collector paid the amount, on the 24th February 1893, on the present Zamorin's receipt, to the first defendant, who is the senior Tamburatti of the Pudiakovilagam to which the deceased belonged. The plaintiff, nephew of the deceased, has since obtained a certificate (exhibit G, dated 4th July 1895) under section 6 of the Pensions Act, 1871, and sues to recover the amount from first defendant on the grounds (1) that the deceased has bequeathed it to him by will (exhibit A, dated 3rd August 1892); (2) that even in the absence of the will A, the amount would go to their Tavazi or branch of the Pudiakovilagam, of which he is the present head and manager; and (3) that such arrears of malikhana are, according to family custom, spent for the obsequies of the deceased malikhana-holder, and he (the plaintiff) has performed the obsequies of the late Zamorin at his own cost. The first defendant denies everyone of these positions."

The Subordinate Judge passed a decree for the principal sum and interest at 6 per cent., instead of 12 per cent.

Defendant No. 1 preferred this second appeal.

Sundara Ayyar for appellant.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and *Govinda Menon* for respondent No. 1.

Govindan Nambiar for respondents Nos. 2 and 3.

Subramania Ayyar for respondent No. 4.

JUDGMENT.—In the Court below, the plaintiff claimed the amount of the pension in dispute in his own right under the will left by the late Zamorin in his favour.

He also claimed the money on behalf of the Tavazi to which he formerly belonged, and of which he was *de facto* manager.

In the appeal here, the Advocate-General put forward another ground, namely, that apart from the will the plaintiff was entitled to the money as the nearest heir to the last Zamorin. This new ground, in order to be considered, would require further enquiry, and we cannot therefore permit it to be raised now.

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As to the second of the grounds on which the suit was based in the Lower Court, it is clearly not maintainable, because the certificate granted to the plaintiff under the Pensions Act permitted him to sue only in his own right and under the will. No leave was given to the Tavazi to sue. Even if it had been otherwise, we would have held that the plaintiff was not entitled to sue on behalf of the Tavazi as at the date of the plaint, he had ceased to belong to it, having become a stani. The fact that he was subsequently allowed to manage the affairs of the Tavazi constituted him only its agent. That would, of course, not give him a right to represent the Tavazi, so as to proceed under section 30 of the Code of Civil Procedure, he not having the same interest as the members of the Tavazi, if they had any.

The only remaining point is whether the plaintiff is entitled to the money under the will was impeached on several grounds. It was first contended that the Zamorin was subject to the *Marumakkattayam Law*, and it was therefore not competent to him to execute a will even in respect to his separate property. The right to dispose of separate property by testamentary disposition is a right now recognized as vested in every Hindu, and without evidence of custom or usage to the contrary, among Malabar Hindus, there can be no reason for holding that the general rule is inapplicable to them. We should therefore hold that the Zamorin had the power to will away his separate property, which the amount in dispute admittedly was, even though the Zamorin was also a member of an undivided family—to wit, his Kovilagam. In fact, however, he was not that. His will is, therefore, unquestionably not open to objection on the ground stated. It was next contended that the transfer of the pension money made in the will was null and void under section 12 of the Pensions Act. There is no doubt the pension was a political pension, being an allowance granted by the Government, not in respect of a right, but as a matter of favour to the Zamorin, after his deposition from the Raj, as the engagement between him and the Government clearly shows (*vide* 'Logan's Collection of Treaties and Engagements relating to Malabar,' pages 372 to 376). See also *The Secretary of State for India in Council v. Khemchand Jeychand*(1). Section 12 is, therefore, applicable to the case, if the amount bequeathed by the will was "money not payable" at the time of the will became operative.

(1) I.L.R., 4 Bom., 432.

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v.
KRISHNAN.

It is not denied that the day appointed for the payment of the quarterly allowance, of which the plaint amount forms part, had not arrived at the time of the Zamorin's death. The money was not disburseable from the Government treasury until a month or more afterwards. If, therefore, the expression "payable" in section 12 means ripe for disbursement or that payment was demandable, the will was doubtless invalid. It was, however, urged by the Advocate-General that the proper construction of the word was that the right to the money had accrued, and hence was "payable," even though the actual payment of it could not be demanded till a later date. We are unable to accept this construction. We think the word payable is used in its primary sense, namely, deliverable in performance of an obligation, in other words that actual payment was demandable by the person entitled. We must therefore hold that the will was invalid under section 12 of the Pensions Act. Further, supposing the transfer did not fall under the prohibition in section 12 of that Act, the case would be governed by clause (9) of section 6 of the Transfer of Property Act, which declares that "political pensions cannot be transferred." There is no conflict between this clause and any provision of the Pensions Act, because there is nothing in the latter Act empowering alienation of a political pension in cases in which section 12 may not be applicable. If such power of transfer existed, it must have been under the general law, and it is expressly taken away by the Transfer of Property Act. It is scarcely necessary to observe that, as the law of testamentary disposition among Hindus has been treated simply as a development of the law of gift *inter vivos* the principles applying to the latter, under section 6 of the Transfer of Property Act, must be held equally applicable to the former, that is to say, that what cannot be given in life, cannot be given by will. For these reasons we find that the plaintiff derived no title to the money under the will. It therefore becomes unnecessary to express an opinion whether, if the plaintiff had a right, his action lay against the Zamorin and not against the first defendant as was contended on behalf of the latter.

The appeal must accordingly be allowed and in reversal of the Lower Court's decree, the plaintiff's suit must be dismissed with costs of first defendant throughout.

APPELLATE CIVIL.

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

VAIRANANDA NADAR (PLAINTIFF)

v.

MIYAKAN ROWTER (DEFENDANT).*

Registration Act—Act III of 1877, s. 17 (d)—Transfer of Property Act—Act IV of 1882, ss. 4 and 107—Lease of a shop for three years—Registration.

Leases falling under section 107 of the Transfer of Property Act are compulsorily registrable notwithstanding the Government notification issued under the proviso to section 17 (d) of the Registration Act.

CASE stated for the opinion of the High Court under Civil Procedure Code, section 617, by V. M. Malhari Rau, District Munsif of Tuticorin, in Small Cause Suit No. 73 of 1889.

The question submitted was whether a lease of a shop for a term exceeding one year was compulsorily registrable. This was a suit to recover Rs. 51 being the arrears of rent accrued due on a shop leased by the plaintiff to the defendant. The letting was evidenced by a document, dated the 12th April 1883, and executed by the defendant. The period provided for was three years and the rent reserved was Rs. 2-8-0 a month. In referring the above question the District Munsif said "under Transfer of Property Act, section 107, "a lease of immovable property from year to year or for any term "exceeding one year or reserving a yearly rent can be made only "by registered instrument. This section is to be read as supplemental to the Indian Registration Act—see section 4: while "section 17 (d) of the latter Act declares such leases to be compulsorily registrable, except where under the power thereby conferred "the Local Government exempts from its operation leases for "terms not exceeding five years and for rent not exceeding Rs. 50. "The Government in the exercise of the power so conferred have "exempted such leases from registration—Rajagopalier's Registration Act, page 51—G.O., No. 1763, dated 4th November 1873. "The plaintiff contends that under the above ruling of the Government, the lease was exempt from compulsory registration. "Reading all the provisions together, I am disposed to think that,

1897.
September 3.

* Referred Case No. 16 of 1897.

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v.
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BOWTER.

"in places where the Transfer of Property Act is in force, all leases for a term exceeding one year are compulsorily registrable. The order of Government was passed when the Act VIII of 1871 was in force and applied to all leases which reserved an annual rent less than Rs. 50 and extended for a term of not more than five years. When Act IV of 1882 was passed, this notification became abrogated so far as leases other than agricultural were concerned, as section 107 requires leases for terms of more than a year to be registered. What little doubt there was about registration was removed by Act III of 1885, which directs that the Transfer of Property Act shall be read as supplemental to the Indian Registration Act. In this view I am supported by the opinion expressed in 'Field's Evidence,' fifth edition, page 446."

Mr. J. Adam for plaintiff.

Ramakistna Ayyar for defendant.

JUDGMENT.—Section 107 of the Transfer of Property Act is declared to be read as supplemental to the Registration Act. It is therefore to be read with section 17 (d) of the Registration Act. The proviso to that clause must, therefore, be restricted to cases not falling under section 107 of the Transfer of Property Act, which absolutely requires the registration of the leases referred to therein. Our answer to the question therefore is that leases falling under section 107 of the Transfer of Property Act, are compulsorily registrable notwithstanding the Government notification issued under the proviso to clause (d), section 17 of the Registration Act.

APPELLATE CIVIL.

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

KANARAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KUTTOOLY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1897.
September
14.
November
4.

Mortgage—Agreement by mortgagor to sell the mortgage premises to the mortgagee—
Fetter on the equity of redemption.

A stipulation in a mortgage, that if the mortgage money is not paid on the due date the mortgagor will sell the property to the mortgagee at a price to be

fixed by umpires, is unenforceable as constituting a fetter on the equity of redemption.

KANARAN
v.
KUTTOOLY.

SECOND APPEAL against the decree of B. Macleod, Acting District Judge of North Malabar, in Appeal Suit No. 132 of 1896, confirming the decree of V. Raman Menon, District Munsif of Quilandy, in Original Suit No. 1 of 1895.

The plaintiff No. 1 was the karnavan of the tarwad to which defendant No. 1 belonged, and the plaintiff No. 2 was a lessee under plaintiff No. 1. In 1882 the predecessor of the plaintiff No. 1 mortgaged certain property to the defendant No. 1 under a document filed as exhibit I in the suit. The present suit was brought to redeem this mortgage. Defendant No. 2 was a tenant under the mortgagee. The defendant relied upon a stipulation in exhibit I to the effect that if the mortgage was not paid off within three years from the date when it was executed, the mortgage premises should be sold to her for a price to be settled by umpires, and she claimed that as the mortgage had not been discharged, she was entitled to enforce the contract to sell the properties to her. The District Munsif dismissed the suit and his judgment was confirmed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Narayanan Nayar for appellants.

Ryru Nambiar for respondent No. 1.

JUDGMENT.—The most important question in the case is whether the agreement in the mortgage (exhibit I) to sell the mortgaged property to the mortgagee in default of payment of the mortgage money is binding upon the mortgagor. Neither of the Courts below has considered this question. They have proceeded to deal with the agreement of sale as if it were valid. On the question as to its validity we have no hesitation in holding against it.

It is the policy of the law that the right of redemption in a mortgagor shall not be fettered or clogged in any manner or to any extent by an agreement between mortgagor and mortgagee, saving transactions between the parties as would operate as an extinguishment of the right. (See proviso to section 60 of the Transfer of Property Act)—a transaction to have this effect must naturally be one entered into after the mortgage. (See *Perayya v. Venkata*(1)).

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KUTTOOLY.

The present case is no doubt not governed by the terms of the Transfer of Property Act, the mortgage being prior to it, but at the date of the mortgage the law was substantially the same. Since 1858 the principles applicable to mortgages in this Presidency are those administered by the Courts of Equity in England, according to which agreements derogating from the right of redemption are treated as unenforceable. This principle is most strongly illustrated in the case of mortgages by conditional sale where the condition is held by the Courts to be inoperative. For other instances of the application of the principle, it is sufficient to refer to the cases at *Mahomed Muse v. Jijibhai Bhagwan*(1) and *Sayad Abdul Hak v. Gulam Jilani*(2) and to two recent English cases (*Field v. Hopkins*(3) and *Salt v. Marquess of Northampton*(4)). In this case the effect of the agreement was practically to deprive the mortgagor of the right to redeem after three years. The agreement must therefore be held to be invalid, and the defendants' contention that plaintiffs are precluded by the above agreement from seeking to redeem fails. It becomes unnecessary to consider the other objections taken to the validity of that agreement.

The result is that the second plaintiff will be entitled to redeem if the lease to him by first plaintiff is binding on the tarwad, and if it is not, the first plaintiff will be entitled to redeem on an amendment of the plaint to that effect. The Lower Appellate Court has not given a finding on the fourth issue which refers to the validity of the lease to second plaintiff. The District Judge will now submit a finding upon it on the evidence on record, 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.

[The District Judge found that the lease was valid and in the result the High Court reversed the decrees of both the Lower Courts, and ordered that a redemption decree be drawn up in favour of second plaintiff on payment by either plaintiff of Rs. 75 to first defendant.]

(1) I.L.R., 9 Bom., 524.
(3) L.R., 44 Ch. D., 524.

(2) I.L.R., 20 Bom., 677.
(4) 1892, App. Cas., 1.

APPELLATE CIVIL.

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

THE COLLECTOR OF VIZAGAPATAM, PETITIONER,

v.

ABDUL KHARIM SAHIB AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

1897.
December 6.

Civil Procedure Code—Act XIV of 1882, ss. 412, 622—Dismissal of suit in forma pauperis without trial—Liability of plaintiff for Court-fee—Revision.

A plaintiff who sues in *forma pauperis* is liable to pay the stamp duty if his suit is dismissed without trial; and he may be ordered to do so under section 622.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the proceedings of E. C. Rawson, Acting District Judge of Vizagapatam, in Original Suit No. 5 of 1895.

This was a suit instituted *in forma pauperis*, which was dismissed without contest on the 25th August 1896 against defendants Nos. 1 to 6 without costs, the plaintiffs being ordered to pay costs to defendant No. 7. A question arose whether the stamp duty was payable by the plaintiff and notice was served on the Collector. The District Judge made no order against plaintiff for payment of Court-fees. He said "this case appears to be on all fours, except "that the suit proceeded as far as the final hearing instead of only "as far as the settlement of issues, with the case of *The Collector of Kanara v. Krishnappa Hedge*(1) where it was decided that "section 412 of the Civil Procedure Code applied only to cases of "adjudicated failure, and that there was no adjudication of the "rights of the parties, and the plaintiff could not, therefore, have "been said to have failed in the suit; the case did not fall within "the section at all."

This revision petition was preferred on behalf of the Secretary of State for India in Council represented by the Collector of Vizagapatam.

The Government Pleader (Mr. E. B. Pocell) for petitioner. Plaintiffs were not represented.

JUDGMENT.—The Bombay case relied on by the District Judge has been dissented from by this Court in *Lakshmikantam v. Lakshmi-*

* Civil Revision Petition No. 73 of 1897.

(1) I.L.R., 16 Bom., 77.

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SAHIB.

devanma(1). Sir T. Muttusami Ayyar there observed:—"The words in the sections are 'succeeds' and 'fails in the suit' and 'they refer to the ultimate decision or the result of the suit and not to the mode in which the decision is arrived at. I should be doing violence to the language of the section if I introduced into them the words 'after contest' which I do not find in them." We see no reason to dissent from this view.

We accordingly allow the petition and direct that the plaintiffs in the suit do pay the Collector the stamp duty payable on the plaint and the costs of this application.

We have dealt with this matter under section 622, Civil Procedure Code, as we are of opinion that the District Judge has failed to exercise a jurisdiction vested in him by law in consequence of a misconstruction placed by him on section 412, Civil Procedure Code.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

RAMASAMI.*

*Criminal Procedure Code—Act X of 1892, s. 419—Presentation of
criminal appeal.*

A petition of appeal under the Criminal Procedure Code is not duly presented when having been signed by a pleader, it is handed in by a person who is not his clerk and over whose conduct and actions he has no control.

PETITION under Criminal Procedure Code, section 439, praying the High Court to revise the order of A. R. Cumming, Head Assistant Magistrate of Kistna.

The order sought to be revised was an order rejecting certain appeals against the convictions of the appellants by the Second-class Magistrate of Jaggiapet. The Head Assistant Magistrate said:—"This batch of appeals was presented to me at Jaggiapet

"by some person whose identity is unknown to me. The vakalats are drawn in the name of A.B., who was a certified vakil, and in the name C.D. who is not. The appeals were not presented by the former, and they could not be properly presented by the latter."

Narayana Ayyangar for the petitioners.

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

JUDGMENT.—The cases decided by this Court do not go further than to hold that, if an authorized pleader present an appeal by the hand of his clerk, the presentation should be accepted as if made by the pleader himself. It has nowhere been held that a pleader may present an appeal by a person who is not his clerk and over whose conduct and actions he has no control.

We cannot therefore say that the Head Assistant Magistrate was wrong in rejecting these appeals.

APPELLATE CIVIL.

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

RASIBI AMMAL (PLAINTIFF)

v.

OLAGA PADAYACHI (DEFENDANT).*

*Village Courts Act (Madras)—Act I of 1889—Succession Certificate Act—
Act VII of 1889.*

The provisions of the Succession Certificate Act apply to suits in a Village Munsif's Court.

CASE stated under section 19 (3), Act VII of 1889, by W. J. Tate, District Judge of Salem, in Original Suit No. 15 of 1897, on the file of the Village Munsif of Puthrakoundanpaliam, Atur taluk.

The case was stated as follows:—

The Village Munsif has applied to me for instructions as to how he should proceed in a suit filed in his Court, where the plaintiff, a Hindu widow, sues to recover money due under a document executed to her husband, and the defendant objected that she cannot sue without a succession certificate in respect of the debts

QUEEN-
EMPRESS
v.
RAMASWAMI.

1897.
November
26.

* Referred Case No. 23 of 1897.

(1) Referred Case No. 12 of 1893 (unreported).

• Criminal Revision Cases Nos. 256 to 263 of 1897.

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PADAYACHI.

of the deceased. The wording of section 4 of the Succession Certificate Act seems to imply that Village Courts are not exempted from the operation of the Act, nor is there any such expression in the Village Act—Act I of 1889. The question is one affecting general practice. I have the honour to solicit the orders of the High Court as to whether the provisions of section 4 of the Succession Certificate Act applies to suits and applications under the Madras Village Courts Act or not.

The parties were not represented.

This case coming on for hearing; upon perusing the letter of reference and the records in Original Suit No. 15 of 1897 on the file of the Village Munsif of Puthrakoundanpaliam, Atur taluk, and the parties not appearing in person or by counsel, the Court expressed the following opinion.

OPINION.—We are of opinion that the provisions of the Succession Certificate Act apply to suits in the Village Munsifs' Courts.

APPELLATE CIVIL—FULL BENCH.

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

LAKSHMINARAYANA PANTULU (PLAINTIFF), APPELLANT,

v.

VENKATRAYANAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Rent Recovery Act (Madras)—Act VIII of 1865, s. 3—Mokhassa-inamdars paying kattubadi to the Zamindar—Obligation to accept patta.

Mokhassa-inamdars, who hold lands in a zamindari and pay kattubadi annually to the Zamindar and who are not cultivating tenants, are not bound to accept a patta from the Zamindar.

SECOND APPEAL against the judgment of E. C. Rawson, Acting District Judge of Kistna, in Appeal Suit No. 2114 of 1893, reversing the decision of F. C. Parsons, Acting Head Assistant Collector of Kistna, in Summary Suit No. 1694 of 1893.

The plaintiff, who was the Zamindar of Telaprole, sued by his next friend under Rent Recovery Act, 1865, to enforce the

* Second Appeal No. 939 of 1895.

acceptance of a patta by the defendant, who was the Mokhassadar of Chatrazi, within the limits of the plaintiff's zamindari. The Head Assistant Collector decided in favour of the plaintiff. The District Judge reversed his decision on appeal.

The plaintiff preferred this second appeal. The second appeal came for hearing before Collins, C.J., and Shephard, J., who referred to the Full Bench the following question:—

Whether the defendants not being (as is assumed) cultivating tenants, are bound to accept a patta from the Zamindar. (See *Suryanarayana v. Appa Rau*(1) and cases cited.)

The case came on for hearing before the Full Bench constituted as above.

Pattabhirama Ayyar for appellant.

Mr. N. Subramaniam, Ramachandra Rau Saheb, and Sriramulu Sastri for respondents.

Pattabhirama Ayyar.—The plaintiff in this case is clearly a landholder within the meaning of section 3 of Act VIII of 1865. The only question, therefore, is whether the defendant is a tenant within the meaning of that Act, for if he is then by section 9 he is bound to accept a patta. Now a tenant is defined by section 1 as any person who is bound to pay rent to a landholder. Here the defendant is admittedly bound to pay kattubadi, and therefore the question comes to this, is kattubadi rent or revenue? The nature of kattubadi has been discussed, see *Venkatarama Doss v. Maharajah of Vizianagaram*(2), and *Mullupudi Balakrishnayya v. Venkatanarasimha Appa Rau*(3). But this discussion has been with reference only to limitation. Kattubadi, however, is defined as rent (Brown's 'Telugu Dictionary'). It is the rent paid by village servants, as for example by a village watchman: and it is in fact the word used in all cases where services are rendered in consideration of only a light rent being imposed for the enjoyment of land. In two cases the question was raised whether a landholder to whom kattubadi was payable was entitled to enforce the acceptance of a patta, but neither of these cases is in point. In *Ramachandra v. Jaganmohana*(4), the judgment proceeded on the ground that kattubadi was in fact not payable and the learned Judges expressly declined to consider whether if kattubadi had

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(1) I.L.R., 16 Mad., 40.
(2) I.L.R., 19 Mad., 329.

(3) I.L.R., 19 Mad. at p. 103—Note.
(4) I.L.R., 16 Mad., 161.

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been payable the acceptance of a patta could have been enforced. In *Rama v. Venkatachalam*(1) it was held that the landholder to whom the 'kattubadi' was then payable was not entitled to enforce the acceptance of a patta. The facts of that case are not fully reported, but from the head-note it would seem that the 'kattubadi' then in question was not really kattubadi but quit-rent; and as quit-rent is collected by the landholder as the agent of Government, it is not rent but revenue. [DAVIES, J.—In this case, does not the Mokhassadar himself stand in the shoes of the landlord, and is he not the person who himself has to issue pattas?] He is bound to issue pattas to the cultivating tenants, and so far as they are concerned is a landlord, but at the same time he is also tenant to the zamindar. [SUBRAMANIA AYYAR, J.—If there are two classes of tenants—the cultivating tenant and the non-cultivating tenant—it may well be that Act VIII of 1865 applies only to one class—the cultivating tenant.] Whenever any rent is payable to a landholder, as defined by section 3, the person bound to make the payment is a tenant, and the Act applies to him. It is true that in *Ramasami v. Bhaskarasami*(2), the Privy Council draw a distinction between cultivating tenants and others and say that Act VIII of 1865 seems to apply only to cultivating tenants. But this dictum was not necessary to the decision. The ground on which the Privy Council proceeded was that inasmuch as there was no pre-existing relation of landlord and tenant between the parties to that case, the zamindar was not bound to grant the lease there in question, and it was consequently not a patta. The decision of the Privy Council is referred to in *Ramachandra v. Narayanasami*(3). The latest case, however, is *Suryanarayana v. Appa Rau*(4), and here the Privy Council case is also considered; and it was held nevertheless that an inamdar who paid jodi was a tenant within the meaning of the Act.

Mr. N. Subramaniam.—According to the definition of landholder in section 1 of Act VIII of 1865, the defendant is a landholder and not a tenant. [DAVIES, J.—The reference assumes him to be a tenant.] I submit he is not a tenant within the meaning of the Act. [COLLINS, C.J.—The reference assumes that he is a tenant within the meaning of the Act and you must argue

(1) I.L.R., 8 Mad., 576.
(3) I.L.R., 10 Mad., 229.

(2) I.L.R., 2 Mad., 67.
(4) I.L.R., 16 Mad., 40.

the case on that assumption.] The defendant is not a cultivating tenant, and according to the ruling of the Privy Council in *Ramasami v. Bhaskarasami*(1), pattas and muchilikas need only be exchanged between cultivating tenants and their immediate landlords. This ruling was acted upon in *Rama v. Venkatachalam*(2). *Suryanarayana v. Appa Rau*(3) is distinguishable, for in that case the person, against whom the acceptance of the patta was enforced, admitted that he was not a landlord: he claimed to be a holder of land with a right of occupancy.

SUBRAMANIA AYYAR, J.—The plaintiff is a Zamindar and is therefore undoubtedly a landholder mentioned in section 3 of the Rent Recovery Act (VIII of 1865). The defendants own a village in the plaintiff's zamindari as mokhassa-inamdars, and as such they have to pay kattubadi or fixed money rent annually to the plaintiff.

The learned counsel for the defendants urged that they being inamdars, ought not to be held to be, within the meaning of the Rent Recovery Act, tenants in any sense.

This contention is however opposed to the course of decisions since 1883. In *Appasami v. Rama Subba*(4), it was held that an inamdar who paid quit-rent to a superior inamdar, was in respect of that quit-rent liable at the instance of the superior inamdar to be summarily proceeded against under the Act as a tenant. In *Subbaraya v. Srinicasa*(5), it was ruled that a permanent lessee of a village forming part of a muttah—though he was not an agricultural tenant—was nevertheless a tenant within the meaning of section 12 of the Act, and therefore entitled to institute a summary suit for damages sustained in consequence of his having been unlawfully ejected by the muttadar. In *Baskarasami v. Sivasami*(6), the decision was that a Zamindar could under the Act cause the interest of permanent lessee (whose holding was similar in character to that of the lessee in the last case)—to be sold for arrears of rent due under the lease. And lastly in *Suryanarayana v. Appa Rau*(3), the Court upheld the contention that a Zamindar could under the Act distrain for arrears of jodi payable by inamdars.

(1) I.L.R., 2 Mad., 67.
(3) I.L.R., 16 Mad., 40.
(5) I.L.R., 7 Mad., 580.

(2) I.L.R., 8 Mad., 576.
(4) I.L.R., 7 Mad., 262.
(6) I.L.R., 8 Mad., 196.

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So far as I am aware no doubt has hitherto been thrown upon the view of the law adopted in the above decisions, and I believe that a considerable number of titles has been created under sales held upon the strength of that view of the law. In these circumstances it is I think too late to contend that the defendants are not tenants at all within the meaning of the Act.

Moreover the present Order of Reference, as I understand it, assumes that the defendants are tenants under the Act for some purposes, and only raises the question whether they are tenants falling within section 3 of the Act and the other sections relating to the exchange of pattas and muchilikas.

Now the language of the leading section, viz., 3, clearly points to tenants who are directly connected with land as cultivators. Unquestionably these are the persons who are sometimes spoken of as cultivating or agricultural tenants but more generally as raiyats. It is this well known and very numerous body of people that the Legislature has all along taken special precautions to protect, for the simple reason that while the agricultural prosperity of the country so much depends on their well being they are peculiarly liable to be oppressed by Zamindars or other landholders who have the right to collect rents from them. One of the measures adopted very early for ensuring the desired protection to raiyats was the compulsory exchange of pattas and muchilikas. In the earliest Regulation relating to the subject, XXX of 1802, the following passage occurs in the preamble "to the end that "cultivators and under-tenants of land may have the benefit and "protection of determinate agreements in their dealings with superior landholders and farmers of land, and it being necessary to "the security and comfort of cultivators and under-tenants that "the terms of such agreements should be made specific to the end "that cultivators and under-tenants being sensible of the advantage "of such security may have recourse to them for the prevention of "disputes; wherefore the following rules have been enacted for "the execution of pattas between proprietors or farmers of land, or "amilis, and under-tenants, under-farmers, or raiyats." And the opening words of the first section of the said Regulation are "Proprietors and farmers of land shall enter into agreements with "the inhabitants and cultivators of land on the terms on which "they respectively occupy such lands." And though, when the law as to the recovery of rent was consolidated and amended in 1865,

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the cultivators or raiyats were less liable to be subjected to exactions on the part of the Zamindars than they had been in 1802, yet the needful continuance of the protection secured by the compulsory exchange of engagements had not materially diminished. Consequently the substance of the old law on the point was re-enacted with the important and stringent modification contained in section 7 of Act VIII to the effect that the patta tendered should be such as the tenant was bound to accept. It is scarcely necessary to add that certain circumstances connected with holdings of raiyats render periodical adjustment of accounts between them and the Zamindar necessary, and the annual exchange of engagements in their case is therefore of great practical importance.

Now before proceeding to consider whether the provisions in the present law relating to pattas and muchilikas extend also to the case of inamdars, such as the defendants, I should make a few observations with reference to the assumption made in section 3 that, in the case of tenants mentioned therein, there was an existing relation of landlord and tenant which would warrant the application by either party for a written agreement; inasmuch as the learned vakil for the plaintiff, if I understand him correctly, seemed to suggest that that assumption was scarcely true of cultivators or raiyats above referred to. But that the assumption in question has all along been true in respect of the holdings of raiyats generally admits of no doubt as will be seen from *Venkata-narasimha Naidu v. Dandamudi Kotayya*(1), where the true origin and character of holdings of raiyats were recently considered. The authorities cited there show that raiyats are neither tenants-at-will nor tenants from year to year, but possess in the lands under their occupation a far more lasting interest, and in fact they are peasant proprietors being entitled to what is known as the kudi-varam right as opposed to the melvaram right or the right of the State. That such was the view adopted by the framers of the Rent Recovery Act is clear from the final report, dated the 21st December 1864, submitted by the Select Committee on the Bill which became the Rent Recovery Act. After referring to the Proceedings of the Board of Revenue, dated the 2nd idem, in which the entire history of the relation between Zamindars and

(1) I.L.R., 20 Mad., 290.

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raiya was reviewed, the Committee in paragraphs 4 and 5 of their report observe, "without going so far as to hold that Zamindars are only farmers or assignees of the public revenue and not proprietors of their estates, they (the Committee) unanimously concur with the Board (of Revenue) that the Regulations of 1802 were intended to protect the rights of occupants of land under Zamindars by fixing the maximum rent demandable from them, and forbidding their ejection as long as that rent was paid. The Committee further hold that Regulations IV and V of 1822 were passed for the increased protection of such occupants of land, in consequence of the passages in the Regulations of 1802 which spoke of a proprietary right being conferred on Zamindars having led to doubt and misapprehension. No alteration is, therefore, necessary in the principle of this Bill which was framed on the above view of the rights of occupants of land under Zamindars" (5 Madras Revenue Register, at pages 116 and 117).

The above extract furnishes the clue to the assumption which is made in section 3 and on which stress was laid on behalf of the plaintiff as if it somehow detracted from the view that section 3 referred only to tenants in the position of raiya; and in my opinion that assumption is perhaps the strongest argument in favour of that view. For the assumption is not true in respect of any other description of tenants of zamindari lands.

Turning now to the case of inamdars in the position of the defendants, it is obvious that they do not strictly come within either the strict letter or the spirit of the provisions in question. In the first place the inamdars are, it is conceded, not occupants of land but possess only the right to receive rents due by such occupants. Secondly, the inamdars form a comparatively very small class fairly able to look after their own interests in their relation with Zamindars or other superior landholders. Thirdly and lastly, the amount of quit-rent or kattubadi, jodi, poruppu or by whatever other name it might be known, payable by them to Zamindars or others under grants creating the inams being mostly fixed permanently, there is little or no necessity for periodical revision and settlement such as are required between Zamindars and raiya. Consequently exchange of patta and muohilikas between Zamindars and inamdars cannot serve any really useful end. On the contrary, though the exchange of such documents between those persons would in truth be nothing more than an idle

formality, yet the neglect of it would, so far as Zamindars are concerned, lead to the serious consequence of loss of rent.

For these reasons I think that the provisions contained in section 3 and the sections which specially refer to it were not intended to apply to inamdars in the position of the defendants.

It remains only to observe that even if a different construction were possible, this Court would be precluded from adopting such a construction by the decision of the Privy Council in *Ramasami v. Bhaskarasami*(1). There it was held that a lease of a village granted by a Zamindar to a banker was not a patta within the meaning of the Rent Recovery Act. In the course of their judgment their Lordships observe "section 3 seems to be confined to the relation of tenants who are cultivating the land and their immediate landlords. The whole Act may not be confined to that class, but the intention appears to be by section 3 and the sections which specially refer to it to regulate the relation of landlords and tenants of that description." These observations were not *obiter dicta*, but were necessary for the decision of the case (see also *Rama v. Venkatachalam*(2)).

I would therefore answer the question submitted in the negative.

COLLINS, C.J.—I agree.

DAVIES, J.—I concur throughout.

BENSON, J.—I also concur.

(1) I.L.R., 2 Mad., 67.

(2) I.L.R., 8 Mad., 576.

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APPELLATE CRIMINAL—FULL BENCH.

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

QUEEN-EMPRESS

v.

SRINIVASALU NAIDU AND ANOTHER.*

1897.
November 5.
1898.
January 7,
18.

Criminal Procedure Code—Act X of 1882, ss. 195 (b), 428, 430 and 476—Whether a High Court in revision can revoke an order of a Subordinate Court under sec. 476, Code of Criminal Procedure.

A High Court, as a Court of Revision, has power, under section 430, to revoke an order made by a subordinate Court under section 476 of the Code of Criminal Procedure.

THESE were two petitions under sections 435 and 430 of the Criminal Procedure Code, praying the High Court to revise the order of G. T. Mackenzie, Sessions Judge of Coimbatore, dated 11th October 1897, in Criminal Miscellaneous Petitions, Nos. 32 and 33 of 1897, confirming the order of W. C. McMurray, Deputy Magistrate of Ootacamund, dated 23rd September 1897, and made under Criminal Procedure Code, section 476, for the prosecution of the petitioners under section 193, Indian Penal Code, for giving false evidence and to revoke the order of the Deputy Magistrate.

These cases came on for hearing before COLLINS, C.J., and BENSON, J., who made the following order of reference to the Full Bench:—

ORDER OF REFERENCE TO THE FULL BENCH.—The question for decision is whether the High Court, as a Court of Revision, has power to revoke an order made by a subordinate Court under section 476, Criminal Procedure Code.

This Court, following the case of *Queen-Empress v. Rachappa*(1), has decided that the High Court has no such power (*Queen-Empress v. Narakka*(2)), but the Calcutta and Allahabad High Courts have held the contrary. See *In the matter of the petition of Khepu Nath Sikdar v. Grish Chunder Mukerji*(3); and *In the matter of the petition of Mathura Das*(4).

* Criminal Revision Cases Nos. 428 and 429 of 1897.

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

(3) I.L.R., 16 Cal., 730.

(2) I.L.R., 13 Mad., 144.

(4) I.L.R., 16 All., 80.

As we have some doubt as to the correctness of the decision in *Queen-Empress v. Narakka*(1), and as the question is one of considerable general importance, we think it desirable to refer it for the decision of the Full Bench.

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[The matter subsequently came on for hearing before the Full Bench constituted as above.]

Mr. R. A. Nelson for petitioners.

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

Mr. R. A. Nelson.—The cases of *Queen-Empress v. Rachappa*(2) and *Queen-Empress v. Narakka*(1) are only apparently adverse to the view that the High Court has such power. The question of the powers of such Court on revision never arose in the former case, the question at issue being the powers of a District Court on appeal under section 195. The latter case decided that a High Court on appeal under that section had no such power, but a power to interfere on revision was assumed (*In the matter of the petition of Mathura Das*(3)). He relied further on *In the matter of the petition of Khepu Nath Sikdar v. Grish Chunder Mukerji*(4), *Abdul Khadar v. Meera Sahab*(5), and *In re Deoji valad Bhavani*(6).

Mr. E. B. Powell.—The proceedings of a Court under section 476, Code of Criminal Procedure, amount to a "complaint" under section 195(b). See *Ishri Prasad v. Sham Lal*(7). Whilst section 195 provides for appeals in the case of a "sanction" being given by a Court, no right of appeal is given in the case of a "complaint" of a Court. Section 430, which states the scope of a High Court's powers on revision, confers upon it, *inter alia*, "the powers conferred on a Court of Appeal by section 195." Therefore a High Court on revision has no power to interfere with a prosecution instituted on the complaint of a subordinate Court. He referred to *Queen-Empress v. Rachappa*(2).

COLLINS, C.J.—The question whether the High Court, as a Court of Revision, has power to revoke an order made by a subordinate Court under section 476, Criminal Procedure Code, is the subject of this reference to the Full Bench.

(1) I.L.R., 13 Mad., 144. (2) I.L.R., 13 Bom., 109. (3) I.L.R., 16 All., 80.
(4) I.L.R., 16 Cal., 730. (5) I.L.R., 15 Mad., 225.
(6) I.L.R., 18 Bom., 581. (7) I.L.R., 7 All., 871.

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I am of opinion that the High Court, in revision, has the power. By section 476, a Civil, Criminal or Revenue Court may, if such Court is of opinion that there is ground for enquiring into any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding, after making any preliminary enquiry that may be necessary, send the case for enquiry or trial to the nearest Magistrate of the first class. It is impossible to hold, as argued by the Public Prosecutor, that this proceeding is a mere complaint of a public servant. It is an order by a Court.

By section 439 the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 195, 423, &c. Now, section 423, clause (c), gives the High Court power "in an appeal from any other order" (other than those orders previously mentioned) "to alter or reverse such order." An order under section 476 is not excluded, and therefore, in my opinion, is included in clause (c).

The case of *Queen-Empress v. Narakka*(1) is not in conflict with either *In the matter of the petition of Khepu Nath Sikdar v. Grish Chunder Mukerji*(2), or *In the matter of the petition of Mathura Das*(3). The Judges in *Queen-Empress v. Narakka*(1) held that there was no appeal against an order made under section 476, but, as pointed out by Aikman, J., in *In the matter of the petition of Mathura Das*(3), they appeared to be of opinion that they had power to interfere in revision.

It is stated that in *Queen-Empress v. Rachappa*(4), the learned Judges who decided that case came to the conclusion that the High Court had no power to revise an order under section 476. I am, however, compelled, with great respect, to differ from the Bombay Court on this point.

SHEPARD, J.—Mr. Nelson has justly pointed out that there is in point of fact no conflict between the case reported in *Queen-Empress v. Narakka*(1), and the Calcutta and Allahabad cases mentioned in the order of reference, and that, as far as this Court is concerned, there is no reported case in which the power of the High Court to review the action taken by a subordinate Court under section 476 of the Criminal Procedure Code has been

denied. On the contrary the language used in the judgment in *Queen-Empress v. Narakka*(1), is clearly indicative of the view that the power is possessed by the High Court, and it is with reference to another point that *Queen-Empress v. Rachappa*(2) was decided.

It is true that in section 195 the distinction between a sanction to prosecute and a complaint is explained by the provision for appeal contained in the antepenultimate paragraph. I was at first inclined to accede to the argument of the Public Prosecutor, founded on the provisions of section 195; but on consideration I think that the sanction, which a public servant may give, or the complaint which he may lodge for the purpose of section 195, are so entirely different from the action which a Court may take under section 476 as to obviate the suggested difficulty of holding that the action of the Subordinate Court may be subject of revision, but not so the complaint of the public servant. Under section 476, the Court before which an offence has been committed has first to hold such preliminary inquiry as may be necessary, then to send the case for inquiry to a Magistrate and to send the accused in custody or take security for his appearance, and finally, if it thinks fit, to bind over the witnesses to give evidence. These are all steps which only a Court or a Magistrate could take. They differ in kind from the complaint which a public servant may lodge. The words used in section 439 giving the High Court powers of revision are general. The section does not refer to section 476 and does not contain any words indicating an intention to exclude from the operation of the section proceedings taken under section 476. I concur in the view expressed by Aikman, J., in *In the matter of the petition of Mathura Das*(3) and answer the question referred in the affirmative.

SUBRAMANIA AYYAR, J.—I am of the same opinion, though at first I was inclined to take a different view. No doubt section 195 draws a distinction between sanction given by a public servant and a complaint by him. But it is difficult to support the suggestion that section 476 only lays down provisions as to how a Court empowered to act under it is to make a complaint. I think there can be no doubt that what is done under the latter section constitutes a "proceeding," which is open to revision under section 439,

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(1) I.L.R., 18 Mad., 144.

(3) I.L.R., 16 All., 80.

(2) I.L.R., 16 Cal., 730.

(4) I.L.R., 18 Bom., 109.

(1) I.L.R., 18 Mad., 144. (2) I.L.R., 18 Bom., 109. (3) I.L.R., 16 All., 80.

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since there is nothing in the Code expressly prohibiting such revision. I, therefore, concur in answering the question in the affirmative.

BODDAM, J.—I agree with the judgment of Shephard, J.

[These cases coming on for final hearing after the above decision of the Full Bench, the Court delivered the following judgment:]

JUDGMENT.—The Full Bench has decided that we have the power to interfere to prevent a prosecution ordered under section 476, Criminal Procedure Code, from being proceeded with. On the merits, however, we find no case whatever for interference. We dismiss both the petitions.]

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar,
Mr. Justice Davies, and Mr. Justice Boddam.

MARUDAMUTHU NADAN AND OTHERS (PLAINTIFFS),
APPELLANTS,

v.

SRINIVASA PILLAI AND OTHERS (DEPENDANTS), RESPONDENTS.*

1897.
April 2.
November 5.
December 14.
1898.
January 31.

Hindu Law—Transfer by Hindu widow of part of her estate—Consent of reversioner.

A Hindu widow with the consent of A, the then nearest reversioner, sold part of the property inherited by her from her husband. A predeceased the widow and on her death B, C and D were the nearest reversioners, and they now sued to recover the property. It appeared that the sale was not justified by circumstances of legal necessity and that D had been born after the sale had taken place:

Held, that the sale was not binding on the plaintiffs or any of them.

SECOND APPEAL against the decree of T. M. Horsfall, District Judge of Tanjore, in Appeal Suit No. 537 of 1894, confirming the decree of S. Dorasami Ayyar, District Munsif of Tanjore, in Original Suit No. 680 of 1892.

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

The plaintiffs preferred this second appeal.

* Second Appeal No. 287 of 1896.

This second appeal first came on for hearing before SUBRAMANIA AYYAR and BENSON, JJ., who made the following order of reference to the Full Bench:—

ORDER OF REFERENCE TO THE FULL BENCH.—A Hindu widow, having sold a portion of the property inherited by her from her husband, the plaintiffs, as reversioners, impeach the sale and sue to recover possession of the property. The finding of both the Courts is that the sale was not made for a necessity rendering it binding upon the reversioners as a sale. It is, however, contended before us that the consent of the then nearest reversioner, Kolandavelu Nadan, renders the sale binding upon the present plaintiffs, who were the reversioners entitled to the estate at the time the succession opened. The first and second plaintiffs but not the third plaintiff were, it is to be observed, in existence at the time of the sale.

The authorities bearing upon the question involved in the plaintiffs' (appellants') contention are not easily reconcilable, and the question itself is of considerable general importance.

We resolve, therefore, to refer for the decision of a Full Bench the following question, viz.:—

Whether the assent of the said Kolandavelu Nadan renders the sale binding upon all or any, and, if so, which of the plaintiffs?

[The matter came on for hearing before the Full Bench as constituted above.]

Sivasami Ayyar for appellants.

Pattabhirama Ayyar for respondents Nos. 1 and 2.

Sivasami Ayyar.—At the time of the sale there were alive besides the consenting reversioner, plaintiff No. 1, the father of the plaintiffs Nos. 2 and 3 and plaintiff No. 2: plaintiff No. 3 was born since. Under these circumstances the consenting reversioner could not by his consent render the sale valid against the plaintiffs. The authorities are summed up in Mayne's 'Hindu Law,' paragraph 592. It requires the consent of all those likely to be affected by the alienation to render it valid. *Rumphal Rai v. Tula Kuari*(1) followed in *Madan Mohan v. Puran Mal*(2). [SUBRAMANIA AYYAR, J.—The Allahabad Court holds that the widow cannot accelerate the succession but that it is not clear. SHEPHARD, J.—Does not the Privy Council in *Behari Lal v. Madho Lal Ahir Gayawal*(3) differ from the Allahabad view?] That case does not conclude

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(1) I.L.R., 6 All., 118. (2) I.L.R., 6 All., 288. (3) I.L.R., 19 Calc., 236.

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the present. The phrase "may be accepted" at page 241 means assuming that for the purpose of the present case. But taking it that the Privy Council holds that it is open to a widow to accelerate the succession she can surrender her estate to the next reversioner in its entirety: she cannot, however, reserve any part of it to herself either as to time or quantity. The matter is discussed by Garth, C.J., in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy*(1) where the distinction between a relinquishment whereby the next heir is let in and an alienation by the widow is explained. There can be no partial relinquishment if the transaction is to pass the estate like the widow's death (*Radha Shyam Sircar v. Joy Ram Senapati*(2)). [SHEPARD, J.—There the four reversioners were of the same grade which distinguishes that case from the present.] The case supports my proposition that the relinquishment to have the effect contended for must be complete. [SUBRAMANIA AYYAR, J.—There are Calcutta decisions upholding alienations of part of the estate.] Yes, for instance, *Hem Ohunder Sanyal v. Sarnamoyi Debi*(3). The judgment is summed up at page 361; the second proposition there stated, which the Judges say is in accord with the decided cases (they do not say in accord with Hindu Law), is I submit wrong: it goes beyond the ruling of the Privy Council in *Rani Anand Kunwar v. The Court of Wards*(4); see also *Kolandaya Sholagan v. Vedamuthu Sholagan*(5). The fact that, under certain circumstances, a reversioner not being the nearest reversioner can sue supports my argument if the widow could alienate validly with the consent of the nearest reversioner the remoter reversioners would in no case be permitted to intervene. The ruling in *Behari Lal v. Madho Lal Ahir Gayawal*(6) must be applied only subject to the reasons for the decision and not in aid of fraud and the fiction of acceleration of the succession as on the widow's death must not be extended to the case of partial alienation.

Pattabhirama Ayyar.—The principle laid down in *Collector of Masulipatam v. Cavalry Vencata Narrainapah*(7) governs the case; the consent not only raises the presumption of necessity and evidences it, but it does more, it gives validity to the alienation.

(1) I.L.R., 10 Cal., 1102, at p. 1108.

(2) I.L.R., 23 Cal., 354.

(3) I.L.R., 19 Mad., 337.

(7) 8 M.I.A., 529, at p. 550.

(2) I.L.R., 17 Cal., 896.

(4) I.L.R., 6 Cal., 704, at p. 772.

(6) I.L.R., 19 Cal., 236.

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See also *Raj Lukhee Dabea v. Gokool Ohunder Chowdhry*(1). The case of *Rani Anand Kunwar v. The Court of Wards*(2) is not inconsistent with this view, for there it was an adoption which was in question and the case is distinguishable on that ground (*Raj Lukhee Dabea v. Gokool Ohunder Chowdhry*(1)). As to the person interested there is none except the nearest reversioner. [SUBRAMANIA AYYAR, J.—Would the consent of the nearest reversioner bar all the others? Yes under the circumstances of the present case, but the consent of one reversioner would not bar others of the same grade. The circumstance that the alienation here did not comprise the whole of the property does not render it inoperative. The whole of the widow's interest in the property in question is dealt with and that suffices. See *Varadayya v. Venkatasubbayya*(3) and *Raghava Mudaliar v. Narayanasami Mudaliar*(4) as to the supposed doctrine that while an entire renunciation by a widow is valid and a partial renunciation is invalid, the case might be put of a transaction by which the parties thought they were dealing with all the properties and there ultimately proves to have been more, can it be that the whole transaction would fail? Again, how if she conveys the whole in several parts to several people? [SUBRAMANIA AYYAR, J.—The Court would consider whether there was in substance a complete renunciation.] See *Noferdoss Roy v. Modhu Soondari Burmonia*(5) and *Cossinaut Bysack v. Hurroosondry Dosnee*(6). He also cited *Collector of Madura v. Moottoo Ramalinga Sathupathy*(7), *Narasimha v. Venkatadri*(8), and *Varjican Rangji v. Ghelji Gokaldas*(9).

SHEPARD, J.—In considering the question referred by the Division Bench, I think we may safely start from the position assumed by the Judicial Committee in *Behari Lal v. Madho Lal Ahir Gayawal*(10), namely, "that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate." Whether the power thus conceded to the widow in Bengal should be allowed to her in this Presidency, where there is no such current of decisions as there

(1) 13 M.I.A., 209, at p. 228.

(3) Appeal No. 158 of 1890 (unreported).

(4) Second Appeal No. 1022 of 1892 (unreported).

(6) 2 Morley's Digest, 196, at p. 216.

(8) I.L.R., 8 Mad., 290.

(10) I.L.R., 19 Cal., 236, at p. 241.

(2) I.L.R., 6 Cal., 764, at p. 772.

(5) I.L.R., 5 Cal., 735.

(7) 12 M.I.A., 397, at p. 442.

(9) I.L.R., 5 Bom., 563.

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is in the other Presidency, is a matter which it is not necessary to consider. The observation of the Judicial Committee is a strong authority for the proposition that if the next reversioner's consent by itself is to validate the widow's conveyance, that conveyance, must be absolute having the effect of destroying the widow's estate altogether. In the case cited the grantee was at the date of the grant the apparent reversionary heir entitled to take on the death of the grantor, and the conveyance, though it seems to have comprised all the property, fell far short of amounting to an absolute surrender of her estate. It was argued that the case of alienations to strangers stood on a different footing and that the consent of the apparent reversionary heir could take the part of legal necessity for the alienation so as to make it binding on the eventual heirs. I do not think the dicta cited support this contention (*Collector of Masulipatam v. Cavalry Venkata Narainapur*(1), *Raj Lukhee Dabee v. Gokool Chunder Choudhry*(2). The consent of the reversionary heir may afford evidence of a legal necessity justifying the widow's alienation, but apart from that its efficacy is no other than that recognized in *Behari Lal v. Madho Lal Ahir Gayawal*(3). It was further contended that the rule laid down by the Judicial Committee would be satisfied, if the widow surrendered absolutely her entire interest in a particular part of the inheritance and that an alienation of that part might therefore be valid, notwithstanding that other property being part of the inheritance remained in her hands. The reasons for the rule show that this cannot have been the meaning of the Judicial Committee. The condition that the widow must surrender the whole inheritance, if she desires to make a valid conveyance, must infallibly operate as a check on the frequency of such conveyances, whereas it would practically be no check at all to require her to divest herself completely of her interest in some part only of the inheritance.

I think we may fairly assume that the Judicial Committee, when making the observation cited, had before them the judgment of the Full Bench in *Nobokishore Sarma Roy v. Hari Nath Sarma Roy*(4); and that, as I gather from the report, was a case in which the whole inheritance had been alienated by the widow (see particularly *per* Garth, C.J., page 1108 and *per* Mitter, J., page 1110).

(1) 8 M.I.A., 529, at p. 551.

(2) I.L.R., 19 Calo, 236, at p. 241.

(3) 13 M.I.A., 209.

(4) I.L.R., 10 Calo., 1102.

I am of opinion that the question referred to us should be answered in the appellants' favour.

SUBRAMANIA AYYAR, J.—I am of the same opinion. I think it unnecessary to go into the question, whether the Hindu Law according to the texts or the commentaries lends support to the doctrine that a female holding a qualified estate can validly surrender such an estate, so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which show that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the Courts. Since there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also. In such circumstances the rule, as stated by the Judicial Committee in *Behari Lal v. Madho Lal Ahir Gayawal*(1), should, I think, be taken to be a rule applicable to this Presidency too, subject no doubt to the restriction pointed out by their Lordships, viz., that the surrender should be absolute and complete and that the whole limited estate should be withdrawn—a restriction that would guard against the injurious results which would follow if the rule were not so qualified. As, however, in the present instance the alienation by the widow was of but a part of the estate, the case must be held not to fall within the rule stated above.

The answer to the question referred, in my opinion, therefore, is that the assent of Kolandavelu Nadan does not render the sale binding upon any of the plaintiffs.

DAVIES, J.—I concur in the judgment of Shephard, J.

BODDAM, J.—I agree.

[This second appeal came on for final hearing, and the Court delivered the following judgment:—

JUDGMENT.—In accordance with the judgment of the Full Bench we must hold that the alienation is not binding on the plaintiffs.

(1) I.L.R., 19 Calo., 236, at p. 241.

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In the result, we set aside the decrees of the Courts below and give judgment for plaintiffs for possession of the land sued for on their paying Rs. 230 within three months from this date, failing which the suit will stand dismissed with costs throughout. If the payment is duly made each party will bear their own costs throughout.]

APPELLATE CIVIL.

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

1897.
April 5, 6.

PICHUVAYYAN (PLAINTIFF), APPELLANT,

v.

VILAKKUDAYAN ASARI (DEFENDANT NO. 2), RESPONDENT.*

Regulation VI of 1831 (Madras), s. 3.—Village service inam—Village blacksmith—Limitation.

The mortgagee of maniam land attached to the hereditary office of village blacksmith sued in the Court of a District Munsif for possession, to which he claimed to be entitled under his mortgage; and there was evidence that he had been in possession for many years up to a date not long prior to the suit.

Held, that, as the plaintiff could have sued only under Regulation VI of 1831 in a Revenue Court, he could not, under Limitation Act, 1877, section 28, acquire a title by prescription to the land.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in Appeal Suit No. 178 of 1895, reversing the decree of S. Ramasami Ayyangar, District Munsif of Sivaganga, in Original Suit No. 481 of 1894.

The plaintiff, alleging that he was the possessory mortgagee, sued to eject the defendants from the land alleged to be comprised in his mortgage. He obtained a decree in the Court of first instance and the second defendant appealed to the District Court.

The District Judge said:—"The plaint land is admittedly maniam land attached to the hereditary office of village blacksmith and is in the possession of the second defendant who is the holder of the office. The District Munsif has held, *inter alia* that the mortgage is valid and that the second defendant is estopped from questioning its validity, but he has entirely over-

* Second Appeal No. 200 of 1896.

looked the provisions of Regulation VI of 1831. One of the objects of that Regulation, as stated in the preamble, was to declare that all emoluments attached to various hereditary village and other offices (other than the office of Kurnam established by Regulation XXIX of 1802) in the Revenue and Police departments, 'are inalienable by mortgage, sale, gifts or otherwise' and Civil Courts are precluded by section 3 from taking cognizance of any claims to the enjoyment of any of the emoluments annexed to such offices. In *Ravutha Koundan v. Muthu Koundan*(1), the question to be decided was whether a certain and alleged to be 'maniam' was or was not 'maniam' and this question was held to be within the jurisdiction of a civil tribunal, but in *Palamalai Padayachi v. Shanmuga Asari*(2) the Full Bench decided that a suit for the possession of the emoluments of an hereditary office is not maintainable in a Civil Court. No doubt in that case the plaintiff claimed also a right to the office, but, considering the terms of the preamble and of section 3, Regulation VI of 1831, the same rule is, in my opinion, applicable to this case also, where the plaintiff seeks to obtain possession of the maniam lands and to eject the office holder. Hence the decree of the Lower Court must be reversed and the plaintiff's suit dismissed with costs throughout."

The plaintiff preferred this second appeal.

Kuppusami Ayyar for appellant.

Desikachariar for respondent.

JUDGMENT.—Blacksmith and carpenter inams are within the purview of Regulation VI of 1831 (letter from the Sadr Adalat to Government, dated 30th June 1852, and *Palamalai Padayachi v. Shanmuga Asari*(2)). The plaintiff did not allege in his plaint a title by adverse possession for over twelve years, nor was there any issue on such plea. Moreover as the plaintiff could have sued only under Regulation VI of 1831 in a Revenue Court but not in a Civil Court for recovery of the inam land and as the Indian Limitation Act does not prescribe any period of limit for suits under the Regulation, the plaintiff could not under section 28 of the Act acquire a title by prescription.

The second appeal, therefore, fails and is dismissed with costs.

(1) I.L.R., 18 Mad., 41.

(2) I.L.R., 17 Mad., 302.

APPELLATE CIVIL.

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

FISCHER (DEFENDANT No. 2), APPELLANT,

v.

KAMAKSHI PILLAI (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, s. 11—Enhancement of rent—Custom.

The imposition by a zamindar of garden assessment on land brought under garden cultivation by a tenant who improved the land by sinking a well after 1865 is illegal, although there might be a custom in the zamindari of charging a varying assessment according to the kind of crop raised.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in Appeal Suit No. 257 of 1895, affirming the decree of K. Krishnama Chariar, District Munsif of Madura, in Original Suit No. 539 of 1894.

The plaintiff was a tenant in the Bodinaikanur zamindari; the first defendant was the zamindar, and the second defendant was the mortgagee in possession of the zamindari. The plaintiff sued to compel the defendants to grant him a proper patta.

The facts of the case were stated by the District Judge as follows:—

The plaintiff held lands classed as faisal punja in the zamindari. He cultivated them with punja crops and paid the faisal punja teervah on them until the end of fasli 1300. In fasli 1301, he made a well, at his own expense, and since then cultivated garden crops. Thereupon, the second defendant tendered him a patta for fasli 1302, charging a higher rate of rent in place of the faisal punja teervah rate. He refused to accept this patta and maintained that the defendants were not entitled to collect more than the faisal rate. The defendants on the other hand contended that according to a custom which prevailed in the zamindari even before the settlement, the tenants are bound to pay according to the "thavanai" of the crops, in other words, that the rent varies with the crop. They admitted that the land had become fit for garden cultivation only by reason of the improvements effected by the plaintiff. The District Munsif held that evidence of the

custom was inadmissible and that the defendants were not entitled to levy anything beyond the faisal rate, and accordingly passed a decree for the plaintiff. On appeal the District Judge found that the rate claimed for garden crops was a customary rate in the zamindari, but that the faisal accounts of the zamindari were not shown to recognize rates of rent varying with crop, and he dismissed the appeal.

Defendant No. 2 preferred this second appeal.

Tirumalasami Chetti for appellant.

Respondent was not represented.

JUDGMENT.—It is admitted that the garden crop in this case is the result of an improvement effected by the tenant in sinking a well. According to the law (section 11, Madras Act VIII of 1865) the landlord is precluded from enhancing the rent on account of improvements made by the tenant (per Muttusami Ayyar, J.—*Venkatagiri Raja v. Pitchana*(1)). The imposition of garden assessment is clearly an enhancement of the rent. It was, however, contended that the zamindar was, in accordance with the custom of the zamindari, entitled to the assessment claimed.

The custom relied upon appears to have been an alleged custom of charging a varying assessment according to the kind of crop raised; such a custom would, if established, be valid, but it could not derogate from the rights secured to tenants by section 11 of the Act of 1865. The custom could only be upheld in so far as it might not conflict with the Statute law. In other words, the landlord would be entitled to vary the rates according to the cultivation only in cases where the variation in the crop was not the result of improvements made by the tenant.

Our attention has been drawn to *Fischer v. Narayanan*(2). In that case, however, there is nothing to show that the well had been constructed after Act VIII of 1865 came into force. Prior to that Act zamindars sometimes collected an enhanced rent on garden crop raised with the aid of wells constructed by the tenants, and a usage under which a zamindar made such collection might not be unreasonable. But such a usage cannot affect the present case where the improvement was effected in 1891.

In this view the second appeal fails and is dismissed.

FISCHER
v.
KAMAKSHI
PILLAI.

1897.
August 2.

* Second Appeals Nos. 1026 to 1032 of 1896.

(1) I.L.R., 9 Mad., 27. (2) Civil Revision Petition No. 195 of 1895 (unreported).

APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.*1897.
August 19.

ERESSA MENON (DEFENDANT No. 12), APPELLANT,

v.

SHAMU PATER AND ANOTHER (PLAINTIFF AND DEFENDANT
No. 1), RESPONDENT.**Malabar tenants' right to compensation for improvements—Compensation for
improvements and arrears of rent set off.*

As regards the right to the value of improvements, there is no distinction between a tenant under a kanom and under a verumpattom.

The right of the landlord to set off against the value of the improvements any rent due to him must prevail against any alienation made by the tenant of his right to compensation.

SECOND APPEAL against the decree of A. Venkataramana Poi, Subordinate Judge of South Malabar, in Appeal Suit No. 325 of 1885, affirming the decree of P. Raman, Acting Additional District Munsif of Calicut, in Original Suit No. 645 of 1894.

The plaintiff sued to recover possession, together with arrears of rent, of certain land demised by him to defendant No. 1. The plaintiff admitted that certain improvements had been made by the defendant and offered to deduct their value from the arrears of rent. Defendants Nos. 2 to 9 were joined as being members of first defendant's tarwad. Defendants Nos. 12 and 14 were mortgagees from defendant No. 1, and they denied the plaintiff's right to credit the value of improvements against arrears of rent and claimed priority over the plaintiff's claim for rent. The District Munsif overruled the contentions of defendants Nos. 12 and 14 and, having assessed the value of improvements for which the plaintiff was charged for with compensation, passed a decree for surrender of the land. This decree was affirmed on appeal by the Subordinate Judge.

Defendant No. 12 preferred this second appeal.

Gorinda Menon for appellant.

Ryru Nambiar for respondent No. 1.

JUDGMENT.—So far as the right to the value of improvements goes, there is no distinction between a tenant under "kanom" and

* Second Appeal No. 1530 of 1896.

under "verumpattom." As pointed out in *Achuta v. Kali*(1), the right to receive such compensation becomes perfected only at the time of eviction, and subject to the customary incidents attending to the tenure. Consequently the right of the landlord to set off against the value of the improvements any rent due to him under the lease must prevail against any alienation made by the tenant of his right to compensation when it is in an inchoate state.

The second appeal therefore fails, and it is dismissed with costs.

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MENON
v.
SHAMU
PATER.

APPELLATE CIVIL.

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

PERIANNA GOUNDAN (PLAINTIFF), APPELLANT,

v.

MUTHUVIRA GOUNDAN AND ANOTHER (DEFENDANTS),
RESPONDENTS.**Limitation Act—Act XV of 1877, sched. II, art. 132—Suit on a hypothecation
bond, dated 1876, to secure money payable on demand.*

In a suit to recover principal and interest due on a hypothecation bond executed before the Transfer of Property Act was passed to secure a loan payable on demand, it appeared that the plaint was filed more than twelve years after the date of the document sued on:

Held, that the suit was governed by Limitation Act, schedule II, article 132, and that an actual demand was not necessary to establish a starting point for limitation and that the suit was barred by limitation.

SECOND APPEAL against the decree of D. Broadfoot, Acting District Judge of Trichinopoly, in Appeal Suit No. 4 of 1895, affirming the decree of G. Narasimhalu Naidu, District Munsif of Kulitalai, in Original Suit No. 613 of 1893.

Suit to recover principal and interest due on a hypothecation bond, dated 15th August 1876, and executed by defendant No. 1 in favour of the predecessor in title of the plaintiff to secure together with interest Rs. 80 payable on demand. The District Munsif held that the suit was barred by limitation and passed a decree for the defendants, which was affirmed on appeal by the District Judge.

(1) I.L.R., 7 Mad., 545.

* Second Appeal No. 1525 of 1896.

PERIANN
GOUNDAN
v.
MUTHUVIRA
GOUNDAN.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Krishnamachariar for respondent.

JUDGMENT.—There can be no doubt but that, under the general law, money lent, payable on demand, is due from the date of the loan; in other words, there is a cause of action on the date of the loan.

This being so, we must hold that, in a suit brought to enforce payment of money so lent, the money must be taken to have become due, within the meaning of the column 3 of article 132 of schedule II of the Limitation Act, on the date of the loan. To hold otherwise would lead to an anomaly for which there is no justification. If it was intended that money lent on the security of immovable property, though payable on demand, should not be subject to the general rule as to money lent and payable on demand (article 59), the language of the third column of article 132 would have been so framed as to make this clear.

We cannot therefore accept the appellant's contention that, in a case like the present, an actual demand is necessary in order to establish a starting point for limitation under article 132.

According to the decisions of this Court, article 132—not article 147—is applicable to the present case, the instrument being admittedly one executed prior to the Transfer of Property Act. Whether it might be different if the instrument had been executed after the Transfer of Property Act came into force, we need not now decide.

The appellant's suit was therefore barred and was rightly dismissed.

We dismiss this second appeal with costs.

APPELLATE CIVIL.

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

NATESAN CHETTI AND OTHERS (DEFENDANTS NOS. 2 TO 4),
APPELLANTS,

v.

SOUNDARARAJA AYYANGAR AND ANOTHER (PLAINTIFF
NO. 1 AND DEFENDANT NO. 1), RESPONDENTS.*

*Limitation Act—Act XV of 1877, sched. II, art. 111—Enforcement
of vendor's lien.*

In 1887 the plaintiff sold land to defendant No. 1 who in 1894, while part of the purchase money remained unpaid, sold it to the defendants Nos. 2 to 4, who had notice of this fact. The plaintiff now in 1895 sued to enforce his vendor's lien:

Held, that the suit was barred by Limitation Act, 1877, schedule II, article 111

SECOND APPEAL against the decree of T. M. Horsfall, District Judge of Tanjore, in Appeal Suit No. 499 of 1895, reversing the decree of N. Sambasiva Ayyar, District Munsif of Tiruvadi, in Original Suit No. 82 of 1895.

In 1887 the plaintiff sold certain land to defendant No. 1, it being agreed as part of the price that defendant No. 1 should pay a sum named to a creditor of his vendor. In 1894, defendants Nos. 2 to 4 who had notice of this arrangement and of the fact that defendant No. 1 had not carried it out, purchased the land from him. The plaintiff now sued in 1895 to recover the amount remaining unpaid asserting a lien on the land. The District Munsif passed a personal decree against defendant No. 1 only. On appeal the District Judge following *Virchand Lalchand v. Kumaji* (1) held that the plaintiff's lien for unpaid purchase money was still enforceable under the twelve years' rule in Limitation Act, 1877, schedule II, article 132, and accordingly modified the decree of the District Munsif and passed a decree as prayed.

Defendants Nos. 2 to 4 preferred this second appeal.

Pattabhirama Ayyar for appellants.

Krishnasami Ayyar for respondent No. 1.

JUDGMENT.—This is a suit to enforce the lien possessed by a vendor of immovable property in respect of unpaid purchase

1897.
August 24.
September 2

* Second Appeal No. 1333 of 1896.

(1) I.L.R., 18 Bom., 48,

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money. The Court of First Instance decided that the case fell within article 111 of the Limitation Act. But the Lower Appellate Court, following *Virehand Lalchand v. Kumaji* (1), held that article 132 applied.

Now article 111 refers solely and in unmistakable terms to suits such as the present, while article 132 deals with suits for money charged upon immovable property generally. In the case cited above no reasons were stated as to why the learned Judges arrived at the conclusion that article 111 was inapplicable to cases similar to this, and that conclusion is opposed to the well established canon of interpretation that, as a rule, general provisions do not derogate from special provisions, but that the latter do derogate from the former. *Generalia specialibus non-derogant, specialia derogant generalibus*. It is scarcely necessary to deserve that, if article 111 does not apply to such suits as the present, it is impossible to see to what suits it would apply. With all deference therefore to the very learned Judges who decided the case which the Lower Appellate Court followed, we must hold that the class of suits to which the present belongs, falls under the special provision, viz., article 111, and that class is excluded from the comparatively general article 132 applicable to cases of money charged on immovable property not specially provided for in the Act.

In this view, the suit, having been brought after the expiry of 3 years from the date mentioned in column 3 of article 111, was clearly barred. We therefore allow the appeal, reverse the decree of the Lower Appellate Court and restore that of the District Munsif. The respondents must pay the appellants' costs in this and in the Lower Appellate Court.

(1) I.L.R., 18 Bom., 48.

APPELLATE CIVIL.

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

SYAMALARAYUDU (PLAINTIFF), APPELLANT,

v.

SUBBARAYUDU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1897.
September 7.

Mortgage—Discharge of encumbrance by intending purchaser—'Bonâ fides.'

A having mortgaged land to B agreed to sell it to C and then to D, in whose favour he executed a conveyance bearing a date prior to the contract with C. C sued A and D to have the conveyance set aside and his contract specifically performed and a decree was passed in his favour. While the suit was pending, D paid off B and now sued A and C to recover the money paid by him:

Held, that the plaintiff occupied the position of the mortgagee whom he had paid off, and that the sum constituted a charge on the land.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Godavari, in Appeal Suit No. 41 of 1896, confirming the decree of E. Subbarayudu, District Munsif of Narsapur, in Original Suit No. 9 of 1895.

Defendant No. 1 was the owner of certain land which was mortgaged for 1,084 rupees. In 1890, he agreed to sell the land to defendant No. 2, but, instead of completing the contract, he conveyed the land to plaintiff antedating the conveyance so as to make it appear that the plaintiff's rights were prior to those of defendant No. 2. Defendant No. 2 then sued to obtain the cancellation of the plaintiff's conveyance and specific performance of his contract with defendant No. 1. After the summons had been served, the plaintiff paid off the mortgagees, and the suit brought by defendant No. 2 having terminated in a decree as prayed therein, he now sued to recover the money so paid by him. The District Munsif passed a decree for the sum in question against defendant No. 1, but held that the plaintiff had no charge on the land in the hands of defendant No. 2. This decree was affirmed on appeal by the District Judge.

The plaintiff preferred this second appeal.

Ramachundra Rau Sahib for appellant.

Pattabhirama Ayyar for respondent No. 2.

JUDGMENT.—There is no dispute that the plaintiff did pay off the mortgagees with a sum of Rs. 1,084. He would ordinarily be

* Second Appeal No. 1223 of 1896.

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v.
SUBBA-
RAYUDU.

entitled to step into their shoes and to claim payment of his mortgage money out of the property originally mortgaged now in the hands of the second defendant, whose liability to pay the mortgage amount was established in the very suit in which the sale to him was upheld. The ground given in the Courts below for refusing to allow plaintiff's payment to be a charge upon the property was that the payment was not *bona fide*, and that it was not *bona fide* because it was made during the pendency of the suit between plaintiff and second defendant about the sale. We fail to see in this circumstance anything to affect the validity of the payment which was no doubt made by the plaintiff for the purpose of strengthening his own claim. The plaintiff's illegal act in antedating his sale deed also for the purpose of supporting his title does not vitiate the payment subsequently made, and which in itself was legal. There was, therefore, no want of *bona fides*, and certainly no fraud. We must accordingly allow the second appeal and direct that a decree for sale of the property be drawn up in the ordinary form for the sum of Rs. 1,084 with interest thereon at the rate of 12 per cent. per annum on Rs. 660 from the 11th March 1891 and on Rs. 424 from the 3rd March 1891 up to the date of the plaint, with 6 per cent. per annum thereafter until date of realization. The date for payment is fixed for the 7th March 1898. The second defendant must pay the plaintiff's costs on the above amount throughout. In other respects the decree of the Munsif is confirmed.

APPELLATE CIVIL.

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

ITTIRARICHAN UNNI AND ANOTHER (DEFENDANTS Nos. 1
AND 2), APPELLANTS,

v.

KUNJUNNI (PLAINTIFF), RESPONDENTS.*

Malabar Law—Powers of stani—Lease by stani of forest land attached to the stanom.

A stani in Malabar is not a tenant for life impeachable for waste. He is a person who represents the estate for the time being, and it is open to him to

* Second Appeal No. 426 of 1897.

take a lease of forest land for a term of years, and the mere fact that the alienation is intended to hold good after his lifetime will not invalidate it.

ITTIRARI-
CHAN UNN
v.
KUNJUNNI

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of South Malabar, in Appeal Suit No. 621 of 1895, reversing the decree of P. P. Raman Menon, District Munsiff of Nedunganad, in Original Suit No. 287 of 1894.

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

"The plaintiff is the appellant. He sued for an injunction and damages in respect of a felling lease executed by the first defendant in favour of the second. In the suit, as framed in the lower Court, the plaintiff alleged that the first defendant was a stani; that he (plaintiff) was the next reversioner and that the acts complained of amounted to waste. The District Munsif held that plaintiff was merely an anandravan of an ordinary tarwad, and that if plaintiff were a reversioner of a stanom, the lease objected to was one within the ordinary powers of a stani to grant. There is no dispute that plaintiff has the right to sue either as reversioner to stani or as anandravan of a tarwad, and the question of his status is not, in my opinion, material. The sole question is whether the acts complained of amounted to waste? The lease in question grants to the second defendant the right to fell timber, except teak and blackwood and trees below 6 inches in girth, in a tract of forest 1½ miles by 1½ miles for a consideration of Rs. 100. On the face of it the lease is of a most improvident character and practically authorizes the entire destruction of the forest. A karnavan, by Malabar Law, cannot dispose of the corpus of the property by an absolute sale without the consent of the anandravans, and if the defendant be a stani, he has still less powers in this respect. He is not in the possession of a life-tenant and the powers of such have been well described by Sir G. Jessel M. R. in *Honywood v. Honynwood* (1) cited and followed in *Dashwood v. Magniac* (2)."

The District Judge recorded a finding that the damage done was not less than Rs. 400 and added, "the plaintiff, however, who is merely a reversioner and not entitled to present possession, cannot have a decree for that amount. There is no Indian precedent, but the form of the corresponding decree in England may be gathered

(1) L.R., 18 Eq., 306.

(2) [1891], 3 Ch., 306.

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from the concluding portion of the bill in *Hony v. Hony*(1)," and he passed a decree as follows:—"it is hereby ordered and decreed that defendants be and are restrained from cutting away timber from the plaint forest described in the schedule below, that defendants do pay into Court Rs. 400, the amount of damages and that Rs. 400 found due will be deposited in the name of the District Munsif of Nedunganad in trust in the suit in the Government Savings Bank and accumulated for the benefit of the person or persons who may be entitled thereto upon the death of defendant No. 1."

Defendants Nos. 1 and 2 preferred this second appeal.

Gorinda Menon for appellants.

Ryru Nambiar for respondent.

JUDGMENT.—This is an appeal by the stani and his lessee against a decree obtained by the plaintiff as successor to the stanom. The effect of the decree is to restrain both the defendants absolutely from cutting the timber in certain forests, and to make the defendants liable in damages to the extent of Rs. 400, a peculiar direction being made as to the manner in which the money shall be treated. In the District Munsif's Court the plaintiff's suit had been dismissed on the ground that the lease was one which the stani was competent to give. This decree is reversed by the District Judge and the decree as abovementioned is framed on the strength of certain English cases cited by the Judge, in which the position of a tenant for life impeachable for waste was in question. There is, as has often been observed, great danger in applying English decisions on the law of real property to cases which arise in this country. To make the decision cited applicable, it must be assumed that the English law of waste has been adopted by the Courts of British India, that the defendant stani was a tenant for life, and further that he was a tenant for life impeachable for waste. No one of these assumptions can safely be made.

The position and powers of a stani have been often discussed. He is not a mere tenant for life, and he is certainly not impeachable for waste in the sense in which that expression is used in the English books. If it were true that a stani was in that position it would follow that he could not even cut down trees which were fit to cut or in a state of decay, without accounting for the proceeds

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which would be treated as capital (see cases cited in notes to *Garth v. Cotton*(1)).

The decision of the Judge, founded as it is on considerations wholly foreign to the case, cannot be regarded as satisfactory. In any view the injunction in the terms in which it is granted could not be maintained, because it goes to the length of preventing the stani from making any use whatever of the timber. As, however, the stani has died it is necessary to pursue the question further except so far as it affects the other defendant. He is viewed by the District Judge as a simple wrong doer and, if it were true that the stani was a tenant for life impeachable for waste, this view might be correct. But the stani has, in truth, much larger powers than are attributed to him by the Judge. He is the person who represents the estate for the time being and enjoys much the same position as was assigned to the holder of an impartible zamindari before the current of decisions was turned in 1887 (see *Mana Vikraman v. Sundaran Pattar*(2)). It is certainly open to a stani to make a lease of forest land for a term of years and the mere fact that the alienation is intended to hold good after his life time will not invalidate it. Similarly it is competent to a stani to cut down forest trees for his own purposes, though by the manner and extent of his operations he may render himself liable to an action at the suit of the probable successor. It depends upon the circumstances of the case whether an alienation made by a stani or other conduct on his part in the management of his estate is of a character to render him liable to an action. In the present case, in order to make the lessee liable in damages, it would at least have to be proved that the acts done by him, would, if done by the stani immediately, have rendered him liable as for destruction of the inheritance. By the mere cutting of trees that being the ordinary and indeed the only way of enjoying the estate no injury is done of which, as between the stani and his successor, the latter has any right to complain. Considering that, as regards the lessee's liability, the finding of the Judge is vitiated by the erroneous point of view which he adopted and taking into account the extent of the forest and the comparatively small amount of timber cut, we hold that, on the facts stated, the decree for damages against him is not justified. As it stands, the decree relating to the damages is moreover

(1) 1 Sim & St., 568; s.c., 24 R.R., 236.

(1) 1 White & Tudor, 697.

(2) I.L.R., 4 Mad., 148.

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unworkable. The District Judge, in adopting it from the prayer of a bill, has failed to notice that in order to make the decree complete directions would be required as to the persons to whom the interest on the sum invested or the sum itself should ultimately be paid.

We must set aside the decree against the surviving defendant and restore as regards him the decree of the District Munsif. The respondent must pay the second defendant's costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

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

RAMASAMI MUDALIAR (DEFENDANT), APPELLANT,

v.

RATHNA MUDALIAR (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, s. 8—Suit to enforce tender of patta—Suit brought after expiration of fasli.

A tenant is not entitled to bring a suit under Rent Recovery Act, 1865, section 8, to enforce the tender of a patta by his landlord after the expiration of the fasli to which the patta relates.

SECOND APPEAL against the decree of S. Russell, District Judge of Chingleput, in Appeal Suit No. 241 of 1895, modifying the decision of M. Srinivasa Rau, Deputy Collector of Chingleput, in Summary Suit No. 5 of 1895.

The plaintiff was the tenant of the defendant, and he sued under Rent Recovery Act, 1865, section 8, to enforce the tender by the defendant of a patta for fasli 1303. The plaintiff demanded a patta after the expiration of the fasli, viz., in August 1894, and instituted this suit in December of the same year. The defendant had tendered to the plaintiff, on the 29th of June 1894, a patta which he refused to accept, alleging that it was not a proper patta which he was bound to accept. The Deputy Collector found that the patta tendered was a proper patta, and accordingly

* Second Appeal No. 1538 of 1896.

dismissed the suit. The District Judge was of opinion that the patta required a modification, and directed that a new patta be given modified accordingly.

The defendant preferred this second appeal.

Pattabhirama Ayyar for appellant.

Krishnasami Ayyangar for respondent.

JUDGMENT.—We do not think that exhibit III is evidence of an implied undertaking by the plaintiff that he accepted the rates and terms of the patta A.

But the second point urged that the suit was not brought within the fasli 1303 to which the patta relates is, we think, fatal to the suit. It has been held in *Venkatasami Naik v. Setupati Ambalam*(1) that a patta must be tendered by a landlord within the fasli for which rent is sought to be recovered, and we are of opinion that the same rule must apply to a tenant when he demands a patta from the landlord. This suit, being brought after the expiration of the fasli for which the patta was demanded, was therefore barred by time. On that ground only, we reverse the decree of the District Judge and restore that of the Deputy Collector. The plaintiff must pay the costs of the appellant in this and in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

VIRU MAMMAD (DEFENDANT NO. 17), APPELLANT,

v.

KRISHNAN AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 6,
7, 9, 11 AND REPRESENTATIVES OF DEFENDANT
No. 15), RESPONDENTS.*

Malabar Compensation for Tenants' Improvements Act (Madras)—Act I of 1887, ss. 4 and 7—Improvements made before and after 1st January 1886.

Malabar Compensation for Tenants' Improvements Act, 1887, section 7, cannot be construed retrospectively so as to invalidate agreements made with respect to improvements prior to the passing of the Act. In computing, therefore, the value of improvements made by a tenant in Malabar, who was let

(1) 7 M.H.C.R., 359.

* Second Appeal No. 1527 of 1895.

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into possession under an agreement before the passing of the Act, it is necessary to ascertain the value of improvements made by him before the 7th January 1887, calculated according to the scales specified in his contract, and also the value of improvements effected subsequently, calculated under the provisions of the Act.

SECOND APPEAL against the decree of the District Judge of South Malabar, in Appeal Suit No. 465 of 1893, modifying the decree of A. Venkataramana Poi, Subordinate Judge of South Malabar, in Original Suit No. 4 of 1892.

Suit to recover possession of land with arrears of rent. The plaintiff had demised the land in question to the predecessors in title of defendants Nos. 1 to 4 and 17 to 19. Defendants Nos. 5 to 15 were sub-kanomdars under them. The main question was as to the compensation for improvements to which the tenants were entitled. The Subordinate Judge passed a decree for the plaintiff, which was modified in appeal by the Subordinate Judge.

Defendant No. 17 preferred this second appeal.

Sundara Ayyar for appellant.

P. K. Subramania Ayyar for respondent No. 1.

Bhaskara Menon for respondents Nos. 2 and 4.

JUDGMENT.—With regard to the sixth defendant, the sub-kanom being prior to the 1st January 1886, the Act does not affect the validity of the contract thereby made. As between this defendant and the appellant the former can only be entitled to the compensation which the contract gives him.

As to the other defendants (now respondents) it is said that the bulk of the improvements must have been effected before the Act came into force, and that for the improvements effected before that date they are only entitled to be paid according to the rates stipulated in the sub-kanoms. It appears to us that section 7 of the Act cannot be construed retrospectively, so as to invalidate agreements made with respect to improvements prior to the passing of the Act. So far as the section relates to making improvements, it must refer to improvements to be made subsequently, and, this being so, it is difficult to construe the rest of the section as referring to improvements effected prior to the date of the Act. Section 4 does not refer to contracts.

It is necessary, therefore, to ascertain the value of the improvements made by each of the sub-demisees before the 7th January 1887, calculated according to the scales specified in the respective

contracts, and also the value of the improvements effected subsequently, calculated under the provisions of the Act.

We must direct the District Judge to return findings on these questions. Fresh evidence may be taken.

The findings should be submitted within one month 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.

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

REGO (PLAINTIFF), APPELLANT,

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ABBU BEARI (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 134—Sale by mortgagee as owner.

A mortgaged land to B and then sold it to C, and subsequently sold it to B ignoring the previous sale. C now brought a suit for redemption and B, who had been in possession for many years, pleaded limitation:

Held, that the suit was governed by Limitation Act, schedule II, article 134.

SECOND APPEAL against the decree of H. G. Josoph, District Judge of South Canara, in Appeal Suit No. 353 of 1895, affirming the decree of O. Chandu Menon, Subordinate Judge of South Canara, in Original Suit No. 24 of 1894.

Suit to redeem a mortgage, dated 12th June 1862. The plaintiff, on the 4th October 1864, purchased the property from the mortgagors, who, however, in 1868, executed a conveyance of the same property to the mortgagee, who was the predecessor in title of the defendant who now pleaded limitation. The Subordinate Judge dismissed the suit, and his decree was affirmed on appeal by the District Judge, who held that the suit was barred by limitation.

The plaintiff preferred this second appeal.

Sankaran Nayar and *Narayana Rau* for appellant.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) for respondent.

* Second Appeal No. 1224 of 1896.

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JUDGMENT.—Inasmuch as the plaint alleges that the original transaction was a mortgage and that was not denied by the defendant, we must treat it as such. It is contended that, as the mortgagee purported to transfer a title acquired since the mortgage and independently of it, the case is not governed by article 134 of the schedule to the Limitation Act. In effect the defendant's vendor purported to transfer the full ownership, when in point of law he had only a mortgage right to transfer. This is exactly the case for which the article is provided.

We must dismiss the appeal with costs.

APPELLATE CIVIL.

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

VENKATARAYADU AND OTHERS (PLAINTIFFS AND LEGAL REPRESENTATIVES OF PLAINTIFF NO. 2), APPELLANTS,

v.

RANGAYYA APPA RAU AND OTHERS (DEFENDANTS NOS. 1, 2 AND 4 TO 9 AND LEGAL REPRESENTATIVES OF DEFENDANT NO. 9),
RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 2—Appeal against order rejecting an insufficiently stamped appeal.

An appeal petition having been presented bearing an insufficient Court-fee stamp was returned to the appellant. After the period of limitation had expired, it was presented again bearing a sufficient stamp together with a petition that it be received. The Appellate Court made an order refusing to admit the appeal. Held, that no appeal lay to the High Court.

SECOND APPEAL against the decree of E. C. Rawson, Acting District Judge of Kistna, rejecting an appeal against the decree of N. Saminatha Ayyar, Subordinate Judge of Ellore, in Original Suit No. 12 of 1892.

The order appealed against was as follows:—

“The appeal cannot be admitted. Even on petitioner's own showing, a ten rupees stamp was required, only an eight anna stamp was affixed to the appeal, and it was accordingly returned.

* Second Appeal No. 13 of 1896.

“It is too late to rectify the stamp duty now. The petition must be dismissed.”

Plaintiffs preferred this second appeal.

R. Subramania Ayyar for appellants.

Ramasubba Ayyar and P. Subramania Ayyar for respondent No. 1.

Tiruvankatachariar for respondent No. 5.

Anandachariu for respondent No. 6.

JUDGMENT.—Objection is taken to the maintenance of this appeal as being made against an order in respect of which no appeal is allowed by the Code of Civil Procedure. The appeal could only be justified on the ground that the order of the District Judge amounted to a decree within the meaning of the code. But as the District Judge had no appeal before him, it is impossible to say that he passed a decree. It must be assumed, and indeed it is not disputed, that the Judge was right in determining the amount of the fee chargeable, and it follows that the memorandum of appeal not being properly stamped, was of no validity whatever (section 28, Court Fees Act). Consequently there having been no appeal and no appellate decree, there can be no second appeal.

The appeal is dismissed with costs.

APPELLATE CIVIL.

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

ITTAPPAN (DEFENDANT), APPELLANT,

v.

MANAVIKRAMA (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, arts. 142, 144—Suit for partition between co-owners—Possession of tenants—Adverse possession—Civil Procedure Code—Act XIV of 1882, s. 43—Cause of action.

The plaintiff was the Zamorin of Calicut, and he sued in 1887 for a moiety of certain property in Malabar alleged to belong in equal undivided shares to his stanom and that of the defendant and to be in the occupation of tenants. The cause of action was stated to have arisen in 1881 when partition was demanded by the Zamorin and refused by the defendant. In some instances the tenants in

* Appeals Nos. 133 and 129 to 132 of 1894.

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APPA RAU.

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November 8,
10 to 12, 15
to 19, 22, 23.
December 17.

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occupation represented the family, a member of which was at one time admitted by the Zamorin under a demise or kanom, and had attorned to the defendant; in other instances they were shown to have been admitted by the defendant on paying off the former tenant who had been admitted by the Zamorin. In all these instances the defendant intended the tenant who attorned to him to hold as his tenant to the exclusion of any claim by the Zamorin, but it was not shown that the Zamorin had any notice of such attempted usurpation on the part of the defendant. And on these facts the defence of limitation was raised on the ground that the land had been held for more than twelve years adversely to the Zamorin. It appeared further that the Zamorin had previously brought suits and obtained decrees for partition of certain parcels of land as belonging equally to the two stanoms, the defendant in each suit being the present defendant and the tenant in occupation of the land then in question. And on these facts a further defence was raised under Civil Procedure Code, section 43:

Held, (1) that Limitation Act, schedule II, article 144 and not article 143 was applicable to the suit, and that in the first class of cases referred to above, the tenancy under the Zamorin had not been determined, and that in the second class, there had been no ouster of the Zamorin, and that consequently the suit was not barred by limitation.

(2) that the suit was not barred by Civil Procedure Code, section 43, by reason of the previous suits.

APPEALS against the decree of V. P. DeRozario, Subordinate Judge of Palghat, in Original Suit No. 41 of 1887.

The plaintiff, the Zamorin of Calicut, sued for an allotment to him by partition of a moiety of the properties described in the schedule attached to the plaint, which were alleged to belong to his stanom and to the stanom of the defendant, the Kuthiravattath Nayar, in equal undivided shares, and to be in possession of tenants. The plaintiff stated that the cause of action arose in 1057 (1881-82) when his demand for partition was not complied with by the defendant. The defendant contended that the plaintiff's present suit was barred under Civil Procedure Code, section 43, as the claim in this suit was not included in former suits brought by the plaintiff and by his predecessor. One of these suits was Original Suit No. 360 of 1869, which was brought by the Zamorin in the Munsif's Court at Temelprom to recover with arrears of rent, a moiety of twelve items of land from a tenant, to whose deceased father the plaintiff's predecessor had let such moiety. In the plaint non-payment of rent by the tenant and non-acceptance of a renewal by him were alleged, and the plaintiff added that he was not willing to allow the lands to remain in the possession of the tenant. In that suit the present defendant was joined as defendant. The Munsif passed a decree for the payment of the arrears of rent, but disallowed the prayer for possession of

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a divided moiety. This latter prayer was allowed by the Civil Judge on appeal and his decision was confirmed by the High Court (exhibit D). It was contended that that suit was virtually a suit for partition of a portion of the property alleged to have been held by the plaintiff on the same right as the property in the present suit, that his cause of action in that suit and his cause of action in the present suit were the same, viz., his right to obtain partition. The other suits relied upon by defendant as constituting a bar under section 43 to the present suit were of the same description as Original Suit No. 360 of 1869. The tenants in occupation sided with the defendant having, for many years, recognised him as their landlord. Some of them represented persons let into possession as kanomdars by the Zamorin, and others had been let in by the defendant. It was contended that the suit was barred by limitation. The Subordinate Judge passed a decree for the plaintiff in respect of part of the property in question.

The defendant preferred this appeal.

Sundara Ayyar and *Subramania Sastri* for appellant.

The Acting Advocate-General (Hon. V. Bhaskyam Ayyangar), *Desikachariar* and *Govinda Menon* for respondent.

SHEPARD, J.—The first point taken in the argument of this appeal is that raised by the third issue. It appears from the evidence, and indeed is in a measure admitted in the plaint itself, that before this suit was launched several suits were brought by the plaintiff or his predecessor against the defendant or his predecessor, in some of which suits decrees were obtained by the Zamorin for the partition of the particular parcels comprised in such suits. In each of these suits the tenant, who, as the plaint states and is admitted, held half under the Zamorin and half under the Nair, was joined as a party. So far as regards the tenant, the plaint made such allegations and asked for such relief as would be made and asked for against any tenant holding under a *jenmi*, while as regards the Nair, the plaint asked for partition, so that in the result the tenant might be left in undisturbed possession of the moiety allotted to the Nair. Independently of these suits there was another suit brought against the Nair alone in which a division of the *devasvom* property was sought for. That suit was dismissed on the ground that such property was not partible.

In these circumstances we are asked to hold that section 43 of the Civil Procedure Code applies and that the plaintiff, having in

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his former suits omitted to sue in respect of the property now in question, is precluded from maintaining the present suit for partition of that property. Stated in the abstract, the question may be said to be whether one of two tenants in common, having sued for partition of part of the property so held by them, is at liberty to bring a separate suit for the remainder of the property. Now it is quite clear that, in applying section 43 of the Code, it has first to be seen whether the cause of action alleged in the plaint is identical with the cause of action alleged in the former suit (*Pittapur Raja v. Suriya Rau*(1), *Mussummat Chand Kour v. Partab Singh*(2), *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*(3)) and that by the term cause of action must be understood all the circumstances alleged by the plaintiff to exist which, if proved or admitted, will entitle him to the relief prayed for (*Mussummat Chand Kour v. Partab Singh*(2), *Head v. Brown*(4)). The class of cases to which section 43 is intended to apply is indicated by the illustration. Where there has been an infringement of one right and one cause of action has arisen the plaintiff must make his whole claim once for all in one suit. For instance, a plaintiff, who complains of wrongful detention or misappropriation of his securities, cannot, after recovering the securities or some of them in one action, afterwards sue to recover the remainder, or damages for the detention of them (*Moonshee Buzloor Ruheem v. Shumsoonissa Begum*(3), *Serrao v. Noel*(5)). There being one single cause of action and the plaintiff having had "an opportunity in the former suit of recovering what he seeks to recover in the second, the former recovery is a bar to the latter action." The rule of law embodied in section 43 operates not to give the defendant a ground of exception to the first suit, but, by prohibiting a second suit, indirectly to compel the plaintiff to include his whole demand in the first suit. There are, however, cases in which the nature of the right is such that independently of section 43, the plaintiff is prohibited from severing his claim. For example, a mortgagor cannot redeem part of the mortgaged property on payment of a proportionate part of the mortgage debt. It is the right of the mortgagee to retain the whole security for any part of the debt. If the mortgagor chose to relinquish a part

(1) I.L.R., 8 Mad., 520. (2) L.R., 15 I.A., 156. (3) 11 M.I.A., 551, at p. 605.
(4) L.R., 22 Q.B.D., 128. (5) L.R., 15 Q.B.D., 549.

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of the mortgaged property and sought to recover the remainder on payment of the whole debt, the mortgagee would have no reason to complain and he would, under section 43, have a complete answer to a second suit brought to recover the omitted part (see *Ukha v. Daga*(1)). But it is another question whether, when a prayer for partial redemption has been granted or refused, the mortgagor can institute another suit. If the prayer were refused, that is, if the mortgagee insisted on his right to have the whole mortgage redeemed once for all, I conceive that the dismissal of the first suit would clearly be no bar to the institution of a second and properly-framed suit. The case of *Kakaji Ranoji v. Bapuji Madharrav*(2) is an authority, if any is needed, on this point. Would it make any difference if the prayer for partial redemption were granted, with the result that the mortgagee was allowed to remain in possession of part of the property as security for the unpaid portion of the debt? The difference is one not recognized in section 43 and therefore if there is any distinction to be drawn the reason for it must be sought elsewhere. In the case above cited the plaintiff, a member of an undivided family, had first demanded a share of a particular portion of the family property. That suit had been dismissed on the ground that it was not properly framed. The plaintiff then sued to have the whole property brought together and divided. It was observed by Melvill, J., with reference to the argument that this suit was barred by section 7 of the Code of 1859, that "so far from these two being the same cause of action, they present all the difference which is expressed by saying that the one is a cause of action and the other is no cause of action." This observation, it appears to me, would have been none the less true if the first suit instead of being dismissed had been decreed in the plaintiff's favour. The cause of action as alleged in the plaint cannot be altered by the result of the suit. Nor can it possibly be held that a decree for partial redemption or partial partition estops the plaintiff from claiming redemption or partition of the rest of the property or from alleging that it is held by the defendant as mortgagee or tenant in common. If there is any estoppel in the matter, it is rather against the defendant than against the plaintiff. In the present case it appears to me that the right put forward in the former suits is

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

(2) 8 Bom. H.C.R. (App. C.J.), 205.

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different from that put forward in the present suit, and that therefore there is no identity of causes of action. The right on the part of a tenant in common to have each field separately divided between himself and his co-tenant is one thing: the right to claim a partition of all the fields held by them as tenants in common is another thing. There has no doubt been an adjudication as to certain parcels of land on the footing of an alleged right of the former sort. To hold that that circumstance prohibits a general suit for partition would lead to the remarkable conclusion that the tenancy in common in respect of the yet undivided lands must continue indissoluble except by consent of the parties or perhaps by suit instituted by the Nair. As far as the Zamorin is concerned, he must for ever be in the position of a tenant in common who has no right to partition. Similarly in the analogous case of mortgagor and mortgagee, the latter, it is supposed, may continue to hold part of the land under the mortgage, while the former is debarred from bringing any further action. In both cases the explanation is the same. It cannot be said that the causes of action are identical when the one plaintiff omits matters which the defendant is entitled to have included and the other is not open to that exception.

These reasons are sufficient, without any discussion of the circumstances of the different suits that have been brought by the Zamorin, for holding that the present suit is not barred by the provisions of section 43. I would only add that I do not think the cases relied on by the Advocate-General in which a member of an undivided family has been permitted to sue his co-parcener and a purchaser from the latter for partition of the property purchased, can be called in aid in the present case. In that class of cases it may be said that the plaintiff, adopting the alienation and seeking to have the purchaser's right defined, consents to a separation of the particular property from the rest of the family estate. The circumstances in the present case are entirely different.

The other point urged with regard to several of the parcels of land comprised in the suit was that of limitation. It was contended that, in the circumstances of this case, the suit fell within article 142 of the schedule to the Limitation Act, and that, therefore, the burden lay on the plaintiff of proving that possession remained with him till some time within twelve years of the institution of the suit. The answer to this, in my opinion, is that

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it must not be assumed that the plaintiff has been dispossessed so as to render article 142 applicable to his case. The defendant's possession must *prima facie* be referred to the title in virtue of which it may have been lawfully enjoyed. At the outset his possession was that of a tenant in common, not inconsistent with the title of the plaintiff, and therefore it lies upon him to show that his possession has assumed another character and has become inconsistent with the plaintiff's title. There being no article especially applicable to the case of tenants in common, article 144, which is appropriate to the case of a possession which was in the beginning lawful but has become adverse, must be applied. Now as between tenants in common mere non-participation of the profits by the one tenant and exclusive occupation by the other is not sufficient to entitle the former to a decree for joint possession or consequently to make a case of adverse possession (*Watson and Company v. Ramchund Dutt*(1)). The party claiming to hold adversely must at least go on to prove that it was in denial of the other's title that he excluded him from enjoyment of the property. According to the English cases there must be something amounting to ouster of the person against whom adverse possession is claimed (*Culley v. Doe d. Taylerson*(2)). An ouster can be presumed to have taken place only when non-participation of the profits has lasted for a considerable time and other circumstances concur. In the present case the actual enjoyment of all the holdings has been in the hands of tenants and not in those of the Nair, and in all the instances in which any question of limitation arises it has been proved that the Zamorin took part in admitting the original tenant. There are two classes of cases which need consideration. There are the cases in which it appears that the present tenant represents the family, a member of which at one time was admitted by the Zamorin and attorned to him. And there are the cases in which the present tenant is shown to have been admitted by the Nair on paying off the former tenant who has been admitted by the Zamorin. There is evidence in all these cases that the Nair intended the tenant who attorned to him to hold as his tenant to the exclusion of any claim by the Zamorin, but it is not shown that the Zamorin had any notice of this attempted usurpation on the part of the Nair. In the first class of cases where the present

(1) I.L.R., 18 Cal., 10.

(2) 11 A. & E., 1008.

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occupant of the land can be identified in point of law with the tenant who was at one time admitted by the Zamorin, it is clear that the Zamorin has not lost his right of action against him, unless it appears that the tenancy has been determined. If the tenant were sued and relied upon article 142 of the Limitation Act, it would lie upon him to prove that the tenancy had been determined more than twelve years before the date of the suit. This would be so even if the holding of the tenant had been reduced to that of a tenant by sufferance (*Adimulam v. Pir Razu-
than*(1)), and such a designation would certainly not be appropriate to tenants of the Zamorin who, whether or not there was a *kanom*, were at any rate entitled to compensation for improvements before they could be ejected. The only possible way in which it could be suggested that the tenancy had been determined, would be by forfeiture consequent on the tenant's implied denial of the landlord's right. But the landlord is not bound to insist on a forfeiture when the occasion arises, and unless he elects to do so, the tenancy remains unaffected. A disobedience by the tenant, known to the landlord and accompanied by payment of rent to a third party, does not, at any rate as long as the term of his tenancy lasts, make the tenant's possession adverse; though in the case of a tenancy at will such conduct might afford evidence of the determination of the tenancy. (See *Doe d. Graves v. Wells*(2), where it appears that the dicta of Lord Redesdale in *Hovenden v. Lord Amiesley*(3) were not adopted.) Here it is not even proved that the landlord was apprised of the tenant's conduct.

Holding with regard to the first class of cases that the tenancy is not proved to have been determined, I think it follows that the Nair's possession was not adverse, for it was only by ousting the tenant or putting an end to the tenancy that the Nair could acquire adverse possession. In the other class of cases there is the circumstance that the present tenant is one who has been admitted by the Nair alone in supersession of the tenant who had attorned to the Zamorin. In these cases the original tenancy was lawfully determined and the present tenant has never attorned to the Zamorin. Nevertheless, I think it is impossible to hold that the Zamorin has suffered anything in the nature of an ouster. If there had been no tenancy in common and the present tenant had simply taken

(1) 1 L.R., 8 Mad., 424.

(2) 10 A. & E., 427, at p. 434.

(3) 2 Sch. & Lef., 625.

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over possession from the original tenant, there could be no question of adverse possession. The fact that the Nair took part in the transaction and took an acknowledgment from the new tenant cannot by itself alter the nature of the Nair's possession. The admission by the Nair of a new tenant was not *per se* inconsistent with the rights of his tenant in common. It is not necessary to consider the question which would arise if knowledge of the action of the Nair in concert with the tenants had been brought home to the Zamorin. No circumstances have been proved from which such knowledge could be inferred.

For these reasons I think that the plea of limitation fails in both the abovementioned classes of cases.

SUBRAMANIA AYYAR, J.—Of the several suits referred to in support of the contention that the present claim is barred under section 43 of the Code of Civil Procedure, all, excepting the one which related to certain *devasom* lands, are more or less similar in their character and may be considered together. Those suits were based on demises of some parcels of land out of the whole property held by the plaintiff, the Zamorin, and the defendant, the Nayar, as co-owners. In them not only the tenants, who held under the demises and against whom part of the relief was claimed, were made defendants, but also the co-owner, and a division by metes and bounds of the parcels to which the demises related was sought. Though the frame of these suits is ambiguous, yet the suits, in so far as the co-owner was concerned, cannot but be treated as suits for partition of the parcels then in dispute. Now the question is whether the cause of action in any of those suits is identical with that in the present suit. It is impossible to doubt that the claim for partition in each of those suits was on the footing that the plaintiff was entitled to a partition confined to the particular parcels comprised in the demises to the tenants who were impleaded in each suit. This view of the Zamorin's right is of course wrong. But strangely enough, not only both the co-owners and their advisers but even the Courts, that had to deal with the suits, continued up to at least 1877 to act as if a claim for such partial partition was sustainable in law. Unquestionably the cause of action thus relied on in each of those suits is different from that in the present suit since the latter is based upon a right which, unlike that alleged in the previous suits, the Zamorin undoubtedly has, to a general and complete partition of the entire property held by him and the

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defendant. *Kakaji Ranoji v. Bapuji Madharrav*(1) is an authority in point, and *Ukha v. Daga*(2) is distinguishable on the ground that there the two suits were on the same right which the plaintiff alleged gave him a title to a share of what had been left undivided at a private partial partition.

Next as to the suit about the *devasvom* lands also the conclusion must be the same. In it the plaintiff sought as one of the two trustees of the *devasvom* a partition of the lands forming the endowments of the institution. That was the right alleged though in law he had no such right. How then can that claim bar a suit in respect of the absolutely different right on which the present claim rests and which undoubtedly the plaintiff has? Clearly therefore it must be held that none of the suits relied on bars the present claim under section 43.

As to the next point taken, viz., limitation, the article applicable is clearly not 142 as was contended for the defendant, but 144. And the question is whether the defendant has held adverse possession for the statutory period in all or any of the cases in which the plea was urged. The facts material so far as that question is concerned are these. The plaintiff and the defendant are co-owners standing in the relation of tenants in common. Some parcels of land have been held by tenants who originally came into possession under demises or *kanom* mortgages granted by the predecessors of the plaintiff in respect of their undivided share, or privies of those who so entered into possession or parties to whom the property was, at the instance of the defendant or his predecessors, subsequently handed over by the Zamorin's tenants. These persons attorned to the defendant's predecessors or the defendant himself and paid rent accordingly. From this the defendant contends that though he has not held direct and actual possession, yet the possession held through these tenants is sufficient to render the possession adverse as against the plaintiff. In dealing with a case such as this some of the special rules governing the matter of adverse possession with reference to persons standing in the relation of landlord and tenant, of mortgagor and mortgagee and of tenants in common, have to be borne in mind. And what are these rules?

First, as to landlord and tenant.—Now a tenant's possession, unlike that of a stranger, is, in its inception, in subserviency to and

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consistent with the landlord's title, and as, during the existence of the tenancy, the tenant is bound to protect the interest of the landlord, the latter has a right to act upon the supposition that his interest has not been betrayed and that no change in the character of the possession has taken place unless and until it is brought home to him that the contrary is the case. Therefore, though the law does not absolutely disable a tenant from disclaiming his landlord's title and claiming to hold in his own right, yet if he does so, "the statute does not begin to operate until the possession before consistent with the title of the real owner becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued and notorious so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the owner." (See *Zellar v. Eckhart*(1) cited in Angell on Limitation, sixth edition, page 458.) It should be added, however, that if the disavowal of the landlord's title and the assertion of the claim to hold on the tenant's own account take place during the currency of a definite term, then the tenant's possession does not necessarily become adverse immediately. For in such a case the term would become forfeited only if the landlord does some act showing his intention, on the ground of the denial of his title, to determine the tenancy. In the absence of such act, the term subsists and the possession is, in law, possession under the lease. But the moment the term comes to its natural termination by effluxion of time the disloyal tenant's possession becomes adverse. The Advocate-General in his argument went further. He contended that even after the expiry of the term the character of the possession remains unaltered so long as either the landlord or the tenant does not, by express notice to the other, put an end to the tenancy. Now, the expiry of the term by effluxion of time coupled with the continuing denial by the tenant that his holding was under the landlord's title, renders impossible the arising between the parties of even a tenancy by sufferance. What tenancy can there be then between the parties which requires to be put an end to by express notice? None. And it follows, as already stated, that the possession in such a case becomes on the expiry of the term *ipso facto* absolutely wrongful—wrongful with respect to both the parties concerned. For that would indeed be an anomalous possession which, as to the rights of

(1) 4 How. (U.S.), 289, at p. 296.

(1) 8 Bom. H.C.R. (App. C.J.), 205.

(2) I.L.R., 7 Bom., 182.

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one party, was adverse, and as to the other fiduciary; and if as a consequence of a disclaimer with the knowledge of the landlord and the setting up of a title in himself, the tenant forfeits his possession as tenant and the other benefits incident to the character of a tenant, he ought to be entitled to the advantage which would result from his known adverse possession (see *Willison v. Watkins*(1) cited in *Angell on Limitation*). And the same observations apply to the case of a tenant from year to year who denies his landlord's title. For such denial is in itself, as all the Judges pointed out in *Doe d. Graves v. Wells*(2) evidence of the cessation of the tenancy. And hence it is that in such a case the tenant is liable to be ejected without notice to quit. The contention of the Advocate-General is therefore opposed to principle and unsupported by authority. And the decisions in Indian cases on the point imply that the rule of law as to it is as stated above. If, instead of claiming title in himself, the tenant attorns and pays rent to or hands the property over to a third party who claims against the landlord, it follows, from what has been stated above, that the possession of the third party is adverse to the original owner provided the owner has knowledge of the facts; subject of course, if the tenancy be for a definite term, to the observations made above in dealing with the case of a tenant setting up title in himself.

Passing now to the case of mortgagor and mortgagee, mere denial by a mortgagee in possession or by the representative of the mortgagee in possession of the mortgagor's right to redeem is of itself not sufficient to convert such possession into adverse possession (*Mussad v. The Collector of Malabar*(3)). Now there can be no doubt that if the interest of the mortgagee alone is assailed by a third party, that of the mortgagor is not thereby affected. But where the mortgagor has made over possession of the mortgaged property to the mortgagee and while he is so out of actual possession, the former's interest is invaded, Turner, C.J., and Muttusami Ayyar, J., in *Ammu v. Ramakishna Sastri*(4) treat such invasion as an ouster. Iunes and Muttusami Ayyar, JJ., however, in *Chathu v. Aku*(5) speak of the right to redeem as a mere right of action; though there are observations in the course of the same judgment

(1) 8 Peters (U.S.), 51, at p. 53.

(3) I.L.R., 10 Mad., 189.

(5) I.L.R., 7 Mad., 26, at p. 28.

(2) 10 A. & E., 427 at p. 435.

(4) I.L.R., 2 Mad., 226, at p. 229.

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which show that if the party claiming in antagonism to the mortgagor had taken and held possession of the mortgaged property itself for twelve years, such possession would bar the mortgagor as was held in *Ammu v. Ramakishna Sastri*(1). Compare *Moidin v. Oothumanganni*(2). This last conclusion is in conflict with the opinion expressed by Telang, J., in *Ohinto v. Janki*(3). The reason for that opinion is stated by the learned Judge thus: "The mortgagor having once put the mortgagee in possession ordinarily has no right to the possession himself until the mortgage is paid off. The mere fact of the mortgagee's letting the property go out of his possession cannot give the mortgagor such a right before payment. And the party in possession, though he may be a trespasser, would ordinarily be able to defend an action of ejectment at the suit of the mortgagor by setting up *jus tertii*." And notwithstanding *Puttappa v. Timmaji*(4), it would be seen from the later case of *Vinayak Janardan v. Mainai*(5) that the above opinion of Telang, J., commended itself as sound to Sargent, C.J., and Candy, J. In this state of the authorities, if I may express my own inclination, I would with deference say that Justice Telang's view appears to be the better view. If, however, that adopted in *Ammu v. Ramakishna Sastri*(1) be the correct one, still the possession of the person taking it from the mortgagee would not be adverse unless and until the mortgagor has notice of it (*Mussad v. The Collector of Malabar*(6)).

Lastly as to the case of tenants in common, the special characteristic of their right is united possession. Each has a present right to enter upon the whole land and upon every part of it and to occupy and enjoy the whole. And if one tenant in common occupied and took the whole profits, the other has, apart from statute, no remedy against the former whilst the tenancy in common continues unless he was put out of possession when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety and the other accepted that appointment, when an action of account would lie as against a bailiff of the owner of the entirety of an estate (*Henderson v. Eason*(7)); see also *Watson and Company v. Ramchund Dutt*(8);

(1) I.L.R., 2 Mad., 226, at p. 229.

(3) I.L.R., 18 Bom., 51, at p. 58.

(5) I.L.R., 19 Bom., 138.

(7) 17 Q.B., 701, at p. 718.

(2) I.L.R., 11 Mad., 416.

(4) I.L.R., 14 Bom., 176.

(6) I.L.R., 10 Mad., 189.

(8) I.L.R., 18 Cal., 10.

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and *Lachmeswar Singh v. Manowar Hossein*(1). Consequently, sole occupation by one tenant in common is *prima facie* not inconsistent with the right of any other tenant in common. And in such cases there is no ouster or adverse possession until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner either direct or to be inferred from notorious acts and circumstances.

Such being the rules applicable to a case like the present, how does the matter stand upon the facts here? It may be shortly observed that the possession relied on by the defendant amounts at the highest to nothing more than sole occupation by one of two tenants in common. In none of the instances, in which limitation is pleaded, express disclaimer of the co-owner's right and notice thereof to him are either alleged or established and the facts relied on as proof of adverse possession seem only to show what has been termed "silent possession." And when regard is had to the position of the parties, to the fact that the parcels of land as to which adverse possession is set up are so few compared with the large number of isolated parcels admitted to have been held jointly and to the nature of the demises under which the disputed parcels were or are held by the actual occupants thereof, it is impossible to come to the conclusion that what are relied on as supporting the contention in question constitute such open and notorious acts of exclusive ownership as, in law, are necessary to warrant the inference that one tenant in common has been ousted by the other. The plea of limitation must therefore be held to fail in all the instances in which it was urged.

I concur in the conclusion arrived at by my learned colleague.

(1) I.L.R., 19 Cal., 253.

APPELLATE CIVIL.

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

RAMACHARI (DEFENDANT No. 1), APPELLANT,

v.

DURASAMI PILLAI (PLAINTIFF No. 1), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 443—Suit against a major defendant by guardian ad litem—Acquiescence.

1897.
September 2.
1898.
January 17.

The managing member of a Hindu family consisting of himself and two brothers, who were minors, mortgaged the ancestral property to secure a debt properly incurred by him in his capacity as manager. The mortgagee brought a suit upon the mortgage joining as defendants the three brothers; the two younger of whom were sued by the mortgagor as their guardian *ad litem*. A decree for the plaintiff having been passed, the lands were sold in execution. The two younger brothers, now sued to have the decree and the sale set aside as regards them, on the ground that they had both been of age at the date of the suit, and accordingly had been wrongly impleaded. It appeared that the elder plaintiff was in fact a major at the date of the previous suit, but he was aware, prior to the sale, of the suit and the execution proceedings, and still allowed his elder brother to conduct the defence and proceedings on his behalf:

Held, that both plaintiffs were bound by the decree in the former suit.

SECOND APPEAL against the decree of T. M. Horsfall, District Judge of Tanjore, in Appeal Suit No. 421 of 1895, modifying the decree of A. Ramaswami Sastrigal, District Munsif of Tiruvalur, in Original Suit No. 94 of 1894.

In 1887 one Saminada Pillai, an undivided brother of the present plaintiff, mortgaged certain lands to Sabapathi Pattan, who brought a suit in 1882 on the mortgage impleading as defendants the mortgagor and the present plaintiffs who were then minors. A decree was passed for the plaintiff and the mortgage property was sold in execution. The present plaintiffs now sued to have the decree set aside and the sale cancelled so far as their shares in the lands were concerned. They alleged that the decree had been obtained by fraud to which their brother was a party, and that they were, as a matter of fact, majors at the time of the suit. The defendants were the purchaser, the mortgagee, and the mortgagor. The mortgagor did not defend the suit; the

* Second Appeal No. 1209 of 1896.

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other defendants pleaded that the mortgage debt was binding on the family, and that the plaintiffs were in fact minors at the date of the suit.

The District Munsif held that the present plaintiff No. 1 was a major and had been wrongly impleaded as a minor in the previous suit, that plaintiff No. 2 was rightly impleaded as a minor, and that defendant No. 3 had incurred the mortgage debt as the manager of the family and had fraudulently instigated the present suit. On these findings he dismissed the suit holding that the decree was binding upon the plaintiffs' shares.

The District Judge on appeal referred to *Bhawani Prasad v. Kallu*(1), and framed a fresh issue as follows: "whether defendant No. 3 was manager at the time and executed the bond as manager."

The District Munsif tried that issue, and he found that the third defendant was the manager and executed the bond as such.

The District Judge finally passed a decree, by which the first plaintiff's share in the mortgage property was exonerated, and the decree of the former suit and the subsequent sale was set aside as regards his share.

Defendant No. 1 preferred the second appeal.

Pattabhirama Ayyar, for appellant.

Sankaran Nayar for respondent.

JUDGMENT.—This case is unlike the Allahabad case quoted by the Judge as his authority for exonerating the first plaintiff from the decree, inasmuch as the first plaintiff was, as a fact, made a party to the suit. Although it has now turned out that he was a major at the time of suit, whereas he was treated in the suit as a minor, he must be held to be bound by the decree if he was aware, prior to the sale, of the suit or the subsequent proceedings, and still allowed the manager of the family to conduct the defence and proceedings on his behalf which the manager in truth did. The plaintiff has not averred in his plaint or elsewhere that he was ignorant of the suit and proceedings, and there are circumstances indicating that he must have been aware of them, but as the point was not put distinctly in issue, the question has not been tried. We think it ought to be tried now, and we remit the following issue for trial :—

(1) I.L.R., 17 All., 537.

"Whether the first plaintiff was aware, prior to the date of the sale, of the Suit No. 340 of 1892, or of the execution proceedings therein."

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

"On the evidence of the defendants, first and second witnesses, I find that the first plaintiff was aware of the Suit No. 340 of 1892 from the date when the third defendant was first served with notice of the suit."]

JUDGMENT.—The evidence relied on by the Judge, together with the probabilities of the case, coupled with the circumstance that the first plaintiff never denied that he was aware of the suit and subsequent proceedings, are sufficient to support the finding. The sale is therefore binding on the first plaintiff also. The result is that the decree of the Lower Appellate Court is reversed with costs in this and in that Court, and the decree of the Munsif dismissing the suit with costs is restored.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

MUNIAPPAN CHETTI AND OTHERS (DEFENDANTS Nos. 5 to 8),
APPELLANTS,

v.

MUPPIL NAYAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Limitation—Adverse possession—Suit for ejectment by a jenmi—Defendant in possession under Government cowle.

The plaintiffs sued for possession of land which was found to be their jenm. It appeared that the defendant had been in possession for more than twelve years under a cowle from Government, which provided that the grant of the cowle should not affect the jenmi's right, but that the defendant had never recognized the plaintiffs' title:

Held, that the suit was barred by limitation.

SECOND APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in Appeal Suit No. 189 of 1895, confirming the decree of P. P. Raman Menon, District Munsif of Nedunganad, in Original Suit No. 366 of 1892.

* Second Appeal No. 1203 of 1896.

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PILLAI.

1898.
January
13, 19.

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The plaintiffs sued to recover [possession of certain land which was found to be their jenm property. It was alleged that the plaintiffs' predecessor in title had demised the land in 1862 to one Koru, the predecessor in title of defendants Nos. 1 to 3. It appeared that in the following year Koru obtained from Government a cowle and that he and the defendants who were his assignees had been in possession ever since. The District Munsif passed a decree for the plaintiff which was affirmed on appeal by the Subordinate Judge, who held that, whether or not the land had been demised to Koru in 1862 as alleged, there had been no possession adverse to the plaintiffs.

Defendants Nos. 5 to 8 preferred this second appeal.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar), Pattabhirama Ayyar, and Subramania Sastri for appellants.

Sankaran Nayar for respondent No. 1.

Ryru Nambiar for respondent No. 2.

JUDGMENT.—In this case it has been found that the jenm title to the plaint land was in the plaintiffs, and that in 1863 one Koru obtained from Government a cowle to cultivate the land, and that he and his assignees (defendants Nos. 5 to 8), have been in possession ever since. It was alleged that Koru originally got possession of the land under an oral lease from the first plaintiff in 1861–62, but the Subordinate Judge did not decide that question, holding that even if Koru took possession of the land on the strength of the Government cowle and without reference to the jenmi, such possession must be regarded as not hostile to the jenmi, who was, therefore, entitled to recover at any time on the strength of his title. The Subordinate Judge therefore decreed that plaintiffs should recover possession on payment of compensation for improvements.

Against this decree the defendants Nos. 5 to 8 appealed on the ground that the plaintiffs' suit is barred by limitation. We have no doubt but that this is so, unless the letting to Koru in 1861–62 alleged by the plaintiffs is proved. The effect of the grant of a cowle *quoad* the jenmi has often formed the subject of judicial decision (Wigram's 'Malabar Law and Custom', 137) and is well laid down in the case of the *Secretary of State v. Ashtanurthi*(1). It is expressly provided in the cowle that the jenmi's rights are

(1) I.L.R., 13 Mad., 118.

not affected by the grant of the cowle, and it is usual for the holder of the cowle to settle with the jenmi at the same time when he receives the cowle from Government. The cowle merely insures a favourable assessment of the Government dues on cultivation. Should the holder of the cowle fail to settle with the jenmi he may be evicted. Should he, however, be left in possession for more than twelve years without any recognition of the jenmi's right, he would like any other trespasser acquire a valid title by prescription. In the present case there was no recognition of the first plaintiff's right as jenmi. The learned pleader for the respondents contends that exhibits 18 and 19 only convey Koru's right to improvements, and that this fact, together with the attornment by Koru to the twelfth defendant as jenmi in 1880, indicate that Koru did not claim the land as owner, and argues that unless he claimed to hold the land as owner the plaintiff's right could not become barred. He relies on a passage in *Sivasubramanya v. Secretary of State for India*(1) to the effect that possession will not generate a prescriptive right unless it is a possession with the intention to hold exclusively and as owner. This argument is untenable. The language must be understood in the light of the facts and arguments in that case, and when so understood, it has no reference to the present case. There the question was whether certain acts were evidence of ownership or merely of an easement. In the present case there is no question of easement at all. Moreover, there is nothing in exhibits 18 or 19 or 1 to indicate that Koru at any time recognized the first plaintiff as jenmi. Exhibits 18 and 19 are as consistent with Koru's recognition of the rival jenmi (the twelfth defendant) as with his recognition of the plaintiff, and exhibit I, by recognizing the latter, affords ground for supposing that Koru, if he meant to recognize any jenmi, meant to recognize the twelfth defendant rather than the first plaintiff. The first plaintiff then was out of possession and Koru was in possession for more than twelve years without any recognition of first plaintiff's right, and the plaintiff's right is therefore barred under articles 142 of schedule II of the Limitation Act (*Kunchu Achen v. Sundaram Patter*(2)), unless as already stated, Koru's possession was that of a tenant under the oral letting alleged by the plaintiff.

We must therefore ask the Subordinate Judge to return a finding on this issue on the evidence on record within six weeks

(1) I.L.R., 9 Mad., 302.

(2) Second Appeal No. 785 of 1894 (unreported).

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Western Railway Co. v. Redmayne(1); *Woodger v. Great Western Railway Company*(2); *Simpson v. London and North Western Railway Co.*(3); Mayne on damages, page 300.

SUBRAMANIA AYYAR, J.—The plaintiff, a tailor, with a view to make special profits during the car festival at a place called Karamadai in the Coimbatore District entrusted to the defendants, the Madras Railway Company, on the 29th February 1896, his sewing machine and a cloth bundle to be carried from Erode and to be delivered to him at Karamadai. The defendants were, however, not told why the articles were sent. Through the fault of the defendants' servants the articles were not carried to Karamadai until long after the date by which they should, in the usual course, have arrived at that station. Before they reached the place the festival had come to an end. The plaintiff, who had waited at Karamadai for a number of days expecting the arrival of the articles, having returned to Erode, the articles were transmitted back and were delivered to him there on the 26th March 1896.

The plaintiff sued for damages said to have been sustained by him in consequence of the delay in the delivery of the articles. The District Munsif gave him a decree for Rs. 16-4-0, being the railway fare of the plaintiff and his assistant from Erode to Karamadai and back and their expenses for food and lodging while at Karamadai.

The first question that arises is whether the plaintiff is precluded from maintaining this suit by one of the conditions printed on the back of the forwarding note, exhibit I. That condition is to the effect that the defendants are not responsible for any loss of, or damage to, the goods by reason of accidental or unavoidable delay in transit or otherwise. It no doubt appears that exhibit I was neither read nor explained to the plaintiff. But, assuming that he was in fact ignorant of the condition in question, that does not affect the binding character of the contract evidenced by exhibit I, inasmuch as in the portion thereof which bears his mark it is expressly stated that he was aware of the conditions on the back and that he agreed to the articles being carried subject to such conditions. (Per Mellish, L. J., in *Parker v. South-Eastern Railway Co.*(4).) He is therefore precluded from

(1) L.R., 1 C.P., 829.
(3) L.R., 1 Q.B.D., 274.

(2) L.R., 2 C.P., 318.
(4) L.R., 2 C.P.D., 416 at p. 421.

maintaining this suit, unless such a condition is void under section 72 of the Indian Railways Act. The question then is whether the contract between the plaintiff and the defendants in so far as it purports to exonerate the latter from responsibility for delay is, as held by the District Munsif, void under section 72 of the Railways Act IX of 1890. In discussing this point I shall proceed on the supposition that the condition covers a delay which, as found here, was neither accidental nor unavoidable. The section referred to in so far as it is material for our present purpose runs thus :

"72 (1) The responsibility of a railway administration for the loss, destruction or deterioration of . . . goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

"(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void unless it—

"(b) is otherwise in a form approved by the Governor-General in Council.

Now, in the present case, there was no loss or destruction of the articles consigned and the applicability of the section to the case depends upon the question whether there was, within the meaning of the enactment, a "deterioration," for which the contract purports to render the defendants not responsible, since the words "damage to the goods" in the contract may be taken to comprehend deterioration. The word deterioration imports the becoming reduced either in quality or in value (see the Standard Dictionary). Having regard to the nature of the articles and to the very limited delay, it is not possible to suggest that any deterioration in quality could have taken place. As regards the value of the cloth, however, it might well have been shown to have been otherwise with reference to what was laid down in *Wilson v. Lancashire and Yorkshire Railway Co.*(1). There the plaintiff, a cap manufacturer, sued the defendants for damages caused by the improper delay in delivering some cloth. The plaintiff had bought the article with a view to make it into caps for sale during the spring season of the year, but owing to the delay in transit the plaintiff was unable to sell or use any part of it or to manufacture

(1) 30 L.J., C.P., 232.

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Western Railway Co. v. Redmayne(1); *Woodger v. Great Western Railway Company*(2); *Simpson v. London and North Western Railway Co.*(3); Mayne on damages, page 300.

SUBRAMANIA AYYAR, J.—The plaintiff, a tailor, with a view to make special profits during the car festival at a place called Karamadai in the Coimbatore District entrusted to the defendants, the Madras Railway Company, on the 29th February 1896, his sewing machine and a cloth bundle to be carried from Erode and to be delivered to him at Karamadai. The defendants were, however, not told why the articles were sent. Through the fault of the defendants' servants the articles were not carried to Karamadai until long after the date by which they should, in the usual course, have arrived at that station. Before they reached the place the festival had come to an end. The plaintiff, who had waited at Karamadai for a number of days expecting the arrival of the articles, having returned to Erode, the articles were transmitted back and were delivered to him there on the 26th March 1896.

The plaintiff sued for damages said to have been sustained by him in consequence of the delay in the delivery of the articles. The District Munsif gave him a decree for Rs. 16-4-0, being the railway fare of the plaintiff and his assistant from Erode to Karamadai and back and their expenses for food and lodging while at Karamadai.

The first question that arises is whether the plaintiff is precluded from maintaining this suit by one of the conditions printed on the back of the forwarding note, exhibit I. That condition is to the effect that the defendants are not responsible for any loss of, or damage to, the goods by reason of accidental or unavoidable delay in transit or otherwise. It no doubt appears that exhibit I was neither read nor explained to the plaintiff. But, assuming that he was in fact ignorant of the condition in question, that does not affect the binding character of the contract evidenced by exhibit I, inasmuch as in the portion thereof which bears his mark it is expressly stated that he was aware of the conditions on the back and that he agreed to the articles being carried subject to such conditions. (Per Mellish, L. J., in *Parker v. South-Eastern Railway Co.*(4).) He is therefore precluded from

(1) L.R., 1 C.P., 329.
(3) L.R., 1 Q.B.D., 274.

(2) L.R., 2 C.P., 318.
(4) L.R., 2 C.P.D., 416 at p. 421.

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maintaining this suit, unless such a condition is void under section 72 of the Indian Railways Act. The question then is whether the contract between the plaintiff and the defendants in so far as it purports to exonerate the latter from responsibility for delay is, as held by the District Munsif, void under section 72 of the Railways Act IX of 1890. In discussing this point I shall proceed on the supposition that the condition covers a delay which, as found here, was neither accidental nor unavoidable. The section referred to in so far as it is material for our present purpose runs thus:

"72 (1) The responsibility of a railway administration for the loss, destruction or deterioration of . . . goods delivered to the administration to be carried by railway shall, subject to the other provisions of this Act, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872.

"(2) An agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void unless it—

"(b) is otherwise in a form approved by the Governor-General in Council.

Now, in the present case, there was no loss or destruction of the articles consigned and the applicability of the section to the case depends upon the question whether there was, within the meaning of the enactment, a "deterioration," for which the contract purports to render the defendants not responsible, since the words "damage to the goods" in the contract may be taken to comprehend deterioration. The word deterioration imports the becoming reduced either in quality or in value (see the Standard Dictionary). Having regard to the nature of the articles and to the very limited delay, it is not possible to suggest that any deterioration in quality could have taken place. As regards the value of the cloth, however, it might well have been shown to have been otherwise with reference to what was laid down in *Wilson v. Lancashire and Yorkshire Railway Co.*(1). There the plaintiff, a cap manufacturer, sued the defendants for damages caused by the improper delay in delivering some cloth. The plaintiff had bought the article with a view to make it into caps for sale during the spring season of the year, but owing to the delay in transit the plaintiff was unable to sell or use any part of it or to manufacture

(1) 30 L.J., C.P., 232.

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any part of it into caps for sale in that season. Referring to the fall in the value of the cloth that could be shown to have taken place in consequence of the same arriving at a time when it was less in demand and less capable of being applied to an immediate use, Williams, Willes and Keating, JJ., spoke of it as "deterioration," and those learned Judges as well as Byles, J., held that in respect of such fall, the same being the direct and natural result of the delay, the carrier was liable even in the absence of notice of the purpose for which the article was sent. Clearly, therefore, in the case before us if the plaintiff had alleged and proved that, owing to the loss of the special opportunity for sale of which he wished to take advantage, the cloth had fallen in value compared to what he could have got for it had he been able to dispose of it at Karamadai as he intended, the plaintiff would have been entitled to a finding that there was a "deterioration" within the meaning of section 72, and that the condition relied on as operating to limit the responsibility of the defendants in respect of such deterioration is void, inasmuch as the contract is not shown to have complied with the provision contained in clause (b) of the section. But the plaintiff did not allege and prove that there was any deterioration as just explained. Section 72 does not, therefore, apply to the case, and it follows that the condition in question precludes the plaintiff from claiming the damages awarded to him by the District Munsif, since they are not due to any deterioration of the articles consigned. I should add that there was another objection, which the District Munsif overlooked, to those damages being allowed. They consist, as will be seen from what has already been stated, of the trainage for the plaintiff and his assistant from Erode to Karamadai and back, rent paid at Karamadai for the shop engaged by the plaintiff for doing his work as a tailor and food expenses for the plaintiff and his assistant during the time they were waiting at Karamadai for the arrival of the articles. It is scarcely necessary to point out that none of these expenses was the proximate and direct consequence of the delay in the delivery of the articles and were therefore not awardable as natural damages (see *Woodger v. Great Western Railway Company*, (1) and *Gee v. Lancashire and Yorkshire Rail. Co.* (2)) as the difference between the price which could have been obtained at the festival and that on the date when the cloth was returned to the plaintiff

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would have been (*Wilson v. Lancashire and Yorkshire Rail. Co.* (1)) already cited. No doubt had the plaintiff caused intimation to be given to the defendants when the articles were entrusted to them that he wanted them for sale or use at the festival, it may be that the items allowed by the District Munsif would be awardable as damages within the contemplation of the parties. But, as already stated, the defendants were not informed, when they undertook to carry the goods, that these were required by the plaintiff at the specific time at which and for the specific purpose for which he wanted them at Karamadai. The items allowed by the District Munsif were therefore too remote and ought not to have been decreed.

For all the reasons stated above I would set aside the decree of the District Munsif and dismiss the suit, but in the circumstances without costs.

BENSON, J.—The question for our decision is how far the Railway Company is liable for damages said to have been caused to the plaintiff by the Company's failure to deliver certain goods to the plaintiff within a reasonable time after they were entrusted to the Company to be carried from Erode to Karamadai. It is admitted that the Railway Company had no notice that the goods were required to be delivered within a fixed time for any special reason. Apart from any special contract, the responsibility of a Railway Company for the loss, destruction or deterioration of goods is declared by section 72 of the Railways Act (IX of 1890) to be that of a bailee as defined in sections 151, 152 and 161 of the Indian Contract Act, and the last section enacts that "if, by the fault of the bailee, the goods are not returned, delivered, or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time." In the present case there was no loss or destruction of the goods—nor was there any change in the absolute condition of the goods, but the word "deterioration" is wide enough to cover a falling off in the value of the goods due to their not having been delivered in time to enable the plaintiff to take advantage of the special market which would have been available during the festival at Karamadai if they had been delivered in due time. In other words, the plaintiff might have claimed as damages the difference between the ordinary value of the goods at Karamadai and the special value which they would have had, if they had been delivered to

(1) I.L.B., 2 C.P., 318.

(2) 30 L.J., Exch., 11.

(1) 30 L.J., C.P., 232.

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him at the time contemplated so as to be available for the special market then existing at Karamadai (*Wilson v. Lancashire and Yorkshire Rail. Co.*(1) and illustration (q) to section 78 of the Indian Contract Act, which illustration appears to be based on the English case). The plaintiff, however, did not allege or prove any such "deterioration," though there was a vague claim and vague evidence as to "loss of profit" owing to delay in delivery. It was, however, distinctly held in the above case, and illustration (q) to section 73 of the Contract Act distinctly shows that the plaintiff could not in such a case recover any damages for loss of profit. If "deterioration" in the sense above stated had been proved, the Railway Company would not have been protected by the special contract on the back of the forwarding note to the effect that the Company is not liable "for any loss of, or damage to, any goods "whatever by reason of accidental or unavoidable delays in transit "or otherwise," since the contract does not exclude "deterioration" in the above sense, but only loss of, or damage to, the goods unless indeed the words "damage to the goods" can be held to include "deterioration" due to extrinsic causes. Even if they could be so held (and I think it would be a strain on the language to do so), there is still the objection that it is not shown that the contract was in a form approved by the Governor-General in Council and required by section 72 of the Railways Act, and it may well be doubted whether sanction would have been given for so unreasonable a contract. For all these reasons the District Munsif was, I think right in disallowing the plaintiff's claim for loss of profits, but I think he was wrong in allowing the plaintiff the rail fare of himself and his assistant from Erode to Karamadai and back, and the cost of their food and lodging at Karamadai. Such damages could not have been in the contemplation of the parties when they made the contract, nor can they be said to have naturally arisen in the usual course of things from the breach, since the Railway Company had no notice of the reason why the things were being sent to Karamadai, or of the arrangements which the plaintiff was making to utilise them there. In other words, the damages are too remote and do not fall within the purview of section 73 of the Contract Act. I agree, therefore, in holding that the decree must be set aside and the suit dismissed, but in all the circumstances without costs.

(1) 30 L.J., O.P., 222.

APPELLATE CIVIL.

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

SESHADRI AYYANGAR (PLAINTIFF), APPELLANT,

v.

NATARAJA AYYAR AND OTHERS (DEFENDANTS AND SUPPLEMENTAL DEFENDANTS), RESPONDENTS.*

Religious Endowments Act—Act XX of 1863, ss. 3, 4, 7, 11, 14 — Suspension and dismissal of trustee of a temple—Powers of temple committee—Civil Procedure Code—Act XIV of 1882, s. 575—Appeal referred owing to a difference of opinion on a point of law.

The plaintiff was appointed to the office of trustee of a Hindu temple under Religious Endowments Act, 1863, section 3, by the temple committee constituted under that Act. Subsequently the committee, having received certain complaints against him, suspended him from office pending enquiry without calling on him for an explanation. They alleged as the grounds of his suspension that he had caused loss of property and money to the temple and that he had conducted things in the temple contrary to custom so as to cause a disturbance of the peace. The trustee refused to acquiesce in the order of suspension and to give up certain records, &c., which he was by that order required to deliver and denied the authority of the committee as asserted by them. Shortly afterwards the committee dismissed him. The plaintiff denying that his suspension and dismissal were legal, brought two suits against the members of the committee, the first for damages for the suspension, and the second for an injunction to restrain the defendants from interfering with his discharge of his duties as trustee. Both of these suits were dismissed and the plaintiff preferred appeals to the High Court.

In the appeal relating to the claim for an injunction it was found that no misconduct had been proved against the plaintiff previous to the order of suspension:

Held, by SHEPARD and DAVIES, JJ., that a trustee in the position of the plaintiff cannot be dismissed from office except for good cause shown, and that his conduct subsequent to the order of suspension did not amount to such good cause.

In the appeal relating to damages:

Held, by SHEPARD, J., that the order of suspension was illegal and that under the circumstances the plaintiff was entitled to substantial damages.

Held, by DAVIES, J. (finding that the committee had proceeded in the *bona fide* belief that they were acting for the good of the temple in suspending the plaintiff pending inquiry), that the order of suspension was not illegal and that the suit was rightly dismissed.

* Appeals Nos. 22 and 23 of 1896.

1897.
August 25,
26, 27.
September
8, 9.
October 8.
1898.
January 31.
February 1,
2, 24.

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Owing to the difference of opinion between the two Judges the last mentioned appeal was referred to the Chief Justice under Civil Procedure Code, section 575, and was heard by him sitting with the two other Judges :

Held, that the whole appeal was open for argument and not only the point of law on which the Judges had differed in opinion.

Held, by COLLINS, C.J., and SHEPHARD, J. (DAVIES, J., *diss.*), that the order of suspension was illegal and the plaintiff was entitled to substantial damages.

Per COLLINS, C.J.—The power of suspension by the committee is, in my judgment, the same as the power of dismissal. The committee, having made due inquiry and having called on the trustee for an explanation, may suspend for good and sufficient cause, but not otherwise.

APPEAL against the decree of D. Broadfoot, Acting District Judge of Trichinopoly, in Original Suits Nos. 10 of 1893 and 26 of 1895.

In these suits which were tried together, the plaintiff was one of the trustees of the Srirangam pagoda and the defendants were the members of the temple committee constituted under the Religious Endowments Act, 1863. The fact of his appointment was communicated to the plaintiff by a document filed as exhibit A which was in the following terms:—"This is to inform you that as you have been appointed to the office of permanent manager of Srirangam, &c., which is vacant, you shall take charge of the said office, and discharge the duties diligently and honestly, submit to the committee the accounts that are due, as early as possible, and recover immediately the losses caused to the devastanam by the former trustees and the other present trustees and report about it." The plaintiff having incurred the displeasure of the majority of the committee, they delivered to him the order suspending him from office, and he sent the reply quoted below at pp. 216, 217. He was not called upon for any explanation and on the 25th February 1893, they sent to him a yadast dismissing him, which was filed in the suit as exhibit R, and was in the following terms:—"Whereas in accordance with the proceedings passed by the members in a meeting held on the 19th instant, you have been dismissed from the office of permanent manager of Srirangam devastanam, and Kasturiranga Ayyangar alias Rangsami Ayyangar of Kovalakudi, residing at Srirangam, appointed as permanent manager in your stead, you are directed to transmit at once to manager T. Ratna Mudaliar Avargal, the said Rangsami Ayyangar Avargal, and Sri Vedaviyasa Alasinga Bhuttar Avargal the present rotation manager, all records and proceedings connected with the Srirangam devastanam that are with you, the

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"key of the cash chest, the peon's silver badge, and all other things of the temple that are with you, and you are informed that if any loss either of property or of ready money had been caused by you to the devastanam during the time that you were employed as manager, the same shall have to be made good by you." In the first of these cases, the plaintiff sued for damages alleging that the action of the committee in suspending him was *ultra vires* and illegal, and in the second he sought a declaration that the order of dismissal was invalid and an injunction to restrain the defendants from interfering with or obstructing the discharge by the plaintiff of his duties as trustee. The District Judge dismissed both the suits, being of opinion that the plaintiff had been guilty of grossly insubordinate conduct which justified his dismissal, and that the order of suspension was also legal.

The plaintiff preferred these appeals.

The Acting Advocate-General (Hon'ble V. Bhashyam Ayyangar) and Narayana Ayyangar for appellant.

Sankaran Nayar for respondents Nos. 1 and 2.

These appeals came on for hearing before SHEPHARD and DAVIES, JJ., who delivered the following judgments:—

SHEPHARD, J. — These are appeals by the plaintiff against the decrees in two suits brought by him against the same parties, being the members of the temple committee constituted under the Act of 1863. It seemed to us convenient to hear first the appeal in which the question of the plaintiff's dismissal from the office of trustee arose, and I will accordingly deal with that question first and afterwards with the question arising in the suit in which damages are claimed.

The plaintiff was appointed a trustee of the Srirangam pagoda on the 1st May 1892, and he assumed office on the 15th of the same month. On the 25th February 1893 a notice was addressed to him signed by three of the defendants—Nataraja Ayyar, Krishna Ayyangar, and Ramasami Chetti,—intimating to him that he was dismissed from the office of trustee and requiring him accordingly to surrender to a person named all the temple property in his possession. The Advocate-General, who appeared for the plaintiff-appellant, did not contend that it was beyond the power of the committee to dismiss one of the trustees appointed by them, but argued that no just cause was shown for the dismissal of the plaintiff. In the Court below numerous charges were framed

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against the plaintiff and they are dealt with *seriatim* by the District Judge, with the result of a judgment of acquittal in the appellant's favour except as to the last or seventh charge. We have considered the evidence as to the other charges and agree in the conclusion at which the Judge arrived. There remains only the seventh charge on the strength of which the Judge has considered the order of dismissal to have been warranted. The judgment is not very explicit on the point, but the finding amounts to this, that the plaintiff was, in respect of his conduct subsequent to an order passed by the committee on the 29th December 1892, grossly insubordinate to the committee and that their final order of dismissal was accordingly right and proper. The order of the 29th December begins by stating that it is necessary that the plaintiff should be suspended from the duties of manager pending the inquiry into certain petitions, and after other recitals ends as follows:—"You shall cease to do the devasthanam duties from the date of receipt of this yadast. Further, you shall deliver charge of all proceedings and records connected with the devasthanam, that are with you to T. Ratna Mudaliar Avargal, who is another manager, and report (that you have done so). You will be informed of the time when the inquiry into the petitions is to be commenced."

This order is signed by the same three persons who signed the subsequent order of the 25th February. The plaintiff's reply is contained in a letter of the 10th January, in which he questions the authority of the committee to pass such an order regarding himself and asks for copies of all papers. The order of the 29th December is followed up by a letter from Ratna Mudali and another desiring him to forward to them the records of the devasthanam, and again by a further letter from the same persons on the 21st January. To these two letters the plaintiff sends an answer, dated the 1st of February, in which he plainly gives his opinion that the committee were not justified in making their order of the 29th December.

On these three letters, that is to say, the letter to the committee and the two other letters, and the conduct of the plaintiff evidenced thereby, we are asked to find that a charge warranting the plaintiff's dismissal has been substantiated. We were referred to no other evidence in this connection. Undoubtedly the plaintiff denied the authority of the committee as asserted by them. As a

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matter of fact, however, he did not after the 29th December take part in the festival which was then in course of celebration. The Advocate-General's argument on behalf of the appellant was directed to showing that the plaintiff was within his rights in resisting the attempt of the committee to displace him from his office, and that the action of the committee was irregular in respect of the omission to allow the plaintiff an opportunity of explaining his conduct. The relations of the committee to the trustees appointed have to be determined by reference to the Act of 1863, taken with the Regulation of 1817. There is very little authority bearing on the question of the powers possessed by the committee over the trustees. The seventh section of the Act provides for the appointment of committees "to take the place and to exercise the powers of the Board of Revenue and the local agents under the Regulation hereby repealed." On the other hand, section 13 imposes on the trustees certain duties in the matter of accounts of their receipts and disbursements. The same section directs the committee to require the production of such accounts periodically. The powers of the Board of Revenue, so far as regards the matter in hand, are declared in the second and third sections of the Regulation. The 2nd section says: "The general superintendent of all endowments in land or money granted for the support of mosques, Hindu temples or colleges . . . is hereby vested in the Board of Revenue." The 3rd section is as follows:—"It shall be the duty of the Board of Revenue to take such measures as may be necessary to ensure that all endowments made for the maintenance of establishments of the description abovementioned are duly appropriated to the purpose for which they were destined by the Government or the individuals by whom such endowments were made." As was observed in *Venkatesa Nayudu v. Shri Shatagopa Swami*(1) "the scope of the Regulation is the prevention of the misapplication of endowments and all its provisions are to be read with reference to that purpose." According to the decision in *Chinna Rangaiyengar v. Subbraya Mudali*(2), it is within the power of the committee, as it was within that of the Board, to deprive a trustee of his office--subject, however, to the right of the trustee to have the grounds of deprivation examined and adjudicated upon by a court of justice. If the result of the examination

(1) 7 M.H.C.R., 77, at p. 81.

(2) 3 M.H.C.R., 334.

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is to show that the trustee ought not to have been removed from his office, the act of the committee in removing him and appointing another in his stead goes for nothing and no order of re-instatement is required. So qualified, the proposition that the committee may dismiss a defaulting trustee amounts to very little. It amounts to no more than saying that their action in resolving on his dismissal and in procuring by peaceable means the substitution in his place of a new trustee is not illegal. It does not follow, as the District Judge seems to think and as was argued before us, that the committee is at liberty to take other measures, such as the Government or any other employer may take against its servants. The notion that the committee may exercise disciplinary powers over trustees appears to me alike unsupported by the provisions of the Act, and inconsistent with the position of a trustee having property vested in him and charged with the gratuitous performance of important public duties. His position is not that of a servant of the committee. He has what may be called a freehold in his office, and except for good cause shown he cannot be removed from it. According to the respondents' contention a trustee can be removed by the committee not only for proved misconduct on his part, but also on a mere allegation of misconduct and for the purpose of inquiry into it. This contention is certainly not supported by the case cited. By way of illustration I may put the case of the member of a club whose conduct is impugned and who under the rules of the club is liable to be expelled by a vote of the members. If the contention of the respondents is sound and the provision for expulsion involves the lesser penalty of suspension, it must follow that before any inquiry has taken place and in anticipation of the final vote of the members the incriminated member may be excluded from the club and from any enjoyment of the advantages which it offers. Such a proposition could not for a moment be accepted. Perhaps a better illustration is that suggested by the case cited in argument of the Municipal Commissioner deprived of his office by the Governor in Council (*Vijaya Raghava v. Secretary of State for India*(1)). In that case the Act, under which the Government purported to proceed, provided for the removal of any Commissioner for misconduct or neglect of duty. It was held that this provision

(1) I.L.R., 7 Mad., 466.

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did not make the Government the Judges on a charge of misconduct, but merely justified the removal of a Commissioner as to whose misconduct they could satisfy the Court. The security of tenure, which according to that decision the Commissioner had under the Act would have been entirely defeated, had it been held that the Government had by implication a power to remove him temporarily, not on account of proved misconduct, but for the purpose of inquiry into suspected misconduct. I think that the Advocate-General was right in saying that a so-called suspension is in point of law not distinguishable from a deprivation. A suspension during inquiry is indefinite in point of duration. There is no certainty that the inquiry will be concluded before the life of the subject of it is terminated. It might possibly be convenient that the committee should possess the powers which the respondents arrogated to themselves, but if the Legislature had intended to give them such powers, surely some provision would have been made for the discharge of the duties of the suspended trustee, for relieving him of responsibility for acts done during the period of his suspension, and generally for the preservation of the trust property during that period. It is clear that the committee during that period have no right to assume the charge of the property (*Ponduranga v. Nagappa*(1)), and no provision is made in the Act for the appointment of a temporary manager. Great difficulties would thus arise in the case of an endowment managed by a single trustee if the respondents' contention were adopted. In the absence of any provision for the suspension of a trustee from the ministration of his office, I am of opinion that the only course which the committee can adopt in cases of necessity is to file a suit and apply for the appointment of a Receiver. Had they done so in the present case and instituted a suit on the 29th December, whatever might have been the fate of the application for a Receiver, it is clear that the suit must have been dismissed. The committee cannot be in a better position because they attempted to take the law into their own hands and have been met by resistance on the part of the trustee. Being of opinion that the plaintiff's refusal to acquiesce in the order was lawful and not a neglect of duty or misfeasance on his part, I hold that the dismissal consequent on that refusal was not warranted in law.

(1) I.L.R., 12 Mad., 366.

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As to the manner in which the plaintiff expressed himself, if that is material, I cannot see that it was intended to be so insulting or defiant as Mr. Sankaran Nayar would have us believe. In their own proceedings with regard to his communication the three committee men speak of the plaintiff as labouring under a mistaken notion as to the powers of the committee. In my view the mistake was on their side rather than on his, and the requests which he made in his answer of the 9th January were perfectly reasonable. What he asked for was particulars of the complaint made against him, and he was clearly entitled to them and to an opportunity of explaining his conduct before any further action was taken against him. It is not pretended that any such thing was done. The defendant, Nataraja Ayyar, who seems to have been the leading spirit on the committee, says that no inquiry was made into the plaintiff's case, that they dismissed him after his insolent letter, and that no notice was sent to him to attend and furnish any explanation.

It is hardly necessary in my view to consider how this conduct on the part of the committee affects the merits of the case. Seeing that the Court may, if the evidence before it justifies dismissal, direct the removal of a trustee whether or not there has been any previous resolution to that effect passed by the committee, I am not sure that the omission to give the accused trustee opportunity to explain himself is material.

I base my judgment on the ground that the order of the 29th December was one which the trustee was not bound to obey, and that therefore there was no misfeasance or neglect of duty within the meaning of the Act. I should also be prepared to hold that, even if the mistake was on the side of the appellant and not on the side of the committee, it was an honest and excusable mistake on account of which in the interests of the pagoda it was not required that the appellant should be dismissed from office.

Disposing first of appeal No. 23, I think the decree of the District Judge should be reversed, and that the plaintiff should have a decree in the terms of his plaint and also costs in this Court and below.

Coming to the other appeal in which damages are claimed, I have in my view of the law no other question to consider than that of the amount of damages. In this suit which was filed before the final order of dismissal was passed, the plaintiff claims

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an injunction and damages on account of the order of the committee passed on the 29th December. On the allegations made in the plaint I apprehend there can be no doubt that the appellant is entitled to some damages. The principal allegation is that the order complained of was illegal. As to that I have already expressed my opinion. But it is also alleged and was argued before us as a ground for awarding substantial damages that the order was made without reasonable or probable cause, and that some of the defendants were in making it actuated by feelings of personal spite against the appellant. It becomes, therefore, necessary to consider the circumstances which led up to the making of the order and the relation of the parties before the 29th December.

The plaintiff was, as I have said, appointed trustee on the 1st May 1892 (exhibit A), and he took charge of the office a few days afterwards. Nataraja Ayyar was not a party to the appointment, but he admits that he knew that the plaintiff was applying for the office and that he knew of the appointment a few days afterwards. He admits also that he did not object to the appointment when it was first mooted. The first occasion when he openly took exception to it was on the 6th June, which is the date of a memorandum stating his objections to the removal of the defendant, Krishna Ayyangar, from the office and the substitution in his place of the plaintiff. There is a suspicious delay about the making of the protest which is not accounted for by Nataraja. It appears that this Krishna Ayyangar had previously held the appointment and resigned it on the 31st May 1891, in consequence of complaints made against him. Subsequently, on the 16th April 1892, he was re-appointed, but his appointment was cancelled on the 29th of the same month and at the same time it was resolved to appoint the plaintiff. Nothing appears to have been done by the defendant Nataraja by way of following up his protest of 6th June. About the time of the plaintiff's appointment two persons—Dorasami and Ramasami—were appointed trustees of another temple, the Lalgudi temple, within the defendants' circle. In this matter there seems to have been a difference of opinion between Nataraja and his fellow committee-man Vasudeva, as there was in regard to the appointment of the plaintiff. Vasudeva says Nataraja urged him to join in the removal of these two trustees but that he refused. I think there can be no doubt that this is true, for Vasudeva's evidence is supported by the minutes written by him and Nataraja

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in July 1892, and it is not contradicted except in a very general way by Nataraja. It appears from these minutes that the dispute had begun before the 6th of June. The end of it was that the two Lalgudi trustees were dismissed on the very day on which the plaintiff was dismissed. On the 27th June 1892 the Chetti, who had been a party to the plaintiff's appointment, died, and so till the 20th October the committee consisted of two persons only, viz., the defendants, Nataraja and Vasudeva. In the interval and indeed for some time afterwards there can be no doubt that the plaintiff's position as trustee was unquestioned. As late as the 19th November 1892 there is a yadast signed by all five members of the committee designating the plaintiff and his colleagues as managers of the temple and entitled to receive the Mohini. All this time, however, while in public the plaintiff was duly recognized, there can be little doubt that Nataraja privately entertained the idea of ousting him from office. He was only waiting for a convenient opportunity. After the instalment of the new committee, the first measure adopted as regards the plaintiff appears to have been the writing of a minute by the new committee-man Krishna Ayyangar. This minute, dated the 21st December 1892, deals with the case of the Lalgudi trustees, and also with certain petitions in which complaints had been made against the plaintiff. The minute concludes with the recommendation that the plaintiff should be immediately suspended, the main ground being that he is a Vadagalai, whereas the temple is a Tengelalai one, and that disturbances are likely to take place during the festival. The defendant Ramasami agrees with this minute. Two days later, on the 26th, the defendant Nataraja expresses his concurrence. In his minute for the first time for more than six months he revives the objections raised by him in his memorandum of 6th June to the plaintiff's appointment. The fourth member of the committee—Krishnamachari—demurs to the recommendation of Krishna Ayyangar and advises that, before any order is passed, the plaintiff should be asked to explain the matters alleged against him. His minute is dated the 27th December. What was done between that date and the 29th when the order of suspension was issued, does not clearly appear. All we know is that the fifth member Vasudeva says he knew nothing of the minutes of his colleagues, nor of the order until after the date when the latter was issued. I think we may fairly assume that the three persons who signed the order were aware that Krishnamachari objected to it

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and advised delay and that the other defendant Vasudeva had never been consulted. I think we must also assume that the two defendants (for the defendant Ramasami Chetti is dead) approved of the terms in which the order was drawn up. Now, what are the matters charged against the plaintiff in this order? There are four heads. There is first the charge that he obtained the office of trustee by improper means—that is the matter on which, as already mentioned, Nataraja's minute dwells. Then there is the charge or causing loss of property and money to the devasthanam. Next, there is the charge of conducting temple affairs so as to cause riots between Tengelais and Vadagalais, and lastly there is the charge with reference to what is called the Tidal festival. I have already said that these charges, which are included in those insisted upon by the respondents at the hearing, have not been established by the evidence. We must take it that they are groundless charges, and consider whether Nataraja and Krishna Ayyangar took reasonable pains to ascertain, if they were true or whether they knew them to be groundless. The question was much discussed whether the matters mentioned in the order relating to the conduct of the festival were within the scope of the committee's authority, the committee being primarily concerned to see only to the preservation and proper disposition of the temple property. In my opinion, having regard to the language of the Act, the committee have no business to interfere in the internal management of the temple or in mere matters of ritual or ceremonial. Their interference with the trustee is unauthorized and improper save so far as it can be justified as necessary in discharge of the secular duties which the Act imposes on the committee. In considering the conduct of the committee, however, with reference to damages, I do not think this ought to be taken into account. I give the committee credit for being honestly mistaken with regard to the scope of their duties.

The materials which they had before them when they wrote their condemnatory minutes were certain petitions, dated on various days in September, October and December 1892. The fact that not a single signatory of these petitions has been called to vouch for the statements made therein is suggestive of their character when it is remembered that the charges were not abandoned at the trial. The defendants have placed themselves in a dilemma. Either they did not examine the signatories, or they did examine them and found them wanting. Nataraja says that he did

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examine them, but as it appears that any examination which took place was after the 29th December, this fact is irrelevant except as throwing light on his subsequent conduct. Obviously, facts which came to the knowledge of the defendants after that date cannot be taken into account in considering what was the mental condition of the defendants on or before that date.

I will take first the charge regarding loss of property which, in my opinion, is the only charge on which the committee were entitled to take any action. Assuming that this charge refers to the gold dust alleged to have been improperly disposed of, I observe that it is not mentioned in the lengthy minutes written by Nataraja and Krishna Ayyangar before the issuing of the order. It appears to be founded on a statement made in a petition, dated the 14th November 1892. Is it possible to believe that men of business and some education like the two defendants selected by a District Judge as competent to discharge important duties could have given credit to the mere statements of the petitioners, untested by examination and uncorroborated? If they had attached any weight to the charge, they surely would have dwelt on it in their minutes. It was urged on behalf of the defendants that the apprehension of a disturbance during the festival compelled them to take immediate action, and it is pointed out that Ramasami Chetti, against whom no personal malice is charged, acquiesced in their view. Here again the grounds of the alleged apprehension are to be looked for in the vague statements made in the petitions. There had been no disturbance during the first ten days of the Ekadasi feast. Ratna Mudali, one of the plaintiff's colleagues who seems to be fairly impartial, was equally responsible with them for the conduct of the festival. He does not appear to have apprehended any trouble and clearly the committee-man, who refused to join in the order of suspension, did not see any reason for immediate action. When we look at the dates, the date of Nataraja's protest, 6th June, the date of the October minute, the dates of the petitions, the date of the filling up of the committee, the 28th October, and the date of the order, it is difficult to avoid drawing inferences against the defendants. One inference I have already mentioned, viz., that the idea of ousting the plaintiff from office was secretly entertained by the defendant Nataraja throughout from the 6th June. Another inference I draw is that, whatever may have been the apprehension of the defendants, there was no sort of urgency and

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that there was a determination to deprive the plaintiff of the honours which he would have enjoyed during the last ten days of the festival. Possibly also the absence of the fifth member may have had something to do with the selection of the date. Before leaving the four charges I must say a word about the first relating to the alleged invalidity of the plaintiff's appointment. It is obvious that, if the appointment was invalid, that could be no ground for the summary action of the 29th December. But I think the prominence which is given to this matter throws considerable light on the conduct of the defendant Nataraja. Here is a member of the committee, who for months has acquiesced in the appointment of the plaintiff as trustee, and also even as late as the 19th November, publicly recognizes him as holder of the office, making use of facts well known to him all the time as a ground for depriving him of his office. I think there is good reason for saying that the real motive which actuated Nataraja was resentment against Vasudeva for having procured the appointment of his relative, the plaintiff, coupled, perhaps, with a sectarian aversion to them both as Vadagalais. One has only to read the petitions to see that the real gist of the complaint against the plaintiff was that he was a Vadagalai, and therefore out of place in a temple which, according to the petitioners, is a Tengalai temple. This is the complaint which is taken up by Nataraja in his first minute on the petition, 4th October 1892. The view expressed there is that as long as plaintiff and Ratna Mudali are trustees and Vasudeva is on the committee, there is no hope of things being conducted properly in the temple. The same line is adopted by Krishna Ayyangar and the other committee-man. Krishna Ayyangar had in addition his own private quarrel with the plaintiff, for, as already mentioned, he had been superseded by him. Further, it is quite possible that bad feeling may have been created between them by the incident connected with municipal affairs in which they came into collision. It is worthy of note that Krishna Ayyangar has allowed all the evidence against him to go uncontradicted and refrained from going into the box. All that can be expected of the plaintiff is that on the one hand he should show there were no facts before the defendants on which fair and reasonable men with a due sense of their responsibility would take action against a trustee, and that on the other hand there were circumstances in the previous relations between himself and the

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defendants to account for the action of the latter. I think the plaintiff has shown that the rivalry between Nataraja and Vasudeva counted for something among the motives of the former's conduct. If, however, I am wrong in supposing there was any personal feeling on the part of Nataraja or Krishna Ayyangar, I am not sure that it makes much difference, because then the sectarian motive is the only one that remains, and the conduct of the defendants if so explained would hardly be less reprehensible than if it had been actuated by motives of personal dislike.

To sum up, I start with the proposition that, inasmuch as the order of the 29th was illegal, the plaintiff is anyhow entitled to some damages. I find that on that date the defendants had no materials before them on which a reasonable man of the world would have taken any decisive action, and that the defendants took no steps to test the accuracy of the statements made to them and in spite of the remonstrance of their colleague gave no opportunity to the plaintiff to explain matters. They required no evidence and listened to no defence. I observe that the plaintiff only and not his fellow-trustee, who with regard to some of the matters was equally responsible was selected for condemnation. I find in the history of the previous relations of the parties ample grounds for believing that hostile feelings were entertained by the defendants towards the plaintiff, and I observe that the charges against the plaintiff were persisted in to the end, although the defendants must have known that they could not substantiate them. I think there is no doubt that one of the main grounds for the proceedings of the defendants was the fact that the plaintiff was a member of the Vadagalai sect. On these findings I am of opinion that the plaintiff is entitled to substantial damages. If the action had been simply for defamation, the plaintiff, having regard to the inuendo which the allegations in the order of the 29th fairly bear, might justly have claimed substantial damages. The first two charges imputing to the plaintiff improper conduct in connection with his appointment and dishonest conduct in regard to the temple property are distinctly defamatory. But the defendants have done more than defame the plaintiff. They have also done their utmost to deprive him of an important office of trust and at a critical moment to rob him of the honours attaching to it. Taking all the circumstances into consideration I would award the plaintiff Rs. 1,000 by way of damages. Costs will of course follow.

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DAVIES, J.—The plaintiff was appointed to the office of permanent manager of the Srirangam devastanam on the 1st of May 1892 by two out of the three then existing members of the temple committee of the Trichinopoly taluk. The present fifth defendant and one Thota Venkatachalasami Chetti, now deceased, were the two members who appointed the plaintiff. The other member of the committee was the first defendant who objected to the appointment on the ground apparently that the second defendant was a more suitable person to hold it than the plaintiff, who was not only a cousin of the fifth defendant who appointed him, but who belonged to the Vadagalai sect of the Vishnuvites, while the temple he was managing was a Tengalai temple. The first defendant's protest was, however, in vain, as he was in the minority. The member Thota Venkatachalasami Chetti died soon afterwards, and on the 21st October 1892 his vacancy and two other vacancies that had existed for some time were filled up by the appointment to the committee of the second defendant, the ex-manager of the temple, to which plaintiff was appointed, and of the third and fourth defendants. Certain complaints having reached the committee, now composed of five members, of mismanagement by the plaintiff, a majority of three members out of five, *i.e.*, the first, second and third defendants, resolved on suspending him pending enquiry into his conduct. This they did on the 29th of December 1892. The plaintiff demurred to the action of the committee, and though, it appears, he did not continue to conduct the services in the temple, he refused to deliver up the papers and the keys of the cash chest that he was in possession of as manager. Challenging the right of the committee to suspend him as they had done, he filed the first suit, the subject of Appeal No. 22, against the members of the committee for wrongful suspension and claiming damages therefor. In consequence of these proceedings on his part the three same members who had suspended him dismissed him from his office on the 25th of February 1893. The plaintiff then brought a second suit, the subject of Appeal No. 23, to declare his dismissal void. But in this suit he claims no damages. The District Judge has dismissed both the suits on the ground that there was nothing irregular in the order temporarily suspending the plaintiff and that his dismissal was justified by his insubordination to the committee. The appeals are based on the grounds that the suspension by the committee of the plaintiff pending enquiry into his conduct

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was illegal as being *ultra vires*, and that both as regards the suspension and the dismissal there was no good and sufficient cause. There is no question here whether the plaintiff was a trustee, manager or superintendent under section 3 of the Act XX of 1863 or section 4 of that Act. He was admittedly a nominee of the committee, and therefore was in the position of a trustee under section 3 and not section 4 of the Act. It was urged on his behalf, however, that the committee had no control over his management of the pagoda and that they had no power to suspend him pending an enquiry into his alleged misconduct. It was not contended that the committee could not dismiss him outright for proved misconduct; but excepting this, it was claimed for him that he was pretty much in the independent position of an hereditary trustee under section 4 of the Act. The first important question then that arises for consideration is what are the powers of the temple committee, (a) in regard to the control they can exercise in the management of the temples in which the nomination of the trustee is vested in them under section 3, and (b) over the individual appointed to the office.

The learned Acting Advocate-General, who appeared for the plaintiff, would have it that the powers of the committee in regard to the first matter are limited to the power conferred in section 13 of the Act to call for accounts, and that the committee have no voice in the internal management of the temple or still less in matters of ritual therein. If that be the case it is hard to understand why the members of the committee must, according to section 8 of the Act, be persons professing the religion for the purpose of which the temple is maintained, or, to use the words of the Government Order, exhibit KK, of 1841 'individuals professing the same faith'; because if their powers are limited to the examination and audit of the accounts of the various temples under their control, the work could be as well if not better done by the Accountant-General and his staff without regard to their creed. The effect of upholding the view put forward would be to reduce the temple committee to a mere nonentity, whereas the plain object of their appointment was to invest them with all the powers which the Board of Revenue used to exercise. The history of the matter shows that the powers of the Board of Revenue were absolute and unlimited, being in fact their exercise of the sovereign power of Government which was conferred on

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the Board of Revenue by the Government by Regulation VII of 1817. It is those powers which have now devolved upon the committee who by force of section 7 of the Act XX of 1863, "were to take the place, and to exercise the powers, of the Board of Revenue and the local agents" under that Regulation. "By the passing of the Act all the powers relating to the superintendence and management of religious establishments which has been vested by the Regulation in the Board of Revenue and the Collectors throughout the country, were completely determined; and either the District Committees appointed under the Act or the trustees, managers, or superintendents referred to in sections 4, 5 and 6 became entitled to the possession and management of all religious endowments, the former of all those of the class described in section 3, and the latter of all within the description in section 4" (Per SCOTLAND, C.J., in the case of *Jusagheri Gosamiar v. The Collector of Tanjore*(1)). Sections 2, 3 and 15 of the Regulation VII of 1817 show that it was the general superintendence of all endowments for the support of temples that was vested in the Board of Revenue, that it was the duty of the Board of Revenue to take such measures as might be necessary to ensure that all such endowments were duly appropriated to the purpose for which they were destined, and that it was the sole object of the Regulation to provide for the due appropriation of the endowments agreeably to the intent of the grantor. For the proposition that these functions were the delegated functions of Government as the sovereign power, there is the direct authority of the Privy Council in the Rameswaram pagoda case in the Ramnad Zamin-dari—see *Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai*(2) from which I take the following extracts (pages 232 to 235):—

"It will be convenient to consider what powers the Board of Revenue and the Collectors possessed, or *de facto* exercised in relation to religious houses. The proceedings upon the accession of Venkatachellam, above described, took place before Regulation VII of 1817 was passed. But it is evident that before that Regulation the British Government, by virtue of its sovereign power, asserted, as the former rulers of the country had done, the right to visit endowments of this kind and to prevent and

(1) 5 M.H.C.R., 334, at p. 341.

(2) L.R., 1 I.A., 209.

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"redress abuses in their management. There can be little doubt that this superintending authority was exercised by the old rulers. . . . It appears, therefore, to be highly probable that the Sotupatis in the days of their power exercised control over the pagoda, not, however, in virtue of any proprietary right of patronage, but as the rightful or *de facto* rulers of the district. The powers they enjoyed as sovereigns, whatever they may have been, have now passed to the British Government. . . . That the new rulers, at an early date, exercised a controlling supervision and authority over the temples very clearly appears from a letter written in 1803 by the Board of Revenue to Mr. Hurdia, the Collector of Madura. . . . It is abundantly clear from this letter that long before Regulation VII of 1817 the British Government not only assumed the power to superintend the management of the property and affairs of the pagodas throughout the Peninsula, but exercised its authority through the agency of the Collectors. The preamble of the Regulation of 1817, after stating that large endowments had been granted by former Governments as well as by the British Government and individuals for the support of temples, and that the produce of such endowments were in many instances misappropriated, declares it to be 'the duty of the Government to provide that 'all such endowments be applied according to the real intent and 'will of the grantor.' It then enacts that the general superintendence of all endowments should be vested in the Board of Revenue and prescribes the duties to be performed by them to prevent misappropriation of the funds. It also authorizes the Board to appoint local agents, and declares that the Collector of the district shall be *ex-officio* one of such agents. . . . [It is thus] established that at an early date the power of superintendence was entrusted by the Government to the Board of Revenue and the Collectors. The Regulation, in fact, merely defined the manner in which that power was thenceforth to be exercised." Similar observations were made by this Court in an earlier case (*Ramiengar v. G. Pandarasannada*(1)). The learned Judges, SCOTLAND, C.J., and INNES, J., say: "The duties of superintendence and the proper appropriation of the endowments of Hindu and Muhammadan temples and religious establishments, of the

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"preservation of the structures of such temples and establishments, and of the management of their affairs, through trustees or managers, were without doubt, we believe, exercised by the officers of the Local Government indiscriminately long before the Tanjore territory and temples were assumed by the Government, and in 1817 the general management of all endowments of religious establishments in this Presidency, as also the duty of seeing that the trustees or managers of such establishments were properly qualified and duly appointed were made without exception, a legal obligation on the Board of Revenue and their local agents by Regulation VII of that year." The complete powers thus entrusted to the Board of Revenue were henceforth exercised by them up to the year 1841, when, according to the judgment in the case just referred to (page 59) "the Government, it appears, became in 1841 strongly influenced by conscientious, moral and religious scruples, and considering that they were at liberty in their executive capacity to divest themselves of the duties and responsibilities imposed by law in connection with Hindu and Muhammadan religious establishments, they determined that all duties and trusts, excepting the management of lands attached thereto, should be left finally and completely in the hands of properly qualified individuals." Exhibit KKK, in the present case, of the year 1841 is evidence of the fact just stated, namely, that the Government in that year resolved to relinquish all interference with native temples both in the internal arrangements thereof and the administration of their revenues, reserving to themselves only the managements of the lands endowed. It is therefore evident that, from the year 1817 up to 1841, the Board of Revenue had the fullest control over temple affairs including even the internal arrangements of the institutions. They exercised these powers over both classes of religious establishments as distinguished now in sections 3 and 4 of the Act XX of 1863. I quote again from the judgment in *Ramiengar v. G. Pandarasannada*(1): "The recitals and enactments too of Act XX of 1863 show that the two classes of temples and religious establishments described in sections 3 and 4, and the property belonging thereto, were, at the time of its passing, alike subject to the control of the Board of Revenue and

(1) 5 M.H.C.R., 53, at p. 57.

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"their local agents in the performance of all the above duties, "and it was the very purpose of the Act to provide differently "for the future exercise of such duties, according as the nomination of the trustee, manager or superintendent of each temple "or religious establishment had or had not been ascertained to be "a right possessed independently of the Government." So that the powers of the Board of Revenue under Regulation VII of 1817 which legally existed until the passing of Act XX of 1863 were continued to the temple committees formed under that Act in respect to all temples falling under section 3, and were taken away only in regard to the temples falling under section 4. That the Board of Revenue were deprived of some of their powers so far back as 1841 by the executive order of Government does not affect the position of the committees created under Act XX of 1863; because it is not the powers of the Board of Revenue as they existed at the time that the control of the temples was made over to the committees, that were conferred upon them, but the powers of the Board of Revenue as they existed in 1817, and what those were have, I think, been sufficiently set forth. The plaintiff's case being one falling under section 3, he cannot possibly claim exemption from control by the committee of his management which can only be claimed by trustees coming under section 4. No case has been cited since the passing of Act XX of 1863 in which exemption from such control has been established by a trustee appointed under section 3 of the Act, and it is certain that it would never have been recognized. On the other hand, in the case of *Virasami v. Subba*(1) we find an instance of a trustee who had submitted generally to the "authority, interference and supervision" of the committee. And a contention there similar to the one in the present suit that a trustee was only liable to render an account to the committee was overruled. If any further proof were wanted as to the all-reaching control vested in Government officers before the passing of the Act XX of 1863, it is to be found in section 22 of the Act which prohibits officers of Government from thereafter undertaking or resuming the superintendence of any endowments, or taking part in the management or appropriation thereof or appointing trustees or being in any way concerned therewith. This is a clear indication that such were the powers which the officers of Government had been previously exercising

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and which thenceforth devolved on the temple committees. From what has been stated there cannot, I think, be a shadow of a doubt that in this case the committee were empowered to supervise and control the plaintiff in all his acts of management including the conduct of religious services. If, for instance, the plaintiff was showing favour to Vadagalai observances rather than to Tengalai, it was within the power of the committee to prevent him from doing so, this being admittedly a Tengalai temple, just as much as if it being a Vishnuvite temple he had introduced a Shivite form of worship therein, because he would have been appropriating the funds of the temple to a purpose foreign to the intention of the grant; and it is the duty of the committee to see to the due appropriation of the funds. Several complaints had reached the committee that the plaintiff was introducing Vadagalai rituals, and if that was so, it was within their power to prevent it under the general powers of control which, in my opinion, they undoubtedly possess.

The other part of the question is, what are the powers of the committee in regard to the individual whom they have appointed to the office in case he disobeys their orders or does not submit to them as to the way in which he should conduct himself in the discharge of the duties of his office? That the committee have for just cause the power of dismissing a trustee or superintendent appointed by them under section 3 of the Act has been laid down in *Chinna Rangaiyengar v. Subbraya Mudali*(1). It was there found that the Board of Revenue both in this Presidency and in Bengal had all along exercised the power, and the Court (SCOTLAND, C.J., and COLLETT, J.) held that the power, though not expressly given by the Regulation, "was properly incident to the principal "duties and the responsibilities of the Board of Revenue and was "impliedly given," and they further held that that power being a power properly exercised by the Board of Revenue, was a power transferred to the committee. That decision was given in 1867 soon after the passing of the Act, and it has never been departed from. On the other hand, it has been followed and recognised in subsequent cases, notably in *Ramiengar v. G. Pandarasannada*(2) and *Virasami v. Subba*(3). Nor is it contended on behalf of the appellant (plaintiff) that he was not liable to dismissal by the

(1) 3 M.H.C.R., 334. (2) 5 M.H.C.R., 53, at p. 54. (3) I.L.R., 6 Mad., 54.

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committee for good and sufficient cause. What is contended is that he was not liable to suspension by the committee. Suspension is no doubt a temporary removal from office as dismissal is a permanent removal therefrom. But surely it stands to reason that the greater power includes the less and that if the committee have the power to remove a trustee from office for all time, they can do so for a time. Indeed, we find wherever we look the two powers are classed together as going hand in hand. Thus, in the leading case of *Chinna Rangaiyengar v. Subbraya Mudali*(1) we find the Judges speaking of the authority 'to suspend or remove' as equivalent powers. In suits brought under section 14 of Act XX of 1863 authorizing a civil court to direct the removal of a trustee, a temporary removal or suspension has been judicially recognised by this Court as within the powers of the civil court in a very recent case—see *Natesa v. Ganapati*(2). Again, in the Madras Civil Courts Act III of 1873, the powers of suspending or removing Subordinate Judges and Munsifs and ministerial officers are clubbed together as alternative courses. So that I think there can be no doubt that where the power of removal exists in a governing body the power of suspension is necessarily included. I do not mean to say that this proposition would apply to the special case that was put of a club where a member may be expelled for misconduct. The rights and obligations of the members of a club are mutual and equal, and are subject to an express set of rules. If no provision is made in those rules for the suspension of a member pending inquiry, such a course would not be permissible, for the simple reason that the special and peculiar rules which govern the club do not permit of it. There is nothing, however, to prevent the introduction of such a rule if the members of the club so choose. The relative position, however, of the temple committee and of the plaintiff is not the same as that of the members of a club. It is not as if the trustee under section 3 was independent of the temple committee in which case the temple committee would not have the power to dismiss him at all, just as they have not the power to dismiss a trustee under section 4. In the words of the judgment in *Chinna Rangaiyengar v. Subbraya Mudali*(1) the plaintiff is an officer "amenable to their control," and as such their subordinate. It is true that in one view he is a trustee as the property of the

(1) 3 M.H.C.R., 334 at p. 337.

(2) I.L.R., 14 Mad., 103.

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temple is vested in him and not in the committee; but in another view he is also a servant of the committee because he is subject to their control. He holds in fact a dual character, and that is why, perhaps, the plaintiff's appointment was designated as that of "permanent manager" and not as that of trustee. If he were a trustee and nothing but a trustee, the committee could have no power in themselves to dismiss him, but would have to seek the intervention of the Courts. But the undisputed power that the committee have in themselves to dismiss him is a clear signification that he is not in the position of an ordinary trustee. If he grossly misbehaves himself, the committee in the exercise of their powers of control can admittedly dismiss him; but supposing his misconduct is not such as to warrant an outright dismissal, are the committee to be powerless to check him by any punishment short of dismissal which dismissal *ex hypothesi* could not be justified? In every view, therefore, it seems to me that the power of suspension is inherent in the power of dismissal. So that if in this case the suspension of the plaintiff had been made as a punishment, I should have no hesitation in holding that it was within the power of the committee; but in this case the suspension was not made as a punishment but was a suspension pending an inquiry into the charges of misconduct alleged against him. Now, assuming of course that the committee acted *bona fide* and believed there was a *prima facie* case made out against the plaintiff, the question is whether in such circumstances it was within the power of the committee to temporarily remove him from office pending further inquiry; that is, whether the committee could suspend him for suspected misconduct as contradistinguished from proved misconduct. The power is one which is (as is well known) exercised by Government over its own servants, and there is an instance of its having been exercised by a Collector over a trustee, *Ponduranga v. Nagappa*(1), where this Court took no exception to the course adopted by the Collector. The following is the text:—"It appears, however, that in 1834 the Collector suspended him from office for neglect of duty on the ground that his conduct was open to suspicion and that in 1837 the Collector finally dismissed him from trusteeship (see exhibits Y, Z and DD). Although it is alleged that this dismissal was an arbitrary proceeding on the part

(1) I.L.R., 12 Mad., 366, at p. 371.

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"of the Collector, there is no evidence to show that such was the case
"and that the Collector passed the order otherwise than in the *bond*
"fide discharge of his duty under Regulation VII of 1817." Viewed as a preliminary and precautionary step ancillary to the exercise of the substantive powers of suspension and dismissal, the procedure appears not only to be unobjectionable, but justifiable as being advantageous to both parties where the relation of master and servant exists. As in this case the control of the committee over the plaintiff was the control over a subordinate, the case seems parallel to the case of master and servant. I must, therefore, hold that the committee did not exceed their powers in suspending the plaintiff pending inquiry. It must be remembered that the powers of the committee are derived from the supreme or sovereign power of Government, and there can be little doubt that the Government were free to suspend a recalcitrant trustee *pro tempore* pending further action when they controlled the management of the pagodas just as they now do with their officers. This Court itself only last year on two occasions suspended Munsifs pending an inquiry into their conduct. This was done under the Court's general power of suspension and it was not considered open to question.

Holding then that the committee were empowered to pass the orders which they did, the next and last question is whether they properly exercised those powers in regard to the plaintiff. Those powers must be exercised in a reasonable and not in an arbitrary way as laid down in the case of *Vijaya Ragava v. Secretary of State for India*(1). It would not be the committee's own view of what constituted misconduct that would justify their removal of the trustee, but only what would satisfy a Court of Equity that there was misconduct. On other hand, in the case of a trustee it is not always necessary to establish actual misconduct against him before he can be removed. A trustee may be removed if the Court is satisfied that the continuance of the trustee would prevent the trusts being properly executed. The principle is stated by Lord Blackburn in *Letterstedt v. Broers*(2) as follows:—
"And therefore though it should appear that the charges of
"misconduct were either not made out or were greatly exaggerated, so that the trustee was justified in resisting them and the
"Court might consider them in awarding costs, yet if satisfied that

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"the continuance of the trustee would prevent the trusts being
"properly executed, the trustee might be removed. It must always
"be borne in mind that trustees exist for the benefit of those to
"whom the creator of the trust has given the trust estate." The grounds on which the majority of the committee issued their first order suspending the plaintiff are to be found in exhibit N. They are (1) that he owed his appointment to the favour of one committee member, his cousin, the fifth defendant, and to the fear of another, the Chetti who has since died, the charge on the latter head being that the plaintiff had taken civil process out against the Chetti to intimidate him, (2) that since his appointment he had caused loss of property and money to the temple, and (3) that he had conducted things in the temple contrary to custom so as to cause a disturbance of the peace between the Tongalais and the Vadagalais, and that some of his irregular acts were disrespectful to the God. It is urged on the plaintiff's behalf that none of these grounds was a good one and that the order was actuated by personal ill-will against the plaintiff. Premising that, unlike in an order for dismissal, the grounds for suspension pending an inquiry do not need to be actually proved and that it is sufficient if there are *prima facie* grounds for action, I observe that the committee had before them several long and detailed complaints of mismanagement on the part of the plaintiff, and I must say that if they believed in the genuineness of those complaints they had ample reasons for suspending the plaintiff pending inquiry. I do not refer to the first ground which they have given in their order, because I think that that was not a proper ground for suspension, as the plaintiff had been in office for seven or eight months during which time he had been acknowledged by the committee as the manager. But in respect to the grounds (2) and (3) there were apparently genuine complaints of actual malversation and of malfeasance and nonfeasance. It is urged that, as regards the ground No. 2, the committee had no reason for believing that there had been any malversation and that as regards the ground No. 3 of general mismanagement the committee had no power of interference with the internal arrangements of the temple. It is also said that it was no part of the business of the committee to prevent a breach of the peace. However, I consider that they had a concern in both matters in the preservation of the peace and in the conduct of affairs in the

(1) I.L.R., 7 Mad., 466.

(2) L.R., 9 App. Cas., 371, at p. 386.

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temple, as they certainly had in regard to the malversation, if any, of the funds. One particular fact must be borne in mind, and that is that there had been no manager of the Vadagalai sect since 1881, and that in the time of the previous Vadagalai manager there had been serious rioting. There had also been a disturbance in the temple soon after the plaintiff took charge in regard to his conduct of the Tidal festival in which the interference of the magistracy was invoked, and at the very time when the order of suspension was passed there was another important festival going on. So that the only question is, did the committee proceed in the *bona fide* belief that they were acting for the good of the temple in suspending the plaintiff when they did; for I think that a court of justice would have acted in the same way on the same materials if there was reason to believe that they were true. I agree with the District Judge in thinking that the three members of the committee who signed the order exhibit N were not actuated by dishonest motives or personal ill-will against the plaintiff. It is not alleged that the third defendant, one of the signatories now deceased, had any personal spite against the plaintiff, and this to begin with is a very material point in favour of the *bona fides* of the order. The circumstances relied on as showing a personal animus against the plaintiff on the part of the other two committee members are not, in my opinion, sufficient to prove it. In regard to the first defendant all that is shown is that he had had a difference of opinion with the fifth defendant respecting the dismissal of the trustees of another temple, the Lalgudi temple, and it is said that in consequence of that he had threatened the fifth defendant to do harm to his cousin, the plaintiff. As it is a fact that the first defendant had protested against the appointment of the plaintiff from the outset, I do not see how any subsequent dispute between him and the fifth defendant could have been the cause of the first defendant's objection to the plaintiff. That objection was never disguised, and I think the first defendant is entitled to be credited with honesty in his objection to the plaintiff's appointment and management. It was mainly on the ground that he was a Vadagalai and therefore not fit to manage this Tengelal temple; and there was no *odium theologicum* on the first defendant's part, for he is neither a Tengelal nor a Vadagalai but a Shivite. I believe, therefore, that it was on public grounds that he objected to the plaintiff's appointment

at first and afterwards ordered his suspension when he found that the appointment had actually led, as he thought it would, to mischievous results.

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In regard to the second defendant there is the fact that he was superseded in the management of this temple by the plaintiff. So that it is possible that his feelings towards the plaintiff were not altogether amicable. But there is nothing to show that he ever evinced any hostility to the plaintiff on that ground. Though he had lost the managership of the temple he had achieved the higher position of a member of the temple committee and was probably just as content with that position as the one he had lost and which he could not recover now that he was a member of the committee. I find nothing in any of the other circumstances alleged against the second defendant as showing his personal animosity to the plaintiff, as I find the acts of the second defendant in connection with the plaintiff were acts performed by the second defendant in his official capacity in which no bias against the plaintiff was even shown. It should be noticed that the fourth member of the committee did not disapprove of the action being taken by the other three members, but only held his hand, thinking that an explanation from the plaintiff should first be called for. This of itself shows that there were matters against the plaintiff calling for explanation at least.

The fifth member is the fifth defendant who, of course, did not join in the order made against his nominee and cousin. I am therefore of opinion that as respects the order of suspension the three members of the committee were well within their rights and that they acted entirely in what they thought to be the interests of the temple in suspending the plaintiff.

To come to the subsequent order of dismissal by the same three members, I am bound to find that they acted without good and sufficient cause, although I attribute no actual *mala fides* to them in so doing. By defying the committee the plaintiff frustrated and prevented them from holding an inquiry and thereby no doubt put them in a fix, which affords them some excuse. But when informing the plaintiff in exhibit R of his dismissal they give him no reason whatever for the same. In the minute they recorded (exhibit S) giving their reasons for dismissing the plaintiff, they state generally that it was because he denied their authority over him and refused to give up the key of the cash

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chest and the records that were with him and at the same time threatened them with a suit on account of his suspension, which suit, as a matter of fact, he had already filed when they passed the order of dismissal. Now, looking to the fact that they gave the plaintiff no notice of their intention to dismiss him or why they dismissed him, and gave him no opportunity of explaining his conduct and that nothing else had occurred against him since his suspension except his refusal to submit to that order, and that in the suit that has now been tried they have failed to substantiate any of the charges laid against him excepting, perhaps, a charge of insubordination, I consider that they were not justified in dismissing him peremptorily only for contesting their authority. He appears to have done this under a *bona fide*, though mistaken, belief that the committee had no power to suspend him without previous inquiry, and I do not think that the letter of protest that he wrote (exhibit Q) went beyond the due bounds of decorum. At any rate, even after this trial, no good and sufficient cause for his dismissal has been proved, and the only ground on which the Judge considered that the dismissal was justified was his insubordination. That by itself, in the circumstances stated, was not of such a kind as to warrant his summary dismissal without his being allowed even the opportunity of an explanation. As before remarked, in order to justify the deprivation of his office there must have been such proved misconduct on the plaintiff's part as to satisfy a court of justice, or it must have been shown that it was absolutely necessary for the welfare of the temple that he should be removed. Neither of these points has been established by the defendants, and I accordingly decide that the plaintiff's dismissal was wrongful, albeit his suspension was right.

In the result the Appeal No. 22 will be referred to the Chief Justice under section 575, Code of Civil Procedure, and the Appeal No. 23 will be allowed and a decree given to plaintiff in the terms of the plaint with costs throughout.

[Appeal No. 22 of 1896 relating to the appellant's suspension from office came accordingly on for hearing before the Chief Justice sitting with SHEPHARD, and DAVIES, JJ.]

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and Narayana Ayyangar for appellant.

Sankaran Nayar for respondents Nos. 1 and 2.

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Bhashyam Ayyangar.—The two questions which arise are, first, whether the defendants had the power to suspend the plaintiff, and in the second if that power existed was there due cause for its exercise. It is true that in cases of clubs and other like associations the Court will not sit as a Court of appeal, but will only see that the proceedings have been duly held in the matter of giving notice to the person concerned and other like respects. It is otherwise in such cases as the present. The Court will form its own judgment as to the cause and ground of the dismissal, as in the case of a municipal commissioner under the District Municipalities Act, see *Vijaya Ragava v. Secretary of State for India*(1) where the plaintiff wanted to have it declared that his dismissal by Government from the office of the Municipal Commissioner was invalid and sought not restoration to office but damages. It was decided that Government could dismiss only when there was misconduct which it had to prove: the matter did not depend upon whether there had been misconduct in the opinion of Government. Now, could Government have suspended the municipal commissioner pending inquiry into the reports which led to his dismissal? Clearly it could not and similarly here the committee had no power to suspend the trustee. The power to dismiss does not include the power to suspend. Compare *Barton v. Taylor*(2). [COLLINS, C.J.:—Is there here any statutory power to dismiss or suspend?] Not in express terms. The power to dismiss comes from the old superintendence of the Board of Revenue which was subject to the Court's power to decide the question of misconduct. The Court, of course, when misconduct is proved, has the power to dismiss, but has the Court power to suspend? [DAVIES, J.—There is a difference between the positions of trustees under sections 3 and 4.] For the present point there is no difference, this case however is under section 3. Trustees under both of these sections were subject to the superintendence of the Board of Revenue under Regulation VII of 1817 and were alike subjects to be dismissed in the manner I have stated. So far as control was concerned no distinction was made between temples under section 3 and section 4 of the Religious Endowments Act in which trustees, managers and superintendents are all on the same footing. The plaintiff who was appointed to the office of trustee by exhibit A took an

(1) I.L.R., 7 Mad., 466.

(2) I.L.R., 11 App. Cas., 197, at p. 205.

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estate of freehold in the office during good behaviour from which the defendants purported to oust him by the order marked as exhibit N. [DAVIES, J.—That was an order of suspension pending enquiry.] In effect, it was a deprivation. It was indefinite in matter of time and even assuming that the power to suspend existed, it was bad for that reason and for want of sufficient cause and also for want of notice to the plaintiff, but there is no warrant in law for such an assumption. [COLLINS, C.J.—If they can dismiss, why cannot they suspend the trustee?] In the first place, because the trustee by his appointment became the grantee of the office in freehold; in the second place it becomes necessary to consider the limitations on the power of dismissal, which are stated in accordance with authority by SHEPHERD, J.; and in the third place it has to be noted that the original committee-men appointed by Government in 1863 and their successors have no property vested in them by their appointment, and the trustee whom they appoint becomes, *ipso facto*, the legal owner of the property. [DAVIES, J.—The whole argument reduces the power of the committee to nothing. COLLINS, C.J.—Take it that a trustee does something wrong, can the committee shut him out?] The answer is furnished by *Chinna Rangaiyangar v. Subbraya Mudali*(1) cited in the judgment of SHEPHERD, J. [COLLINS, C.J.:—He may be dismissed then subject to the effect of a suit by him for reinstatement.] That is so. See also the case reported next after the case last cited which continues the history under the names of the same parties. [DAVIES, J.—Does not removal imply dismissal and ejection from office?] The trustee cannot be ejected without recourse to law. [DAVIES, J.—Compare the case of the removal of a municipal officer, if Government determined to remove such an officer, must it bring an ejection suit?] If he is persistent in, for instance, attending the municipal meetings, Government can take the law into its own hands and abate his action of trespass. If he brings his action of trespass against the chairman of the municipality the defendant cannot justify by pleading only the Government order, but must show misconduct. The trustee's position is comparable with that of a Judge in England who does not like Indian officials hold office during Her Majesty's pleasure, but during good behaviour, see *Dunn v. The Queen*(2)

(1) 3 M.H.C.R., 334.

(2) [1896], 1 Q.B., 116.

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which emphasizes the distinction. The unsuccessful plaintiff there sued the authority which appointed him to an office not during good behaviour, but during Her Majesty's pleasure and subsequently dismissed him. In such a case it is unnecessary to prove misconduct to justify the dismissal. In *Chinna Rangaiyangar v. Subbraya Mudali*(1) suspend and remove are used as synonymous terms. [DAVIES, J.—Then it would be the same in the Civil Courts Act.] The words are controlled by the context. See also Act XXXVII of 1850, section 25, and *Ponduranga v. Nagappa*(2). The appointment is for life. There can be no temporary appointment of trustee or manager or superintendent. What then is meant by suspension pending enquiry? And what are its results? To whom does the property meanwhile belong? Suppose the suspension to be malicious, is the trustee meanwhile responsible or not? If somebody else is put in and brings a suit in his capacity as trustee and afterwards the suspension is shown to be unjustifiable, what is the Court to do in the suit of the person so put in? The position of a person having a freehold in his office and being suspended from that office is one which is inconceivable. There is no legal authority for the position that even a master having employed a servant for a term of years can suspend his servant from his employment. Properly regarded a suspension for misconduct is in law a dismissal provided that there is really misconduct; if the person suspended is afterwards reinstated it is in fact a re-appointment. Regulation VII of 1817 which gave the Board of Revenue no power to appoint a temporary trustee has to be imported into Act XX of 1863. See section 11 of the Regulation when the trustee is hereditary and section 12 when he is a nominee, and section 7 of the Act. [DAVIES, J.—What is removal?] Bringing about the end of his legal office and cessation of his powers as office holder. [DAVIES, J.—Can the committee eject him? *Chinna Rangaiyangar v. Subbraya Mudali*(1) is an authority for saying they can remove him without a suit.] Subject to the limitations already pointed out. But on general principles if there is power to dismiss a trustee and appoint a new one there is no power to suspend and appoint an *ad interim* trustee. Of course, a Court may in a suit appoint a receiver who will exercise the powers of the trustee who has been dismissed pending

(1) 3 M.H.C.R., 334.

(2) I.L.R., 12 Mad., 366.

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the decision whether he has been rightly dismissed. In *Natesa v. Ganapati*(1) with which must be taken *Sivasankara v. Vadagiri*(2), the word suspend is used as meaning a conditional dismissal. In this view it is important to refer back to *Barton v. Taylor*(3); see the second plea, page 202. [DAVIES, J.—Suppose the misconduct is not enough to justify dismissal, cannot they suspend?] No, they cannot temporarily divest him of his estate and they cannot punish. [DAVIES, J.—If Court makes an order of removal under Act XX of 1863, section 4, what is the effect?] He is a trespasser from that moment, and a suit to eject might, under certain circumstances, be necessary. Here, however, no misconduct before suspension has been established. [DAVIES, J.—There was a *prima facie* case.] But suspension which is necessarily a punishment could not be justified except where actual misconduct is shown. If suspension is justified by only a *prima facie* case not ultimately proved, then want of notice to the trustee is fatal. As to a committee's powers of control over trustees, I do not argue, and never did, that the committee could only compel trustees to produce accounts; they can issue lawful orders as to the application of endowments. Their powers are neither more nor less than those of the Board under the Regulation. It is not an ecclesiastical control but a control over the endowments. They have the powers succinctly stated in Act XX of 1863, section 22, which provides they shall be no longer exercised by the Government officers. They did not comprise any interference in the ceremonies. The management of endowments does not include these matters. The temple is not the endowment. There are temples without endowments, and they did not come under the Regulation of 1817 nor under the Act of 1863, see sections 3, 7, 22.

Sankaran Nayar.—The property is that of the idol not of the trustee, and the interest of the temple not of the trustee, is to be preserved, see *Maharance Shibessource Debia v. Mothooranith Acharjo*(4), and *Letterstedt v. Broers*(5) as to the removal of a trustee. [SHEPARD, J.—He can be removed, of course, but a strong case must be made out, so it has always been held in these cases.] The interest of the temple is the main thing to be observed. [COLLINS, C.J.—But here he has been declared not to

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have been properly dismissed. He is now the trustee of the temple.] The Regulation gave no new power to the Board of Revenue (*Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai*(1)), but only regulated and defined existing powers already vested in the Board. Moreover, the extent of the powers is not to be gauged by section 22 which is negative. Section 3 governs this temple. Sections 4, 5 and 6 are immaterial except for fact that section 6 refers to trustees as managers of these temples; then comes section 7 as to the constitution and duties of committees. Section 8 relates to the qualification of committee-men; section 9 to the tenure of office; section 10 to vacancies in the office. Then section 12 gives the committee powers over the temple and the property. [DAVIES, J.—This temple has no land but only a money income.] But the point is that it is not only the endowment as distinct from temple that is concerned, but the committee has power over the temple. [SHEPARD, J.—The Board of Revenue had not the jewels.] That was so in a sense, but there was no one else to hold them except the Government peishkar. The case of *Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai*(1) is on the facts *ad rem*—there there was a temporary injunction or suspension by the Collector of a newly-appointed trustee for one year. The argument was that the Collector was acting as agent of the zamindar. The Privy Council said no, but acting as Collector under the powers which existed before the Regulation. The Regulation does not limit the rights of the Collector, but prescribes how they are to be exercised. All the acts complained of in the present case were such as involved the use of temple property and the employ of the temple servants. [SHEPARD, J.—Can you read exhibit N and say that the committee had the interest of the temple primarily in their minds?] The matter is alleged at the outset—it is said he has occasioned loss, and also they allege misuse which suffices to bring it within the section. As to trustees of this temple, there is no reference to any trustee or manager in the early records; the Collector was in direct management. [SHEPARD, J.—You say the position of affairs was as in 1841 except that the committee is in the place of Collector.] Yes, under sections 7 and 12 except for section 11. [SHEPARD, J.—You say

(1) I.L.R., 14 Mad., 103.

(2) I.L.R., 13 Mad., 6.

(3) L.R., 11 App. Cas., 197.

(4) 13 M.I.A., 270, at p. 278.

(5) L.R., 9 App. Cas., 371.

(1) L.R., 1 I.A., 209, at p. 235.

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the decision that a committee cannot hold property is wrong.] Yes, if it is necessary I am prepared to show that. [SHEPARD, J.—Section 11 is important as recognizing a trustee apart from the committee.] The trustee took the place of the local agent not of the Board. The place of the Board was taken by the committee. It was Board and Collector till 1841, the Board and manager till 1863. The Board could remove the manager at any time unless they were precluded by the deed of appointment. In 1842 four stalathars were appointed hereditarily, and the trustees kept under control of the Board. As to the argument with reference to the suits, the Collector and any manager *de facto* could sue. The argument about suits and the ownership of the property falls to the ground if it is remembered that the idol is the owner, and suits are brought for it. See *Queen-Empress v. Muttusami Pillai*(1), where COLLINS, C.J., and PARKER, J., say:—"The Devasthanam committee appointed under Act XX of 1863 exercise the same powers of supervision that were formerly exercised by the Board of Revenue under Regulation VII of 1817, but the property of the temple is not vested in them, nor do they represent the property. The person who represents the property is the trustee or manager, who is indeed appointed, and may, no doubt, be removed by the committee for sufficient cause. But the trustee or manager is not in the position of a clerk or servant removable at the pleasure of the committee. He holds his office permanently, though subject to removal for misconduct. It was held in *Ponduranga v. Nagappa*(2) that the members of a devasthanam committee were not entitled as against the trustee or manager to be put in possession of the property of the temple or to the receipt of its income. The right view appears to be that the deity is regarded as the owner of the temple property, and the trustee or the manager appointed by the committee is the agent of the deity subject to the committee's control." The manager is an agent of the idol only subject to the committee's control. Where the action of the committee is in question, it has to be considered whether it is against the interest of the idol in the particular circumstances. As to the decision in

(1) Criminal Appeal No. 215 of 1895 (unreported).
(2) I.L.R., 12 Mad., 366.

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Chinna Rangaiyengar v. Subbraya Mudali(1), it shows that powers to dismiss and suspend are all traceable to the express powers of general superintendence, and must be judged as any other act of general superintendence is to be judged. So the powers are not to be construed as statutory powers. Were it so, it might be that power to dismiss would not include power to suspend. In *Natesa v. Ganapati*(2) if there had not been so many trustees the case would have been different, and the result might have been different. Before the case of *Chinna Rangaiyengar v. Subbraya Mudali*(1), the Sudder Court first held that Civil Courts had no power as to dismissal only the Board (*Dascekamiengar v. Singamiengar*(3), see also the decision in *Kassiyassy Kistna Putter v. Vangala Shangaranat Josser*(4)). The High Court said we will not go so far as that, but will allow the person dismissed to go to Court after dismissal. The second Sudder case quoted above took the middle course and said that the person aggrieved might go either to the Board of Revenue or to the Court. This explains *Chinna Rangaiyengar v. Subbraya Mudali*(1) which does not rule that any new rights (not enjoyed by the Board of Revenue) were given by Act XX of 1863 to the committee. Page 76 of Book III gives the history between 1841 and 1863. See *Venkatasa Naidu v. Sadagopasami Iyer*(5) and *Jusagheri Gosamiar v. The Collector of Tanjore*(6). This Srirangam temple is admittedly under section 3 of Act XX of 1863. Section 7 of the Act embodies sections 11, 12 and 13 of the Regulation, but that presupposes a vacancy, i.e., a previous manager's superintendence. What was to be done where as here there was none such? Clearly the Board could appoint, not therefore under the section, but under its general powers of superintendence. *Barton v. Taylor*(7) quoted on the other side helps me, because it recognizes the distinction between suspension and dismissal: but it held that although there were no rules the power was not to be used further than necessary. [SHEPARD, J.—It was said it could not be done punitively but by way of self-defence.] My contention is that the suspension was necessary in the interests of the trust. It is

(1) 3 M.H.C.R., 334. (2) I.L.R., 14 Mad., 103.
(3) Sudder Adalat Decisions of 1857, p. 5.
(4) Sudder Adalat Decisions of 1858, p. 39.
(5) 4 M.H.C.R., 404, at p. 408. (6) 5 M.H.C.R., 334, at p. 341,
(7) L.R., 11 App. Cas., 197.

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to be noted also that there the person suspended was not a subordinate, but an equal member of the assembly. As to punitive suspension *Natesa v. Ganapati*(1) shows it is legal under this Act to suspend or dismiss. Compare also District Municipalities Act IV of 1884, section 42; Local Boards Act V of 1884, section 45; Civil Courts Act, section 18; the Enquiry into offences of public servants, Act XXXVII of 1850, section 25, and Legal Practitioners Act XVIII of 1879, section 14. The committee can be the trustees, see section 12 of Act XX of 1863; they are not always the only trustee (*Ponduranga v. Nagappa*(2)), but see *Ramiengar v. G. Pandarasannada*(3), which says that section 4 refers to cases where the right of management is shown and not only actual possession and management. The case of *Vijaya Ragava v. Secretary of State for India*(4) does not apply; there there was no question of general superintendence, and no question of a subordinate, but the question related to a statutory power, and in such a case suspension is unnecessary, because the councillor has no executive function, and there was no obstruction. [DAVIES, J.—Also that was only an appointment for a term.] As to the evidence—can this bench go into evidence? or only into the point of law referred? See section 575, Civil Procedure Code.

[*Per cur.*—The whole appeal is referred and the whole is open for argument. SHEPHARD, J.—But you must assume that the other appeal is rightly decided and there was no cause for dismissal.]

The evidence duly considered is sufficient to justify the suspension. *Hayman v. Governors of Rugby School*(5) shows that the discretion of a committee cannot be overruled; and that discretion can be exercised on evidence not strictly proved, see *In re Burnham National Schools*(6).

Bhashyam Ayyangar in reply: referred to *Venkatesa Nayudu v. Shri Shatagopa Swami*(7). As to *Rajah Muttu Ramalinga Setupati v. Perianayagum Pillai*(8), the sovereign having power to see that the funds were devoted to proper purposes and to appoint trustees, the question there was whether Collector's act should be ascribed to him as representative of Government or as representative of zamindar; the Privy Council said the former.

(1) I.L.R., 14 Mad., 103. (2) I.L.R., 12 Mad., 366. (3) 5 M.H.C.R., 53.

(4) I.L.R., 7 Mad., 466. (5) I.R., 18 Eq., 28, at p. 72.

(6) I.R., 17 Eq., 241, at p. 248. (7) 7 M.H.C.R., 77, at p. 81.

(8) L.R., 1 I.A., 209.

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COLLINS, C.J.—This appeal was re-heard by SHEPHARD and DAVIES, JJ., and myself under the provisions of section 575 of the Code of Civil Procedure, the two first-named Judges having differed in opinion.

The suit was brought in the District Court of Trichinopoly by the plaintiff—the permanent trustee of the Srirangam temple—against the temple committee of the said temple for suspending him from performing the duties of his office—claiming an injunction and also damages.

I have to consider two questions—*firstly*, has the committee power to suspend the trustee of the temple; and *secondly*, if the power exists, were the members of the committee justified under the circumstances in exercising the power?

This is one of those frequent disputes between the worshippers of Vishnu—calling themselves, respectively, Vadagalais and Tengalais—and it arose in this wise;—there was a vacancy in the office of trustee of the Srirangam temple, and on the 1st of May 1892 the plaintiff was elected by a majority of the then existing committee permanent trustee and manager of the temple. The temple is not a purely Tengalai temple (see Acting District Judge's proceedings), although the majority of the worshippers as well as the officials are undoubtedly Tengalais—the plaintiff was a Vadagalai. Sometime after the plaintiff was appointed some vacancies in the committee were filled up, and the majority of that body were Tengalais. As might be expected, petitions were at once presented against the plaintiff. He was charged with having obtained the office of trustee by fraudulent or improper means—that he unduly favoured his relative, the fifth defendant,—and that in the matter of ritual and the observance of the ceremonies he had not observed the usual customs, had used the revenues of the temple improperly and by various means had outraged the feelings of the Tengalai sect. These charges against the plaintiff were, if true, sufficiently serious to justify the committee in holding an enquiry.

All they appear to have done, however, was to ask some of the petitioners, if they could prove the allegations contained in the petition, and they naturally received an answer in the affirmative. The majority of the committee thereupon wrote various minutes recommending that the plaintiff should be suspended—one of the grounds being that plaintiff was a Vadagalai, whereas the temple

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is a Tungalai one, and they also suggested that disturbances might take place during the festival. This festival commenced in December and the principal day of the festival was the 30th December 1892, on which day special honours would be paid to plaintiff as trustee. On the 29th December 1892 the first, second and third defendants served on the plaintiff the following order (exhibit N) :—

“Yadast from the members of the committee for the devas-
 “tanam of Trichinopoly taluk to K. Seshadri Ayyangar, perma-
 “nent manager of Srirangam devastanam.

“As it is necessary that you should be suspended from doing
 “the duties of manager pending the enquiry and result of the
 “petitions received in the office of the committee in which it is
 “stated, among other things, while there were three members on
 “the committee, you were appointed as manager by two of them
 “without the cognizance of the third, which is contrary to rules,
 “that one of the members who so appointed you was your near
 “relation, namely, your brother, that the other member appointed
 “you out of fear, learning that you attempt to take out a civil
 “warrant against him when he was so ill as to be in his last
 “moments, you having previously presented an execution petition
 “to the Court for the execution of a decree you had obtained
 “against him and caused an objection notice to be served on him,
 “and also from a desire for money, that within the short period
 “that has elapsed after you became a manager you have caused
 “loss of property and money to the devastanam, that you have
 “conducted several things in the temple that are contrary to
 “custom, so as to cause the occurrence of riots concerning the
 “Tungalais and the Vadagalais, that you conducted the Tidal
 “festival of the 28th Adi on the 29th, contrary to the temple
 “rules and long custom, that you committed in connection with it
 “irregular acts very disrespectful to the God and that you so
 “conducted the festival contrary to custom out of regard for
 “M.R.Ry. Vasudeva Ayyangar Avargal, who is your brother and
 “a committee member, you shall cease to do the devastanam
 “duties from the date of receipt of this yadast. Further, you
 “shall deliver charge of all proceedings and records connected
 “with devastanam, that are with you, to T. Ratna Mudaliar
 “Avargal, who is another manager, and report (that you have
 “done so).

“You will be informed of the time when the enquiry into the
 “petitions is to be commenced.

29th December 1892. (Signed) Krishna Ayyangar,
 („) Tota Ramasami Chetti,
 („) S. Nataraja Ayyar,
Committee Members.”

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It will be observed that the charges against the plaintiff refer to the past; that the first charge is that the plaintiff was illegally elected to the office of trustee. He is not called upon for any explanation, but is then and there suspended on the eve of the 30th December—the day on which certain honours would be paid to him.

In answer to N the plaintiff sent exhibit Q :—

“To

THE MEMBERS OF THE DEVASTANAM COMMITTEE,
Trichinopoly Taluk.

“Yadast sent by K. Seshadri Ayyangar Avargal, permanent
 “manager of Srirangam devastanam.

“The yadast No. 17, dated 29th ultimo, has been received from
 “that office.

“We, as far as we know, cannot understand, if there is any
 “rule that the members could accept the petitions referred to in
 “the yadast, or that such proceedings could be taken thereupon
 “or that we should be bound thereby.

“As steps should be taken after knowing the contents, &c.,
 “of the said petitions, I request that true copies may be caused to
 “be made of the said petitions and of the proceedings in connection
 “with them existing in the office of the members and of the
 “circulation proceedings and forwarded to me within three days.
 9-1-93. (Signed) Seshadri Ayyangar.”

Exhibit Q is said to be grossly insubordinate and upon its receipt the committee at once dismissed the plaintiff from his office.

The plaintiff thereupon commenced two actions against the committee in the District Court of Trichinopoly—one for suspending him and the other for dismissing him. Both suits were tried together. All the charges of misconduct against the plaintiff failed, but the District Judge, in a not very satisfactory judgment, held that the suspension and dismissal were both justified—the dismissal on the ground that exhibit Q was grossly insubordinate.

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Exhibit Q appears to me a proper reply to the committee who had suspended plaintiff, and contains, as far as I can gather, no elements of insubordination, and I entirely differ from the view taken by the District Judge on this matter.

A Divisional Bench, consisting of SHEPHARD and DAVIES, JJ., reversed the decree of the District Judge so far as the dismissal was concerned for the reasons given in their judgments, but differed as to the right of the committee to suspend him, SHEPHARD, J., holding there was no power to suspend plaintiff, and awarding him damages for such suspension, and DAVIES, J., holding that the committee had the power to suspend and was justified in the course they adopted.

The Acting Advocate-General, for the plaintiff—appellant, contends that the committee has no power to dismiss the trustee without calling upon him to show cause why he should not be so dismissed; that he cannot be dismissed except for misconduct in the performance of the duties of his office; and he denies altogether that the committee can suspend, and he further argues that the appellant was guilty of no offence that warranted either his dismissal or suspension. Mr. Sankaran Nayar, for the respondents, contends that the committee has full power at their discretion either to suspend or dismiss a trustee and, further, that in this case the committee was justified in suspending the plaintiff, and that they acted in good faith and in the interest of the temple.

It is true that the British Government had assumed a certain control over these endowments, apparently from the time they took possession of the country. In *Rajah Muttu Ramalinga Setupati v. Perianayagam Pillai* (1), the Privy Council stated that the British Government, by virtue of its sovereign power, asserted, as the former rulers of the country had done, the right to visit endowments of this kind and to prevent and redress abuses in their management.

The Government thus claimed and exercised a general power of superintendence over the temples and by Regulation VII of 1817 conferred that right upon the Board of Revenue. In the preamble of that Regulation (VII of 1817) it is stated that “the Regulation was for the due appropriation of the rents and produce of lands granted for the support of . . . Hindu temples and

“that there are grounds to believe that in many instances the produce of such endowments has been misappropriated and that it is the duty of the Government to provide that all such endowments be applied according to the real intent and will of the grantor.” The Regulation, therefore, enacts that the general superintendence of all endowments in land or money for the support of Hindu temples be vested in the Board of Revenue—such Board to take measures for the due appropriation of such endowments—to appoint agents—the Collector of the Zillah to be one—to ascertain particulars of such endowments and to report to the Board the names of the present trustees or managers of such institutions and by what authority appointed—such agents are to recommend fit persons for the confirmation of the Board of Revenue in cases where the right of nomination appertains to Government and the Board may appoint such persons so recommended or make such other provision for the trust, management or superintendence of such institutions as may to them seem right. The Regulation also enacts that individuals deeming themselves injured by any orders passed under this Regulation, may sue for the recovery of their rights or for damages.

By clause XV, trustees, managers or superintendents guilty of fraud or embezzlement of the revenues, funds or other property of the said institutions shall be punished.

The question now arises what was the general superintending power after 1817 possessed by the Board of Revenue and conferred by the Regulation?

The Board could undoubtedly prevent and redress abuses; but in my opinion an enquiry must take place to ascertain if such abuses really existed, and if it was found that such did exist, it could be prevented and redressed; but if any individual considered himself injured by any order of the Board he might sue and claim damages for such injury (clause XIV). I am of opinion that the Board of Revenue possessed no arbitrary power. A trustee or manager, for instance, could not be dismissed or suspended at the mere will and pleasure of the Board, but only for just cause which must be ascertained by enquiry. From 1817 to 1841 the Board of Revenue exercised the general superintendence before alluded to, but in the latter year the Government resolved to relinquish all interference with native temples, reserving only to themselves the management of the lands endowed.

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By Act XX of 1863, section 1, so much of Regulation VII of 1817 (Madras Code) as related to endowments for the support of Hindu temples or other religious purposes was repealed.

Section 3 enacts that in case of every temple. . . . to which the provisions of Regulation VII of 1817 are applicable and the nomination of the trustee, manager or superintendent whereof at the time of the passing of this Act is vested in or may be exercised by the Government or any public officer or in which the nomination of any such trustee, &c., shall be subject to the confirmation of the Government or any public officer, the Local Government shall make special provision. (It is conceded that the plaintiff's office is included in this section).

Section 7 enacts that in all cases described in section 3 the Local Government shall appoint one or more committee in every division or district and such committee . . . shall exercise all the powers heretofore performed by the Board of Revenue and local agents, except in respect of property specially provided for under section 21 of the Act.

By section 11 no member of a committee shall be a trustee or manager of a temple under charge of such committee. The committee therefore appointed under this Act, have the power conferred on the Board Revenue by Regulation VII of 1817—that is a general superintendence and a power to prevent and redress abuses and nothing more.

Section 14 gives any person interested in the temple power to sue the trustee or manager or the member of any committee of a temple for any misfeasance, breach of trust or neglect of duty. The Court may direct the specific performance of any act by such trustee, manager or member of a committee, may decree damages and costs against them and may also direct their removal. I will now consider the position of a trustee or manager of such religious institutions as are referred to in Act XX of 1863, section 3. It is clear that he is not a servant of the committee. He holds his office permanently. He represents the property of the temple which is vested in law in the God or idol. (See *Queen-Empress v. Muttusami Pillai*(1).) Under certain circumstances he may be dismissed by the committee, but only on good and sufficient grounds and after an enquiry into the facts, and such dismissal may be set aside by

(1) See ante, page 212.

the Courts of Law. In *Chinna Rangaiyangar v. Subbraya Mudali*(1) SCOTLAND, C.J., and COLLETT, J., held that a trustee could be dismissed on good and sufficient grounds without having recourse to a civil suit, and I am bound by that decision.

The learned Judges in *Chinna Rangaiyangar v. Subbraya Mudali*(1) observe that the authority to suspend or remove for just cause was properly incident to the principal duties and responsibilities of the Board of Revenue, and was impliedly given, and they refer to some cases decided by the Court of Sadr Adalat. These cases, however, relate to removal of the trustee for misappropriation of the funds or fraudulent abuse of the trust. I am doubtful whether the Judges in *Chinna Rangaiyangar v. Subbraya Mudali*(1) meant that the Board of Revenue had a general power to remove trustees or could only remove them if they had been guilty of offences mentioned in clause 15 of the Regulation VII of 1817.

The power of suspension by the committee is, in my judgment, the same as the power of dismissal. The committee, having made due enquiry and having called on the trustee for an explanation, may suspend for good and sufficient causes, but not otherwise. In the present case I am of opinion that the suspension was illegal—no sufficient enquiry having been made into the allegations contained in exhibit N, and no explanation required from the plaintiff; and I further think, after reading and considering the whole of the evidence, that the committee were actuated throughout by the fact that the plaintiff was a Vadagalai and that the principal cause of the suspension on the 29th December was to prevent the plaintiff from receiving the usual honours paid to a trustee on one of the principal days of the festival, viz., December 30th. I do not think the action of the committee in suspending plaintiff was for the purpose of preventing a disturbance as now alleged by the respondent.

I am of opinion that the plaintiff is entitled to damages and the amount decreed by Mr. Justice Shephard—one thousand rupees—appears to me a reasonable sum. The decree of the District Court must be reversed, and a decree given for plaintiff in the terms of the prayer in the plaint with Rs. 1,000 damages. The damages and the costs throughout are to be paid by the first, second and third respondents—the other respondents will bear their own costs.

(1) 3 M.H.C.R., 334.

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SHEPHARD, J.—I adhere to the opinion already expressed by me, and I concur in the terms of the decree proposed by the Chief Justice.

DAVIES, J.—I adhere to my judgment as already pronounced.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

1898.
February 3,
21.
March 10.

RAMASAMAYYAN AND OTHERS (DEFENDANTS NOS. 1, 3 AND 4),
APPELLANTS,

v.

VIRASAMI AYYAR (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, s. 85—Mortgage suit against Hindu mortgagor and two sons—Sale of mortgage premises—Subsequent suit for share of a third son.

A Hindu having three sons executed a mortgage in favour of the defendants, who subsequently obtained a decree for sale on the mortgage and brought the property to sale in execution and purchased it themselves, the mortgagor and two only of his sons being brought on to the record. It did not appear whether the plaintiffs in that suit were aware of the interest of the third son, who now sued to recover his one-quarter share of the mortgage premises claiming that the previous proceedings were not binding on him and alleging that the mortgage was unsupported by consideration:

Held, that the plaintiff was entitled to have the question tried whether there was really a debt owing by the father to support the mortgage.

Quare: Whether *Bhawani Prasad v. Kallu* (I.L.R., 17 All., 537) lays down the right rule with reference to Transfer of Property Act, section 85.

SECOND APPEAL against the decree of F. H. Hamnett, Acting District Judge of Tanjore, in Appeal Suit No. 141 of 1896, reversing the decree of T. Venkataramayya, District Munsif of Kumbakonam, in Original Suit No. 379 of 1894.

The plaintiff sued for possession of a one-fourth share of certain land which had been mortgaged on 18th October 1875 by his father to the father of defendants Nos. 1 to 4. On the death of the mortgagee the agent of the Court of Wards had taken

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charge of his estate on behalf of the defendants, and a suit on the mortgage had been brought on their behalf in 1889 against the mortgagor and his sons other than the present plaintiff. A decree for sale was passed and the land having been brought to sale was purchased on behalf of the present defendants. The plaintiff now sued as above to recover his one-fourth share in the land alleging that there was no consideration for the mortgage and that, as he was not a party to the mortgage suit, the decree passed therein was not binding on him. It was not shown that the plaintiffs in the former suit were then aware of the plaintiff's interest. The District Munsif dismissed the suit: but his decree was reversed on appeal by the District Judge who passed a decree as prayed, holding that by reason of Transfer of Property Act, section 85, the decree in the mortgage suit and the subsequent proceedings in execution were not binding on the plaintiff and were inoperative so far as his share in the property was concerned.

The defendants Nos. 1, 3 and 4 preferred this second appeal.

V. Krishnasami Ayyar and R. A. Krishnasami Ayyar for appellants.

Pattabhirama Ayyar and Balamukunda Ayyar for respondent.

SHEPHARD, J.—The parties to this appeal are, on the one hand, the infant son of a judgment-debtor named Ramayyan, and on the other the judgment-creditors of the same person who, in execution of their decree, purchased the property previously held by them under an hypothecation. The District Munsif dismissed the suit, without hearing any evidence, on the ground that the plaintiff disclosed no cause of action. The District Judge on appeal reversed this decree and granted a decree in the plaintiff's favour, holding that the plaintiff's original interest in the property had been in no way affected by the sale thereof, because the plaintiff had not been joined with his father and brother in the suit which led up to the sale. The District Judge bases his judgment on the ruling of the Full Bench of the Allahabad High Court in *Bhawani Prasad v. Kallu*(1). In that case the plaintiff was similar to the plaintiff now before us in that it did not allege that the debt incurred by the father was incurred for immoral or impious purposes. The plaintiff there relied, as the plaintiff-respondent does here, on the fact that he was no party to the mortgage decree obtained against

* Second Appeal No. 1495 of 1896.

(1) I.L.R., 17 All., 537.

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his father. The judgment of the majority of the Court in that case, like the argument in the present case, proceeded entirely upon the ground that the law has been altered by the enactment of section 85 of the Transfer of Property Act, which directs that "all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage. Provided that the plaintiff has notice of such interest." Independently of the statute, the position of a purchaser, who in a sale in execution of a decree against the father bought the entirety of the estate, is the same as regards the son, whether the decree was a mortgage decree or a decree for money. In either case all that the son can claim is that, not having been a party to the sale or the proceedings which led up to it, he should have an opportunity of showing that there was in reality no such debt as to justify the sale (*Mussamut Nanomi Babuasin v. Modun Mohun*(1), *Kunhali Beari v. Keshava Shanbaga*(2)).

The theory is that as the father may, in order to pay a just debt, legally sell the whole estate without suit; so his creditor may bring about such sale by the intervention of a suit. It is not necessary that the son shall be called in whether the sale is voluntary or procured by a proceeding in *invitum*, and there is no object in joining him except to preclude him from afterwards questioning the nature of the debt. According to the decision in *Bhawani Prasad v. Kallu*(3) a distinction must be made between a voluntary and an enforced sale, when such sale is the consequence of a mortgage suit; and in this latter case it must be held that no interest passes except that of those who are made parties to the suit, and this distinction is insisted upon because the Legislature has enacted as a written rule of law what was previously a well-recognized rule of procedure. Having regard to the theory above stated I cannot think that this effect should be given to the section. The section is certainly imperative in its terms. Expressed in any other mood it would be vain. But a sanction is not wanting, for inconvenient consequences may follow on a neglect of the law. The mortgagee who omits to join persons interested in the property may have his suit dismissed or, if he obtains a decree, may find notwithstanding that he has to institute

(1) L.R., 13 I.A., 1 at p. 9.

(2) I.L.R., 11 Mad., 64, at p. 76.

(3) I.L.R., 17 All., 537.

or defend another suit. Nevertheless as against the Hindu father the decree which is passed in the absence of his sons is a good and valid decree. The creditor, although he may have failed to obey the rule contained in the section, has got the decree which he requires as a foundation for his application to sell the whole estate. In the Allahabad Court this proposition would be denied. In effect it must be said that the decree though valid against the father, has since the Act was passed lost the peculiar quality which it previously possessed. It can no longer be made the means of compelling the father to sell the estate. This seems to me a conclusion which is wholly unwarranted by the terms of the section. I agree with Mr. Justice Banerji in the reasons which he has given for dissenting from the rest of the Court. In addition I would only refer to the proviso appended to the section. The effect of the proviso is that, unless the mortgagee has notice of the existence of the son, he is not affected by the section, and therefore presumably the decree which he obtains and the subsequent proceedings therein are not vitiated by the omission to join the son. It follows that the extent of the interest obtained by the purchaser may depend on the knowledge or want of knowledge of the mortgagee at the time of the institution of the suit.

I think we ought to be slow to adopt a construction which would lead to this anomaly as well as the other anomalies dwelt upon by Mr. Justice Banerji.

For these reasons I would reverse the decree of the District Judge, but inasmuch as the plaint in effect alleges that there really was no debt owing by the father I think the respondent is entitled to have that question tried. It is argued on behalf of the appellant that the only question which the son of a Hindu debtor can raise is as to the nature of the debt, and that he cannot question the existence of a debt which forms the foundation of a decree against his father. According to this contention it would be open to the father by confessing judgment to procure by indirect means the sale of the entire estate when he could not lawfully alienate it by a voluntary conveyance. The limitation which is imposed by Hindu law on the father's power of alienation would become illusory.

But this is clearly not the law. Whether the sale is a voluntary or an enforced sale, its validity depends upon the existence of a just debt in satisfaction of which the sale is effected. If authority

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is needed the *dictum* in *Mussamut Nanomi Babuasin v. Modun Mohun*(1) may be cited as showing that the son may question alike the existence and the nature of the debt in consequence of which the sale has taken place.

The decrees of both Courts must be reversed and the suit must be remanded for retrial by the District Munsif. It must be understood that no questions have been decided in this appeal save those two questions which arise upon the allegations made in the plaint. The respondents must pay the costs of this appeal. Other costs will be provided for in the revised decree.

DAVIES, J.—I agree to the reversal of the Lower Appellate Court's decree, because there was no allegation in the plaint and nothing to show that the mortgagees who brought the suit wherein the sale was decreed had notice of the plaintiff's interest. Their omission therefore to make the plaintiff also a party to that suit did not *ipso facto* entitle the plaintiff to a decree, for in the Allahabad case the ruling in which the Judge has followed, and with which I cannot say that I disagree, the fact was there had been such notice. I also agree to the reversal of the decree of the Court of First Instance and to the order of remand which my learned colleague has directed in the case, because there can be no doubt that the plaintiff's suit lies to show, as is alleged in the plaint, that there was no consideration for the mortgage or, in other words, the non-existence of the debt by which it is sought to bind the plaintiff's share in the family property.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

CHINNA OBAYYA (PLAINTIFF), APPELLANT,

v.

SURA REDDI AND ANOTHER (DEFENDANTS NOS. 1 AND 2),
RESPONDENTS.*

Hindu law—Illatom son-in-law—Right to partition.

The question whether an illatom son-in-law can demand partition from his father-in-law is not a pure question of law, but one that depends upon custom and can only be determined upon evidence.

(1) L.R., 18 I.A., 1 at p. 18.

* Appeal No. 71 of 1906.

APPEAL against the decree of W. G. Underwood, District Judge of Cuddapah, in Original Suit No. 10 of 1894.

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The plaintiff was the illatom son-in-law of defendant No. 1, and he brought this suit for partition of the family property. Among the issues framed, the eleventh was:—"Is the suit prematurely brought?" The District Judge decided this issue against the plaintiff and dismissed the suit on the ground that an illatom son-in-law is not entitled to partition during the life-time of his father-in-law.

The plaintiff preferred this appeal.

Ramachandra Rau Saheb for appellant.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar), Ethiraja Mudaliar, and Tiruvenkatachariar for respondents.

JUDGMENT.—The question whether an illatom son-in-law can demand partition from his father-in-law is not a pure question of law, as the Judge has treated it, but one that depends upon custom and can only be determined upon evidence taken as to the custom. Such a question was indeed raised in *Hanumantamma v. Rami Reddi*(1), but was not decided in that case. The Judge should, therefore, have acceded to the plaintiff's request to permit him to adduce evidence as to the custom alleged to be one of the incidents of an illatom adoption. We must, therefore, reverse the decree of the Judge and remand the case for re-trial, directing the eleventh issue to be dropped altogether and the following issue to be substituted for it, viz., whether it is one of the incidents of an illatom adoption that the adoptee may demand partition from his father-in-law. The costs hitherto incurred will be provided for in the revised decree.

(1) I.L.R., 4 Mad., 272.]

APPELLATE CIVIL.

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

1897.
April 2.

KRISHNA BHATTA (PLAINTIFF), APPELLANT,

v.

SUBRAYA AND OTHERS (DEFENDANTS NOS. 1, 3 AND 2),
RESPONDENTS.*

Limitation Act—Act XV of 1877, s. 5—Appeal admitted after time by District Court—Power of Subordinate Court to whom the appeal is transferred.

A District Court by an *ex parte* order admitted an appeal filed after the expiry of the period of limitation and transferred it for disposal to the Subordinate Court, in which objection was taken that the appeal was time-barred. The Subordinate Judge held that he could not entertain the objection, he heard the appeal and remanded the suit:

Held, that the Subordinate Court had jurisdiction to entertain and dispose of the objection, and that the objection was sound and that the order of remand should be set aside.

APPEAL against the order of U. Achutan Nayar, Subordinate Judge of South Canara, in Appeal Suit No. 160 of 1895, remanding to be re-heard Original Suit No. 37 of 1894 on the file of the District Munsif of Puttur.

This was a suit for money in which the District Munsif passed a decree for plaintiff. Defendants presented their appeal in due time to the District Court, together with an application for permission to appeal *in forma pauperis*. After a protracted inquiry the District Judge refused the application and rejected the appeal, which, however, he said he would admit on payment of the Court-fee. The appellant accordingly paid the Court-fee and the District Judge made an order, *ex parte*, admitting the appeal, notwithstanding that the period of limitation had already expired. The appeal was then referred by the District Judge to the Subordinate Judge for disposal. Objection was taken at the hearing on the ground of limitation, and *Bishnath Prasad v. Jagannath Prasad*(1) was quoted. The Subordinate Judge referred to *Patcha Saheb v. Sub-Collector of North Arcot*(2) and *Jhotee Sahoo v. Omesh Chunder Sircar*(3), and held that the appeal was not barred by limitation, and that, if it were, he had no jurisdiction to go behind the order of the

* Appeal against Order No. 58 of 1896.

(2) I.L.R., 15 Mad., 78.

(1) I.L.R., 13 All., 305.

(3) I.L.R., 5 Cal., 1.

District Court. In the event he reversed the decree of the District Munsif and remanded the suit.

The plaintiff preferred this appeal.

Narayana Rau for appellant.

Pattabhirama Ayyar for respondents.

JUDGMENT.—We have all the materials before us to form our opinion and have arrived at the conclusion that the District Judge acted illegally in admitting the appeal on the 12th June 1895. At that date the appeal was many months out of time, and the affidavit shows no ground for excusing the delay. The Subordinate Judge considers that he was not entitled to question the order of the District Judge and relies on *Jhotee Sahoo v. Omesh Chunder Sircar*(1).

But seeing that the order was *ex parte* and that the appeal was transferred by the District Judge to the Subordinate Judge, we think that upon that transfer all the powers of an Appellate Court became vested in the Subordinate Judge. Otherwise an appeal would be partly in one Court and partly in another.

We do not agree with the decision in *Jhotee Sahoo v. Omesh Chunder Sircar*(1). It is urged before us that the point of time cannot be taken on appeal from an order of remand, but if the Subordinate Judge was wrong in entertaining the appeal, it is clear that he ought not to have made an order of remand.

We must allow the appeal and set aside the order of the Subordinate Judge and restore the decree of the District Munsif with costs throughout.

APPELLATE CIVIL.

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

SANJIVI (DEFENDANT NO. 1). APPELLANT,

v.

JALAJAKSHI AND ANOTHER (PLAINTIFF AND HER REPRESENTATIVE),
RESPONDENTS.*

Hindu law—Devadasi—Adoption—Illegal purpose.

The plaintiff sued as the adopted daughter of a deceased dancing woman to recover a share of the property left by her. It appeared that the adoption of the

(1) I.L.R., 5 Cal., 1.

* Appeals Nos. 227 and 236 of 1895.

KRISHNA
BHATTA
v.
SUBRAYA.

1897.
July 8.

SANJIVI
v.
JALAJAKSHI.

plaintiff, which took place in 1871 when she was six years old, was made with the intention of bringing her up to practise prostitution even during her minority :

Held, that the adoption was invalid.

APPEAL against the decree of O. Chandu Menon, Subordinate Judge of South Canara, in Original Suit No. 41 of 1894.

The plaintiff sued to recover a moiety of the property left by a deceased dancing woman who had adopted successively the defendant and the plaintiff. The plaintiff's adoption took place about the year 1871. Issues were raised as to the validity of the adoption of the plaintiff. These issues were determined by the Subordinate Judge in favour of the plaintiff. He referred to *Chalakonda Alasani v. Chalakonda Ratnachalam*(1), *Kumakshi v. Nagarathnam*(2), *Venku v. Mahalinga*(3), and *Muttukannu v. Paramasami*(4), and in the result he passed a decree for the plaintiff.

The defendant No. 1 preferred this appeal.

Ramachandra Rau Saheb and *Madhava Rau* for appellant.

Narayana Rau for respondent No. 2.

JUDGMENT.—The plaintiff and first defendant are dancing girls. The plaintiff claims a share in the property of her adoptive mother, the deceased Lacha. The first defendant, another adopted daughter of Lacha, denies the plaintiff's adoption.

We have no doubt but that the plaintiff was brought up as an adopted daughter with the first defendant by the deceased Lacha. The evidence as to the fact of adoption is not very clear, but on the whole we accept the conclusion of the Subordinate Judge that there was an adoption and such adoption was, in effect, admitted by the first defendant so long ago as 1885. But the validity of the adoption is questioned on two grounds: firstly, because the adoption of the plaintiff, who was then a minor, was made after the Penal Code came into force, and with the intention of bringing her up to practise prostitution even during her minority and, secondly, because there is no sufficient proof of local usage to support the validity of an adoption by a dancing girl during the lifetime of a daughter previously adopted. We think that the first objection is valid. That the intention of the adoption was, as alleged, is clear from the evidence of the plaintiff's own second witness. The evidence shows that Lacha herself practised

(1) 2 M.H.C.R., 56.

(3) I.L.R., 11 Mad., 393.

(2) 5 M.H.C.R., 161.

(4) I.L.R., 12 Mad., 214.

prostitution and took the plaintiff and defendant with her to nautches during their minority.

The evidence also shows that, from the time that plaintiff and first defendant arrived at puberty, they have been prostitutes.

In these circumstances it is idle, in the absence of any trustworthy evidence to that effect, to contend, as plaintiff's vakil now does, that the plaintiff's adoption was with a view to giving her in marriage rather than for prostitution. An adoption made as this was with such intention after the Indian Penal Code came into force is illegal, and can give the plaintiff no right to claim the property of Lacha by inheritance. In this view it is not necessary to consider the second objection to the validity of the adoption. Both appeals must, therefore, be allowed with costs and the plaintiff's suit dismissed with costs.

APPELLATE CIVIL.

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

LOBO (DEFENDANT), APPELLANT,

v.

BRITO (PLAINTIFF), RESPONDENT.*

Specific Relief Act—Act I of 1877, s. 42—Benami purchase by a Government officer prohibited from acquiring land—Suit for declaration against benamidar.

The plaintiff sued for declaration of his title to certain land which had been purchased by him in the name of the defendant. The object of the transaction was to conceal from the Collector the fact that the plaintiff, who was a Tahsildar, had acquired property in his taluk contrary to the rules of his department :

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

APPEAL against the decree of U. Achutan Nayar, Acting Subordinate Judge of South Canara, in Original Suit No. 33 of 1895.

The plaintiff sued for a declaration of his title to certain land. The title-deeds of the land stood in the name of the defendant, but it had, in fact, been acquired by the plaintiff who was a Tahsildar and as such prohibited, by the order of Government, from acquiring property within his taluk either in his own name or in the

* Appeal No. 134 of 1896.

SANJIVI
v.
JALAJAKSHI.

1897.
September
22.

LEBO
v.
BATE.

name of others *benami* for him. The Subordinate Judge passed a decree for declaration as prayed.

The defendant preferred this appeal.

Sankaran Nayar for appellant.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and *Ayya Ayyar* for respondent.

JUDGMENT.—It is contended that because the plaintiff acquired the property in the defendant's name for the purpose of concealing it from Government, he being an official of Government, who was not authorized to acquire land, the plaintiff cannot recover possession of it from the defendant or obtain any relief in respect of it. We are unable to accept this view. No doubt the plaintiff intended to conceal the acquisition of the land from the authorities and acted dishonestly and in contravention of the rules of his department. But we do not think he can be said to have acted illegally so as to bring the case within the principle that a man is precluded from obtaining relief in respect of a transaction, the purpose of which was illegal and has been accomplished. As to the question whether a declaratory suit lay, we are of opinion that the Judge is right. The defendant never asserted he was in possession and the finding is that he was not.

We dismiss the appeal without costs, as also the memorandum of objections.

APPELLATE CIVIL.

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

SRINIVASA CHARLU (PLAINTIFF), PETITIONER,

v.

BALAJI RAU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Presidency Small Cause Courts' Act—Act XV of 1882, s. 37—Amendment Act—
Act I of 1895, s. 13—Powers of Full Bench—Appeal.

Act I of 1895, section 13, does not empower the Full Bench of the Presidency Court of Small Causes to entertain appeals of questions of fact against the decree of one of the Judges of the Court.

* Civil Revision Petition No. 375 of 1896.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the order of the Full Bench of the Presidency Court of Small Causes in Small Cause Suit No. 544 of 1896.

SRINIVASA
CHARLU
v.
BALAJI
RAU.

The petitioner was the plaintiff in the suit. The suit was dismissed and he made an application to the Full Bench on the ground that the evidence had been wrongly appreciated. The Full Bench declined to entertain the application and dismissed it. The grounds of his present petition were, *inter alia*, the following:—

“(1) The Full Bench of the Presidency Court of Small Causes has failed to exercise jurisdiction vested in it by law.

“(2) The Full Bench erred in dismissing the plaintiff's appeal to it.

“(3) The Full Bench ought to have held that, under the amended Presidency Small Cause Courts' Act I of 1895, an appeal is allowed to the Full Bench on questions of fact and law.

“(4) The Small Cause Judge having admittedly not acted upon the defendants' accounts, no valid reasons have been assigned for not accepting the payment of the 100 rupees in July 1893 as proved by the plaintiff's witnesses.”

Ranga Rau for petitioner.

Respondents were not represented.

JUDGMENT.—It is urged before us that the ruling of this Court in *Sadasook Gambir Chund v. Kannayya*(1) with regard to the powers of the Full Bench of the Presidency Small Cause Court to revise a decree of a single Judge or order a new trial under section 37 of Act XV of 1882 as it stood before amendment, is inapplicable since the amendment of the Act by section 13 of Act I of 1895.

We are unable to find any ground whatever for this contention. The alterations relied on are two in number. The first is merely an alteration in the title of the chapter. It is now entitled “new trials and appeals” instead of “new trials and rehearing.”

The change is intended merely to express more fully the subject of the chapter, for it contains the very important provision that “every decree and order of the Small Cause Court in a suit shall be final and conclusive”; in other words, that no appeal

(1) I.L.R., 19 Mad., 96.

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RAU.

shall lie. It is futile to argue that, because the word "appeals" appears in the title of the chapter, it must therefore allow appeals, notwithstanding the express words of section 37.

The second alteration is that in the present section 38, the words "where a suit has been contested" are introduced before the provisions which relate to the cases in which a new trial or revision may be allowed. The effect of this addition is to restrict, not to extend, the powers given in the section. Under the un-amended law those powers might have been exercised in any proper case without regard to the question whether the suit was contested or uncontested. Under the amended law those powers can only be exercised in contested cases. In other respects, the terms of the section remain exactly as they were before.

Thus the effect of the recent alteration is not to extend the powers of revision, as urged by the appellant, but, on the contrary, to limit them to contested cases. The limitations on those powers, which were shown in the ruling of this Court in the case above referred to, remain unaffected by the recent change in the law, and in addition there is now imposed this further limitation, viz., that the powers shall not be exercised at all in cases that have not been contested.

There is thus no ground for our interference with the order of the Full Bench of the Small Cause Court.

We dismiss this petition.

APPELLATE CIVIL.

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

CHINNASAMI PILLAI (PLAINTIFF), APPELLANT,

v.

KARUPPA UDAYAN AND OTHERS (DEFENDANTS Nos. 1 to 8
AND 10 AND 11), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, s. 2—Suits Valuation Act—Act VII of 1887,
s. 8—Suit for partition—Order by Appellate Court directing that the plaint be
returned—Appeal against such order—Amendment of memorandum of appeal.*

The plaintiff sued in the Court of the District Munsif to recover his share of family property. The amount of the property exceeded, but the amount of the

* Appeal against Order No. 184 of 1895.

share claimed was within the pecuniary limit of the jurisdiction of the District Munsif who passed a decree for the plaintiff. On appeal it was held that the suit was not within the jurisdiction of the Court. The decree accordingly was reversed and it was ordered that the plaint be returned for presentation to the proper Court. The plaintiff preferred this second appeal to the High Court:

Held, that the Lower Appellate Court had not passed a decree within the meaning of the Civil Procedure Code, section 2, and that plaintiff's remedy was not by way of a second appeal, but he should have proceeded under Civil Procedure Code, section 588.

The petition of appeal having been allowed to be amended in accordance with this ruling:

Held, that the Court of First Instance had jurisdiction to entertain the suit.

SECOND APPEAL against the decree of T. Ramachandra Rau, Subordinate Judge of Trichinopoly, in Appeal Suit No. 50 of 1893, reversing the decree of T. M. Rangachari, District Munsif of Trichinopoly, in Original Suit No. 99 of 1891.

The plaintiff sued for partition and possession of a one-fifth share of the family property worth Rs. 228-5-10 for recovery of his share of the profits for the three years preceding the suit, namely, Rs. 475-0-9, being one-fifth of Rs. 2,375-3-9. The District Munsif passed a decree for the plaintiff disallowing, however, thirteen of the items claimed. The Subordinate Judge, being of opinion that, as the value of the whole property was more than Rs. 2,500, the District Munsif had no jurisdiction, reversed the decree, on the authority of *Vydinatha v. Subramanya*(1). He accordingly directed the District Munsif to return the plaint to the plaintiff for presentation to the proper Court.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar for appellant.

Sundara Ayyar for respondents Nos. 1 to 5.

JUDGMENT.—On behalf of the respondent, it is objected that no second appeal lies in this case, inasmuch as the decision of the Subordinate Judge appealed against was not an adjudication, upon the right claimed or the defence set up, falling under section 2 of the Civil Procedure Code and therefore not a 'decree,' but that it was an 'order' directing the return of the plaint and therefore the appeal should have been preferred under section 588 of the Civil Procedure Code.

We think this contention is well founded and we are unable to agree with the view taken in *Bindeshri Chaubey v. Nandu*(2).

(1) I.L.R., 8 Mad., 235.

(2) I.L.R., 3 All., 456.

CHINNASAMI
PILLAI
v.
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UDAYAN.

CHINNASAMI
PILLAI
v.
KARUPPA
UDAYAN.

However, the case is one in which all that is required to be done to put matters right is a mere formal amendment in the petition of appeal, which we allow the appellant to make.

Now as to the Subordinate Judge's order itself, it is clearly wrong. In a case like this, whether it falls under section 8 of the Suits Valuation Act, or under 14 of Act III of 1873 the value for the computation of Court-fees and that for the purpose of jurisdiction are the same, viz., the value of the share claimed by the plaintiff. The District Munsif had jurisdiction to try the suit inasmuch as the value of such share was less than Rs. 2,500.

The order of the Subordinate Judge is set aside. The case should be restored to the file and dealt with according to law. We allow the appeal, but in the circumstances, without costs.

APPELLATE CIVIL.

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

RAJAH ESWARA DOSS (DEFENDANT), APPELLANT,

1897.
August 26.

VENKATAROYER (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 43—Rent Recovery Act (Madras) — Act VIII of 1865, s. 18—Suit by a landlord in the Court of the District Munsif for arrears of rent for two years—Subsequent attachment for rent of a third year accrued due at date of suit.

A zamindar brought a suit in the District Munsif's Court to recover from a tenant on his estate the arrears of rent for two years. Rent for the third year was also due. No claim for it was included in the suit, but the landlord attached the land by summary process under the Rent Recovery Act to recover it. The tenants sued in the Revenue Court under the Rent Recovery Act to have the attachment set aside as illegal:

Held, that the zamindar was not precluded by Civil Procedure Code, section 43, from pursuing his remedies under the Rent Recovery Act and that the attachment was not illegal.

SECOND APPEAL against the decree of S. Russell, District Judge of Chingleput, in Appeal Suit No. 55 of 1896, affirming the decision of M. Tillanayakam Pillai, Deputy Collector of Chingleput, in Summary Suit No. 87 of 1895.

* Second Appeals Nos. 68 to 71 of 1897.

RAJAH
ESWARA
DOSS
v.
VENKATA-
ROYER.

The defendant was a zamindar and the plaintiffs were tenants on his estate and they brought these suits under the Rent Recovery Act by way of appeal from the attachment of their land for arrears of rent for fasli 1303. It appeared that after these arrears had accrued due, the zamindar had sued his tenants in the District Munsif's Court for the arrears of rent for the two previous faslis. In the present cases the Deputy Collector held that the landlord was prevented by the provisions of Civil Procedure Code, section 43, from recovering the rent for fasli 1303 by summary process, and he accordingly declared the attachment to be illegal and directed that it be cancelled. The District Judge on appeal affirmed this decision, referring to *Taruck Chunder Mookerjee v. Panchu Mohini Debya* (1) and *Madho Prakash Singh v. Murli Manohar* (2).

The defendant preferred this second appeal.

Mr. N. Subramaniam for appellant.

Narayana Ayyangar for respondent.

JUDGMENT.—Though by section 43, Code of Civil Procedure, the landlord in circumstances such as these is precluded from suing for rent not included in his previous suit, this does not preclude him from adopting any other remedy the law gives him to enable him to recover his rent, as for instance by distraint under the Rent Recovery Act.

We must, therefore, reverse the decree of both the lower Courts and dismiss the plaintiff's suit with costs throughout.

APPELLATE CRIMINAL.

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

ADIKKAN (ACCUSED No. 1), PETITIONER,

v.

ALAGAN AND OTHERS (COMPLAINANT AND PROSECUTION WITNESSES)
RESPONDENTS.*

Criminal Procedure Code—Act X of 1882, ss. 211, 217 and 560.

A Magistrate, in acquitting a person accused on a charge of theft which he found to be false and malicious, awarded compensation to each of them to be

(1) I.L.R., 6 Calc., 791.

(2) I.L.R., 5 All., 406.

* Criminal Revision Case No. 345 of 1897.

1897.
November 1.

ADIKKAN
v.
ALAGAN.

paid by the complainant. Subsequently one of the accused applied for and obtained sanction to prosecute the complainant for bringing a false charge under Penal Code, section 211, and certain of his witnesses for the offence of giving false evidence under section 193:

Held, that the order granting sanction was not illegal as regards the complainant by reason of the previous award of compensation.

PETITION under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the order of E. L. Thornton, Head Assistant Magistrate of Madura, in Miscellaneous Case No. 17 of 1897 by which he revoked the sanction for the prosecution of the complainant and the witnesses for the prosecution in Calendar Case No. 188 of 1896 granted by S. Muthusundaram Ayyar, Second-class Magistrate of Tirupatur.

This was a case of theft which was found to be false and malicious; the Second-class Magistrate acquitted the accused, and awarded Rs. 50 to each of the accused as compensation to be paid by the complainant. The first accused then applied for sanction to prosecute the complainant and some of his witnesses under Penal Code, sections 193 and 211. The Second-class Magistrate granted the sanction. The Head Assistant Magistrate revoked the sanction so far as the complainant was concerned on the ground that he had already been ordered to pay compensation in the case alleged to have been brought knowing it to be false. He referred to Weir's Criminal Rulings in which it is stated that the High Court held in 1867 that an award under section 270 of the Criminal Procedure Code would not bar a proceeding against a complainant under section 211, but he based his decision on *Shib Nath Chong v. Sarat Chunder Sarkar*(1) observing that that case was more recent and found a place among the reported decisions.

V. Krishnasami Ayyar for petitioner.

Sundara Ayyar for respondents.

JUDGMENT.—We cannot concur in the view of the law taken by the Head Assistant Magistrate. He relies on *Shib Nath Chong v. Sarat Chunder Sarkar*(1). That case is not on all fours with the present case; but even if it were, we should, with great respect for the learned Judges who decided it, feel bound to dissent from its conclusions. We do not think that there is anything in the terms of section 560, Criminal Procedure Code, to justify the conclusion that a Magistrate who grants sanction to prosecute for offences

(1) I.L.R., 22 Calo., 586.

ADIKKAN
v.
ALAGAN.

punishable under sections 211 and 193, Indian Penal Code, is *ipso facto* debarred from also granting compensation under section 560, Criminal Procedure Code, to the person falsely accused. The sanction to prosecute for making a false charge is granted on grounds of public policy for an offence against public justice. The compensation is granted partly in order to deter complainants from making vexatious and frivolous complaints, and partly in order to compensate the accused for the trouble and expense to which he has been put by reason of the false complaint. We can see no ground in law or reason why compensation should not be granted in a case in which the Magistrate also directs a prosecution for making a false charge. The case (*Queen v. Rupan Rai*(1)) relied on by the learned Judges appears to us to be an authority directly opposed to their conclusion.

However that may be, the interpretation of the law by this Court to which the Magistrate refers is clear and is opposed to the view recently taken by the Calcutta High Court. The Magistrate is bound to take the law as it is laid down by this Court, and ought not to rely on the decision of another High Court when it is opposed to the decision of this Court.

We set aside the order of the Head Assistant Magistrate and affirm that of the Second-class Magistrate.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

KARUPPANAN AMBALAM (PLAINTIFF),

v.

RAMASAMI CHETTI (DEFENDANT).*

1897.
November
12.

Provincial Small Cause Courts' Act—Act IX of 1887, sched. II, art. 35—Suit for compensation for illegal attachment—Suit to recover money paid in excess.

The plaintiff sued to recover from his landlord a sum which the defendant had collected in excess of what was properly due to him by distraint of the plaintiff's cattle:

Held, that the suit was cognizable by the Small Cause Court.

CASE stated under Civil Procedure Code, section 646, by S. Russell, District Judge of Madura, in Original Suit No. 431 of 1897.

(1) 6 B.L.R., 296.

* Referred Case No. 27 of 1897.

KARUPPANAN
AMBALAM
v.
RAMASAMI
CHETTI.

The case was stated as follows :—

" Under the provisions of section 646-B of the Code of Civil Procedure, I have the honour to submit, for the orders of the High Court, the records in Original Suit No. 431 of 1897 on the file of the District Munsif of Sivaganga (Small Cause No. 400 of 1897, East Subordinate Court, Madura), as the District Munsif has failed to exercise a jurisdiction vested in him by law.

" The plaintiff in the suit is the tenant and the defendant is the landlord. Plaintiff sues to recover from the defendant a sum of Rs. 138-10-5, which the defendant has collected in excess of what is properly due to him upon demand and distraint of plaintiff's cattle.

" The suit was originally filed in the East Subordinate Court, Madura, on the small cause side in Small Cause No. 400 of 1897. The Subordinate Judge returned the plaint for presentation to proper Court, holding that it was not triable by the Court of Small Causes under article 35, clause (j), of second schedule to Act IX of 1887. Secondly, the plaint was presented in the District Munsif's Court of Sivaganga, where it was filed as Original Suit No. 431 of 1897. The District Munsif in his turn returned the plaint for presentation to proper Court, holding that the suit was a suit for money and not triable on the Original Side—*vide Raghunoni Audhikary v. Nilmoni Singh Deo*(1).

" I am of opinion that the case should be entertained on the Original Side, as there has been alleged excessive distraint under article 35, clause (j), of second schedule to Act IX of 1887."

The plaintiff was not represented.

V. Krishnasami Ayyar for defendant.

JUDGMENT.—The suit was to recover back money paid in excess of the amount due under pressure. It was not a suit to recover compensation for illegal, improper or excessive distress or attachment within the meaning of article 35, clause (j), of the second schedule of the Provincial Small Cause Courts' Act of 1887. This has been held to apply only to cases where the suit is brought to recover damages for the tort (*Dewan Roy v. Sundar Tewary*(2)) and not for money paid in excess, and with this ruling we agree. The suit is, therefore, one cognizable by a Court of Small Causes as the Munsif held.

(1) I.L.R., 2 Cal., 393.

(2) I.L.R., 24 Cal., 163 at p. 165.

APPELLATE CIVIL.

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

SANKARA AYYAR AND ANOTHER (PETITIONERS IN REFERRED CASE
No. 21 OF 1897),

1897.
December 6.

v.

NAINAR MOOPPANAR AND OTHERS (PETITIONERS IN REFERRED
CASE No. 22 OF 1897).*

Succession Certificate Act—Act VII of 1889, s. 14—Refund of deposit.

If an application for a succession certificate is granted, the sum deposited by the applicant cannot be refunded; but if no order for the grant of the certificate has been made, a refund can take place.

CASES stated under Succession Certificate Act, 1889, section 19, by R. D. Broadfoot, District Judge of Tinnevely.

The cases were stated as follows :—

" In cases of succession certificates the applicants, to whom the Court has ordered the issue of the certificates with or without security, apply occasionally for the refund of the deposit made by them under section 14(1) of the Succession Certificate Act VII of 1889, on the ground that the applicant is unable to furnish the required security, or that the necessity for obtaining a certificate has ceased.

" I am of opinion that, possibly in the former case, the applicant may be entitled to a refund, but not in the latter. At first I thought that refund should not be granted after the matter has been decided in open Court. Petitioner's vakil urges that, until the certificate is signed, the application may be withdrawn.

" Two applications for refund of the kind (Miscellaneous Petitions Nos. 283 and 299 of 1897) are now pending before me. It appears to me that a refusal by me to return the deposit is not subject to appeal and may cause hardship to the party if my view is mistaken.

" I, therefore, refer the question, at the request of the applicants' pleaders, up to what stage in the proceedings is an applicant entitled to obtain a refund ?"

The parties were not represented.

* Referred Cases Nos. 21 and 22 of 1897.

SANKARA
AYYAR
v.
NAINAR
MOOPPANAR.

JUDGMENT.—We are of opinion that clauses 2 and 3 of section 14 of the Act must be read together. If the application is allowed, i.e., if the order for the grant of a certificate has been made, the sum in deposit becomes at once legally appropriated, as duty, to the extent of the debt covered by the order, and cannot be refunded.

In other cases we think that a refund can be made.

APPELLATE CIVIL.

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

1897.
December 8.

UNICHAMAN (PLAINTIFF), PETITIONER,

v.

AHMED KUTTI KAYI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

*Limitation Act—Act XV of 1877, sched. II, arts. 97, 116, 120—Transfer of Property Act—Act IV of 1882, s. 68—Suit for mortgage money by mortgagee on disturbance of possession.**

The defendants demised certain land to the plaintiff under a registered kanom deed in 1888. The plaintiff was evicted in February 1893. He now sued in 1896 to recover the amount of the kanom:

Held, that the period of limitation applicable to the suit was six years and that the suit was not barred by limitation.

PETITION under Provincial Small Cause Court's Act, section 25, praying the High Court to revise the decree of J. H. Munro, Subordinate Judge of South Malabar, in Small Cause Suit No. 182 of 1896.

The predecessor in title of the defendants demised certain land to the plaintiff under a registered kanom deed, dated 25th November 1888. The mortgagor failed to secure possession to the plaintiff who was ejected from the land on the 4th February 1893. The plaintiff now sued to recover the amount of the kanom, less certain arrears of rent due by the plaintiff to the defendants. The Subordinate Judge held that the suit was barred by limitation under Limitation Act, schedule II, article 97, and accordingly dismissed the suit.

The plaintiff preferred this petition.

* Civil Revision Petition No. 47 of 1897.

Mr. C. Krishnan for petitioner.

Ryru Nambiar for respondents.

UNICHAMAN
v.
AHMED
KUTTI KAYI.

JUDGMENT.—We think that the Subordinate Judge was wrong in holding that the suit was barred under article 97, schedule II, of the Limitation Act. The claim is for money lent on a usufructuary mortgage, the cause of action being the failure of the mortgagor to secure the mortgagee in possession. The liability to secure the mortgagee in possession, or, in default to repay the mortgage money, is not a liability arising under the common law on the ground of failure of consideration, but is a liability imposed by section 68 of the Transfer of Property Act. If this liability be taken to be one arising under a covenant implied by law as incidental to the mortgage contract (which was in writing and registered) then article 116 of the Limitation Act would apply. Otherwise the appropriate article is 120, the case not being otherwise provided for. In either view the suit is not barred, since it was brought within six years from the time when the cause of action accrued. The case *Saraba Khandapa v. Abaji Jotirav*(1) is distinguishable from the present by the fact that when it was decided the Transfer of Property Act was not in force in Bombay. We, therefore, reverse the decree of the Lower Court, and remand the suit for disposal on the merits. Costs will abide and follow the result.

APPELLATE CIVIL.

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

VENKATAGIRI RAJAH (PLAINTIFF), PETITIONER,

v.

VENKAT RAU (DEFENDANT), RESPONDENT.*

*Provincial Small Cause Courts' Act—Act IX of 1887, sched. II, arts. 11 and 13—
Suit for jodi.*

A suit for arrears of jodi is maintainable as a small cause suit under Provincial Small Cause Courts' Act, 1887.

PETITION under Provincial Small Cause Courts' Act, section 25, praying the High Court to revise the order of T. M. Rangachari,

1897.
December 1

(1) I.L.B., 11 Bom., 475.

* Civil Revision Petition No. 74 of 1897.

VENKATA-
GIRI RAJAH
v.
VENKAT
RAU.

District Munsif of Nellore, in Small Cause Suit No. 679 of 1896.

The plaintiff was a zamindar and the defendant was entitled to three-fourths share in a certain agharam on his estate. The plaint set out that customary jodi payable by the defendant to the plaintiff had fallen into arrears and the suit was filed on the small cause side of the Court to recover the arrears. It was objected on the part of the defendant that the suit was not maintainable as a small cause suit and reference was made to the Provincial Small Cause Courts' Act, 1887, schedule II, articles 11 and 13, and *Kumara Venkatachala Reddiar v. Narayana Reddy*(1) and *Subramanian Chetti v. The Prince of Arcot*(2).

The District Munsif upheld this objection and returned the plaint.

The plaintiff preferred this petition.

Desikachariar for petitioner.

Respondent was not represented.

JUDGMENT.—We do not agree with the District Munsif in holding that “jodi” is a cess or due of the kind referred to in schedule II, article 13 of the Provincial Small Cause Courts' Act. The general word “dues” in that article must be taken to be dues similar in kind to the special dues mentioned in the article. In the present case the claim is for “jodi” which is rent on favourable terms. Article 11 of schedule II has no application whatever.

The claim was, therefore, cognizable by the Small Cause Court.

We set aside the order and direct the District Munsif to receive the plaint and dispose of it according to law. Costs will abide and follow the result.

(1) 4 M.H.C.R., 393.

(2) I.L.R., 2 Mad., 146.

APPELLATE CIVIL.

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

KRISHNAYYAR (PLAINTIFF),

v.

SOUNDARARAJA AYYANGAR (DEFENDANT).*

1897.
December
15.

Provincial Small Cause Courts' Act—Act IX of 1887, sched. II, art. 18—Suit by temple manager against his predecessor for damage sustained by temple.

A suit by the manager of a temple against his predecessor in office for damages sustained by the temple owing to the negligence of the defendant is not cognizable by a Court of Small Causes.

CASE stated under Civil Procedure Code, section 646, by S. Russell, District Judge of Madura, in Small Cause Suit No. 1315 of 1896.

The case was stated as follows:—

“Under the provisions of section 646-B of the Code of Civil Procedure, I have the honour to submit, for the orders of the High Court, the records in Small Cause Suit No. 1315 of 1896, on the file of the Subordinate Court of Madura (West) (Original Suit No. 109 of 1897 on the file of the District Munsif of Madura), as the Subordinate Judge has failed to exercise a jurisdiction vested in him by law.

“The plaintiff in the suit is the present manager of the Kalla Alagar devastanam, and the defendant is the late manager. Plaintiff sues to recover from the defendant a sum of Rs. 87-8-7, being the amount of damages which the devastanam had sustained by the defendant's negligence in not prosecuting certain suits which he had instituted on behalf of the devastanam while he was acting manager.

“The suit was originally filed in the West Subordinate Court (Madura) on the small cause side in Small Cause No. 1315 of 1896. The Subordinate Judge returned the plaint for presentation to a proper Court, holding that the suit is one relating to a trust, and as such, is not cognizable by the Small Cause Court—*vide* article 18 of second schedule to Act IX of 1887. Secondly, the plaint was presented in the District Munsif's Court of Madura, where it was filed as Original Suit No. 109 of 1897. The

* Referred Case No. 28 of 1897.

KRISHNAYAR v. SUNDARA-RAJA AYYANGAR. District Munsif, in his turn, returned the plaint for presentation to proper Court, holding that the suit is not one relating to trust, and as such, is cognizable by the Court of Small Causes.

"I am of opinion that the suit is of a small cause nature, and the Subordinate Judge was wrong in having returned the plaint."

The parties were not represented.

JUDGMENT.—A person like the defendant in the present case holding the office of manager of a temple, though he possesses no hereditary right and is subject to the superintendence of a committee appointed under Act XX of 1863, has been held to be a trustee (*Sethu v. Subramanya*(1)). A claim against such a person for damages said to have been caused by his neglect in the discharge of his duties as manager must, therefore, be held to be a suit relating to a trust falling under article 19 of the Provincial Small Cause Courts' Act.

The answer to the question submitted is that the suit is not cognizable by a Small Cause Court.

APPELLATE CRIMINAL.

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

KARUPPANA NADAN (ACCUSED), PETITIONER,

v.

CHAIRMAN, MADURA MUNICIPALITY (COMPLAINANT),
RESPONDENT.*

*Criminal Procedure Code—Act X of 1882, ss. 16, 350—Bench of Magistrates—
District Municipalities Act (Madras)—Act IV of 1884, ss. 263, 264.*

A trial on the charge of making an encroachment upon public land under District Municipalities Act (Madras), 1884, sections 167, 263 and 264, was begun before a Bench of seven Magistrates, and ended in a conviction by five of the Magistrates in the absence of the other two. It appeared that the Municipal Council had passed no resolution under District Municipalities Act, section 264 :

Held, that on the facts of the case the conviction under section 263 was right, and that it was not invalidated by the absence at the end of the trial of two of the Magistrates before whom it had begun.

(1) I.L.R., 11 Mad., 274 at p. 277.

* Criminal Revision Case No. 509 of 1897.

Quære : Whether a charge under section 264 would lie in the absence of a resolution passed by the Municipal Council.

CASE referred for the orders of the High Court under Criminal Procedure Code, section 438, by J. Twigg, District Magistrate of Madura, in Register Case No. 1414 of 1897.

The accused was convicted by a Bench of Magistrates of the offence of encroachment upon public land under District Municipalities Act IV of 1884, sections 167, 263 and 264, and was sentenced to pay a fine. On appeal the Deputy Magistrate reversed the conviction on the ground that the notice issued by the chairman of the Municipal Council was unauthorized by the council, and that the prosecution was not instituted by the council, and that only five of the seven Magistrates pronounced judgment in the case. The District Magistrate in referring the case submitted the following memorandum :—

"In Summary Trial No. 10299 of 1896, the Madura Bench Magistrates convicted accused under sections 167, 263 and 264 of Act IV of 1884.

"In appeal the Deputy Magistrate, Melur Division, reversed the finding on the grounds—

(a) that the notice said to have been disobeyed was issued by the chairman, and there was nothing to show that he had been authorized by the council to issue it ;

(b) that the prosecution was instituted by the chairman and not by the council ;

(c) that only five of the seven Magistrates who constituted the bench for the trial of the case pronounced judgment.

"As to (a) the Appellate Court might have called for the evidence which would no doubt have been forthcoming. The point only comes in question with reference to the conviction under section 264. (b) It is submitted that a complaint may be laid by any one acquainted with the facts, and that so far as the Court is concerned it is immaterial whether the complaint was lodged by direction of the council or not. (c) As the five Magistrates who joined in pronouncing judgment had been present throughout the case, it is submitted that their decision is not rendered invalid by the fact that two other Magistrates who had sat during the case did not join in the judgment."

Together with the memorandum of the District Magistrate was submitted a letter to him by the Deputy Magistrate in which

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he said:—"I, however, with reference to the points adverted to in your memorandum, beg to submit a further explanation as follows:—(a) It is appellant's contention that the conviction was illegal, because the notice was issued by the Chairman instead of by the council contrary to law. While section 264 of Act IV of 1884 provides for punishment for non-compliance with notice, sections 167 and 263 of the Act require that such notice should be given by the council and not by the chairman. The question, therefore, has an important bearing on the conviction. In the present case the notice was issued by the chairman independently of the council, as is apparent from the chairman's endorsement order under date the 3rd October 1896 on the sanitary Inspector's report, and the notice signed by him under date the 14th idem. The sanitary Inspector who represented the prosecution also admitted the fact. The question as to the illegality of the notice was duly raised in the lower Court as well. (b) In the present case, the prosecution was ordered by the chairman, and that, for offences falling under sections 167, 263 and 264 of the Municipal Act IV of 1884. Sections 280 and 287 of the Act are clear that the council, and not the chairman, should direct the prosecution in such cases. The case in point does not seem to fall under the general rule that any person acquainted with the facts of a case can set the law in motion by a complaint. It is, rather, an exception to the general rule, created by statute—*vide* the decision of the Bombay High Court in *In re Ganesh Narayan Sathe*(1).

The principle has been re-enunciated also by the Allahabad High Court—*vide* penultimate clause of their decision in *Farzand Ali v. Hanuman Prasad*(2). (c) In regard to this point, I beg to submit that not only two of the Magistrates, who had sat during the first hearing, did not join in judgment, but only two out of the five Magistrates who joined in judgment had made local inspection, which was, of course, part of the enquiry and must have influenced and guided the decision of the case."

Rangachariar for complainant.

Accused was not represented.

JUDGMENT.—It is not quite necessary to consider whether in the absence of a resolution passed by the Municipal Council the

(1) I.L.R., 13 Bom., 600.

(2) I.L.R., 18 All., 465 at p. 469.

accused could have been proceeded against under section 264 of the District Municipalities Act, 1884. The accused was clearly punishable under section 263 if as alleged he erected the fence in the lane without the license required by the law. The circumstance that two out of the seven Magistrates (who constituted the bench that sat during part of the trial) did not attend on the day when the accused was convicted by the five Magistrates who were present then does not affect the legality of the conviction. The cases of *Hardwar Sing v. Khega Ojha*(1) and *Damri Thakur v. Bhowani Sahoo*(2) are clearly distinguishable inasmuch as in the present case the Magistrates who decided it had attended throughout the trial. We must, therefore, set aside the order of the Deputy Magistrate acquitting the accused and direct the Magistrate to rehear the appeal and dispose of it according to law.

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APPELLATE CRIMINAL.

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

QUEEN-EMPRESS,

v.

SUBBA NAIK AND OTHERS.*

*Penal Code—Act XLV of 1860, ss. 302, 304 and 324—Good faith—Order of
superior officer—Firing on an unlawful assembly.*

A caused crops to be sown on land, as to the enjoyment of which there was a dispute between her and B. Persons having proceeded to reap the crops on behalf of B, the servants of A went to the place with the station-house officer and some constables who were armed. The station-house officer ordered the reapers to leave off reaping and to disperse, but they did not do so; he then told one of the constables to fire, and he fired into the air. Some of the reapers remained and assumed a defiant attitude. The station-house officer, without attempting to make any arrests and without warning the reapers that, if they did not desist from reaping, they would be fired at, gave orders to shoot, and one of the constables fired and mortally wounded one of the reapers. It was found that neither the station-house officer nor the last-mentioned constable believed that it was necessary for the public security to disperse the reapers by firing on them:

1898.
March 11,
23.

(1) I.L.R., 20 Cal., 870.

(2) I.L.R., 23 Cal., 194.

* Criminal Revision Case No. 351 of 1897.

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Held, that the station-house officer and the constable were not acting in good faith and that the order to shoot was illegal and did not justify the constable and that both he and the station-house officer were guilty of murder.

PETITION preferred on behalf of Government under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the sentences passed on the prisoners in Calendar Case No. 47 of 1897 on the file of the Sessions Court of Tinnevely.

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

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

Prisoner, No. 1, was not represented.

Vaidinada Ayyar for prisoner No. 2.

Ramakistna Ayyar for prisoner No. 3.

JUDGMENT.—This is a petition presented by the Public Prosecutor on behalf of the Government to revise the sentences passed by the Sessions Judge of Tinnevely on the three accused on the ground that the sentences are inadequate. The first prisoner was an acting station-house officer, the second prisoner is a constable, and the third prisoner is a private kavalgar. The first and second prisoners were charged with culpable homicide amounting to murder under section 302, Indian Penal Code, but were convicted under section 304 of the Code, the third prisoner was charged with voluntarily causing hurt with a dangerous weapon under section 324, Indian Penal Code, but was convicted under section 323. The first prisoner was sentenced to one year's rigorous imprisonment, the second prisoner to imprisonment until the rising of the Court, and the third prisoner to two months' rigorous imprisonment. The prisoners have not appealed against their conviction.

The facts of the case as found by the Sessions Judge are as follows:—There was a dispute between two co-widows about the enjoyment of a certain field. On the 18th January 1897 the first and third prosecution witnesses (one Sankaralinga Tevan whose death was the subject of enquiry and some coolies) went to the field in question and began to reap the crop on behalf of the junior widow. The Sessions Judge believes that the balance of evidence is that the crop was sown by the senior widow. Soon after the reaping began about midday, three Vellalas of the faction of the senior widow together with the first and second prisoners and another constable, each constable being armed with a gun and accompanied by the kavalgar of the senior widow, appeared on the

scene. The first prisoner ordered the reapers to desist, and the first prosecution witness declined to obey and the point was argued, as the Sessions Judge says, with some acerbity. Finding that the coolies still continued reaping, the first prisoner directed Namasi-vayam, one of the constables, to fire and he fired in the air. Some of the coolies then ran away, but some remained and assumed a defiant attitude. Then the head constable, first prisoner, again gave orders to shoot, the second prisoner fired and Sankaralingam fell mortally wounded; the third prisoner at the same time attacked third prosecution witness, knocked him down with a stick and stabbed him with some weapon, but the injuries inflicted were not serious. The prosecution witnesses say that the deceased was endeavouring to stop the coolies from running away and that was the reason he was shot by the second prisoner when he was directed to fire. The Police rendered no aid to the wounded man, and when the Village Munsif arrived on the scene all the prisoners had gone away.

The prisoners on their trial at the Sessions set up a defence, which the Sessions Judge considered untrue, and we agree with him.

It was admitted by the prosecution that after the first prisoner had given orders to the coolies to disperse and they had neglected to do so, the assembly became an unlawful one. Assuming that it was so, and that the assembly refused to disperse, it would have been the duty of the Police to arrest the persons who appeared to be the leaders of the assembly, and see what effect that course had upon the remaining coolies, but we do not find that any attempt was made to do this. Nor was any warning given to the coolies that if they did not desist from reaping they would be fired at. It is worthy of remark that no injuries were inflicted on the Police. We have no hesitation in saying that under the circumstances above detailed both the first and second prisoners were guilty of murder. The Government, however, has not appealed against the acquittal on that charge.

We are of opinion that the accused Police officers cannot shield themselves on the plea that they were acting in good faith, for nothing is said to be done in good faith which is done without due care and attention, and we are of opinion that neither the first nor the second accused believed that it was necessary for the public security to disperse such an assembly by firing on them.

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The degree of force which may be lawfully used in the suppression of an unlawful assembly depends on the nature of such assembly, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be obtained. (Lord Bowen's Report on the Colliers' Strike and Riot;—1893.)

The taking of life can only be justified by the necessity for protecting persons or property against various forms of violence, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed (*Keighly v. Bell*(1), *Rex v. Suddis*(2), and *Alexander Broadfoot's case*(3)).

We are of opinion that the second accused is not protected in that he obeyed the orders of his superior officer. The command of the head constable cannot of itself justify his subordinate in firing if the command was illegal, for he and the head constable had the same opportunity of observing what the danger was, and judging what action the necessities of the case required. We are of opinion that the order the second accused obeyed was manifestly illegal, and the second accused must suffer the consequence of his illegal act. The revision petition of the Government, so far as it relates to the enhancement of punishment on the first and second accused, must be allowed, and we sentence R. Subba Naik, the first prisoner, to ten years' rigorous imprisonment, and the second prisoner, Sabjammiah Sahib, to seven years' rigorous imprisonment.

The third accused undoubtedly has received a lenient sentence, but in his case we do not feel ourselves compelled to interfere.

Ordered accordingly.

(1) 4 F. & F., 763 at p. 790.

(2) 1 East., 306 at p. 312.

(3) Foster's Crown Law, 154.

APPELLATE CIVIL.

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

SURYANARAYANA SASTRI (PLAINTIFF), APPELLANT,

v.

RAMAMURTI PANTULU (DEFENDANT), RESPONDENT.*

1897.
October 11
12.

Transfer of Property Act—Act IV of 1882, s. 135—Actionable claim—Claim affirmed by a Court—Consideration for assignment—Limitation—Construction of decree.

A, as guardian of the widow and legatee of the depositor, claimed a sum of money in the hands of a Bank, to which B asserted an adverse claim. Pending an application by A for a succession certificate, B sued the Bank and the widow for the money and A was joined as a defendant. A decree was passed in 1889 by which it was ordered that the Bank should pay the money to B on his giving security to pay it over to A on his obtaining the succession certificate. B furnished security and received the money in 1892. A meanwhile had obtained the succession certificate and in 1894 he purchased the rights of the widow who had come of age. In the same year he sued B for the money.

Held, that the suit was not barred by limitation and that the plaintiff was entitled to a decree; but that he could recover only the price actually paid by him with interest and the incidental expenses and costs, as the case was not within Transfer of Property Act, section 135 (d), since on the true construction of the decree of 1889 all that had been decided was who should hold the money pending the settlement of the rights of the rival claimants.

APPEAL against the decree of E. C. Rawson, Acting District Judge of Vizagapatam, in Original Suit No. 36 of 1894.

The plaintiff sued as the assignee of one Ramamma to recover from the defendant Rs. 2,279-6-0 with interest. Ramamma was the widow of one Subbarayadu who died in 1887, leaving a will by which he bequeathed the abovementioned sum then deposited in a Bank at Vizianagaram to her, and appointed the present plaintiff Suryanarayana Sastri to be her guardian until she should come of age. Suryanarayana Sastri in his capacity of guardian of the minor widow applied for a succession certificate in 1888 to enable him to collect the money; but before it was issued Ramamurti Pantulu, the present defendant, asserted a claim to the money as assignee from the undivided brothers of the deceased and the father and natural guardian of the widow. This claim

* Appeal No. 40 of 1897.

not being recognized by the Bank, he instituted Original Suit No. 357 of 1888 on the file of the District Munsif of Vizianagaram to recover the money. In that suit, in which the plaintiff impugned the genuineness of the will, the original defendants were the Bank and the widow and the alleged assignors, and Suryanarayana Sastri was subsequently brought on to the record as sixth defendant. The District Munsif held that the Bank was justified "in withholding payment to the plaintiff not because there was any doubt as to the minor third defendant being the widow of the late Subbarayadu, but because the sixth defendant also claimed the money as being guardian to the widow under a will." But in view of the facts that no certificate had yet been issued to Suryanarayana Sastri, and that the Bank was not in a financially sound position, instead of dismissing the suit he passed a decree by which it was ordered that the Bank "do pay to plaintiff the suit amount on condition of his giving sufficient security to return the money to sixth defendant on his producing the certificate from the District Court of Vizianagaram, and that the Bank on payment of money into Court be exonerated from all liability to pay the money to any one else and that sixth defendant do look to plaintiff for payment of the money." This decree was dated 29th April 1889, and the plaintiff having furnished the required security received the money in January and March 1892. Suryanarayana Sastri obtained the succession certificate on the 14th of February 1890. Ramamma came of age in or about 1892 and on the 14th of March 1894 she assigned her rights to him and he instituted the present suit on 6th November 1894.

The plaintiff, contended that his claim was *res judicata*, but the District Judge held that it had not been the subject of adjudication, and disposed of the case on the merits. The will was upheld, and it was found that the money was part of the testator's self-acquisitions and that the suit was not barred by limitation; that the consideration for the plaintiff's assignment was Rs. 1,450 only, and that the subject of the assignment was an actionable claim within the meaning of Transfer of Property Act, section 135, it being impossible for the money to be recovered except by a suit. The District Judge accordingly on the authority of *Nilakanta v. Krishnasami*(1) passed a decree for Rs. 1,450 and interest from the date

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

of the assignment and costs thereon and disallowed the rest of the plaintiff's claim.

The plaintiff preferred this appeal and the defendant filed a memorandum of objections.

Ramachandra Rau Saheb for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—The first question for consideration is what was the price for the assignment. The Judge has found that only Rs. 1,450 was actually paid and that there was no satisfactory evidence of the payment by plaintiff either of the litigation expenses—Rs. 290—or of the sum of Rs. 1,900 under the receipt exhibit B. Notwithstanding the execution of this receipt exhibit B by Ramamma we agree with the Judge in believing her evidence that no money was paid her on that receipt. The evidence in proof of payment is not of a credible character, and the omission of the plaintiff to state whence he procured this large sum of money indicates that he never had it. It would have been easy for him to show how he happened to get the money if he really did get it. The payment of the Rs. 1,900 is therefore not proved. As regards the Rs. 290 for legal expenses, there can be no doubt that plaintiff must have spent a considerable amount of money in litigation on behalf of Ramamma. There is to begin with the stamp of Rs. 60 on the succession certificate which he obtained on her behalf and she admits that she has paid nothing to plaintiff on account of litigation expenses. The sum mentioned by plaintiff and admitted in the assignment itself, viz., Rs. 290, may be accepted as correct, as it is not extravagant.

It is then contended for the plaintiff that he is entitled to recover on the assignment the whole amount mentioned therein as the consideration, even if the whole amount was not paid. If the case fell under clause (d) of section 135 of the Transfer of Property Act that would be so, but we think that in this case the claim had neither been affirmed nor was ready for affirmation by a Court, and it therefore remained an actionable claim. The decision in the suit against the Bank did not determine whether Ramamma or the defendant was entitled to the money. That was left for future determination. All that the Court then decided in reference to the money was as to who should hold the custody of it, pending the settlement of the rights of the rival claimants. We must therefore hold that the plaintiff can recover only the price he

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paid and that we have found to be Rs. 290 over and above the sum allowed by the Lower Court. The decree of the Lower Court will be modified by adding this sum, and the incidental expenses attaching to the assignment, viz., Rs. 46 to the amount decreed to plaintiff. The appellant and the respondent will have and pay proportionate costs in this and in the Lower Appellate Court on the amounts now allowed and disallowed. There is nothing in the memorandum of objections. We agree with the Judge as to the genuineness and validity of the will of Ramamma's husband and, as the defendant received the money within three years of suit, no question of limitation arises. The memorandum of objections is therefore dismissed with costs.

APPELLATE CIVIL.

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

NARAYANA CHETTI (DEFENDANT), PETITIONER,

v.

LAKSHMANA CHETTI (PLAINTIFF), RESPONDENT.*

Contract Act—Act IX of 1872, s. 43—Joint promissors—Suit for money against person carrying on business of a dissolved partnership—Objection taken on ground of non-joinder.

In a suit for money due on account of dealings in clothes from 1889 to 1895, it appeared that the dealings had taken place between the plaintiff and the firm consisting of the defendant and another till 1894 when the firm was dissolved since which date the defendant had carried on the business and dealt with the plaintiff:

Held, that the suit was not bad for non-joinder of the late partner.

Per cur: it is not incumbent on a person dealing with partners to make them all defendants in a suit.

PETITION under Provincial Small Cause Courts Act, section 25, praying the High Court to revise the decree of K. Ramachandra Ayyar, District Munsif of Trichinopoly, in Small Cause Suit No. 54 of 1896.

The plaintiff sued to recover a sum due on account of dealings in clothes from March 1889 to January 1895. Up to 1894 the

* Civil Revision Petition No. 525 of 1896.

dealings took place between the plaintiff and the firm consisting admittedly of the defendant and another. In that year the firm was admittedly dissolved, and the business was carried by the defendant. The defendant pleaded, *inter alia*, non-joinder of his late partner. The District Munsif passed a decree for plaintiff.

The defendant preferred this petition.

S. Subramania Ayyar for petitioner.

Tirumalasami Chetti for respondent.

JUDGMENT.—According to the law declared in the Contract Act, section 43, especially when taken with section 29 of the Civil Procedure Code, it is clear that it is not incumbent on a person dealing with partners to make them all defendants. He is at liberty to sue any one partner as he may choose. *Lukmidas Khimji v. Purshotam Haridas*(1)

The petition must therefore be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

SURYANARAYANA PANDARATHAR (LEGAL REPRESENTATIVE
OF DECEASED COUNTER-PETITIONER AND DEFENDANT No. 2), APPELLANT,

v.

GURUNADA PILLAI (PETITIONER AND TRANSFeree-PLAINTIFF),
RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 179—Application for execution—Continuation of previous application.

In June 1892, an application was made for execution of a decree and it was dismissed, the applicant being relegated to a suit to establish his right. He did not sue, but in September 1892 he put in a fresh application to execute, which was dismissed. He then sued and in March 1895 a decree was passed in his favour. He now put in a petition in October 1895 praying that his petition of September 1892 be revived or continued:

Held, that the petition was barred by limitation.

APPEAL against the order of T. M. Horsfall, District Judge of Tanjore, in Civil Miscellaneous Appeal No. 19 of 1896, reversing the order of S. Dorasami Ayyar, District Munsif of Tanjore, in

(1) I.L.R., 6 Bom., 700. * Appeal against Appellate Order No. 28 of 1897.

NARAYANA
CHETTI
v.
LAKSHMANA
CHETTI.

1897.
October 22.

SURYA-
NARAYANA
PANDA-
RATHAR
v.
GURUNADA
PILLAI.

Execution Petition No. 789 of 1895, in the matter of Original Suit No. 103 of 1880, on the file of the Additional District Munsif's Court of Tanjore.

The facts of the case were stated by the District Judge as follows :—

"In 1879 the late Zamindar of Gandarvakottai was sentenced to transportation for life for abetment of dacoity. On the 20th September 1880 one Seshayyengar got a decree against him (Original Suit No. 109 of 1880). In 1881 the Government, which had declared the estate to be forfeited to Government, released its lien thereon in favour of the zamindar's minor son, the estate being placed under the Court of Wards.

"Seshayyengar made a series of attempts to execute his decree. The first four applications were all against the minor. They are dated 17th September 1883, 17th September 1886, 25th September 1889 and 21st June 1892. All were dismissed, for reasons which are not now of any consequence.

"Seshayyengar died, and in 1892 his heir transferred the decree to one Gurunada Pillai, who is the present petitioner. On the 19th September 1892, this plaintiff put in the fifth execution petition. This time it was against the former zamindar, who was then still alive. The Court of Wards objected and the petition was again dismissed, petitioner being referred to a regular suit. Then plaintiff filed a suit (Original Suit No. 632 of 1892) to have his right established to execute the decree against the zamindar's property in hands of the Court of Wards.

"The Court of Wards set up various pleas, only one of which now concerns us. It was that the decree being 12 years old was incapable of execution.

"The Lower Court held, on 29th November 1893, that, as no application to execute the decree had ever been granted, the decree could still be executed, and on appeal by the present zamindar, I upheld that finding (Appeal Suit No. 586 of 1894) on 18th March 1895.

"On the 3rd October 1895, plaintiff has now put in the sixth application for execution, this time against the present zamindar."

The petition was presented under Civil Procedure Code, sections 274 and 623, and paragraphs 6 and 10 of the petition were as follows :—

"*Previous execution, if any.*—Petition was put in on the 17th September 1883 and nothing was recovered. The petition presented on the 17th September 1886, having been returned, another petition was put in on the 24th September 1886 and notice was ordered, and it was dismissed for non-payment of batta. Petition was presented on the 25th September 1895 and it was dismissed for non-payment of batta for notice. Petition was put in on the 21st June 1892, praying that I may be treated as assignee-plaintiff and that the amount found deposited in the Taluk may be attached; and the execution petition was dismissed on the 5th September 1892, directing me to institute a regular suit. A petition was put in on the 19th September 1892 praying that I may be treated as assignee-plaintiff and that the immovable properties may be attached, it was ordered on the 20th October 1892 that a regular suit may be instituted. In obedience to the said order I filed Suit No. 632 of 1892 of this Court and Appeal Suit No. 586 of 1894 of the District Court, Tanjore, and a decree was passed on the 18th March 1895 directing me among other things to go on with the execution of the decree in Original Suit No. 103 of 1880 as assignee-plaintiff.

"*Relief prayed for.*—As it was decided, in Original Suit No. 632 of 1892 on the file of this Court and in Appeal Suit No. 586 of 1894 preferred thereon on the file of the District Court, Tanjore, on the 18th March 1895, that I should be treated as assignee-plaintiff so as to enable me to execute the decree, in accordance with the order directing me to bring a regular suit, dated 20th August 1892, passed on the petition presented by me on the 19th September 1892, praying that I may be made assignee-plaintiff in this suit and that the amount may be recovered (for me), I pray that the Court may be pleased to restore to its file the petition, dated 19th September 1892, and to order that the immovable properties mentioned in the list presented with this petition and referred to in the decree in Original Suit No. 632 of 1892, and also described in the list attached to this petition, may be attached for the amounts mentioned in columns 7 and 8 herein and also for subsequent interest and execution charges, &c., and sold at auction and the amount recovered for me."

The District Munsif dismissed the petition on the ground that three years had elapsed between the dates of the second and third petitions for execution. The District Judge held that it was not

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open to the zamindar to raise this point and that the present petition should be regarded as a continuation of the previous proceedings—as to which he referred to *Chandra Prodhan v. Gopi Mohun Shaha*(1) and *Narayana Nambi v. Pappi Brahmani*(2). He accordingly reversed the order of the District Munsif and granted the relief sought.

The zamindar preferred this appeal.

Pattabhirama Ayyar for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT:—This is an appeal from the District Judge allowing an execution petition on the ground that though dated more than three years after the last preceding application it is in effect a mere revival or continuation of it. In June 1892, the respondent had put in a petition which was dismissed, the petitioner being relegated to a regular suit to establish his right. He did not bring a suit, but in September 1892 put in a fresh application to execute. This was dismissed as he had not chosen to take the course suggested when his previous application had been dismissed. After this the respondent filed his suit to have his right established and that suit ended in his favour on the 18th March 1895. On the 3rd October 1895 more than three years after his last petition was dismissed, he put in the present application asking to have the former application of September 1892 revived or continued. Both the Courts held that this application was not barred because it was in effect a mere revival of the last previous application.

We think this decision is wrong. Had there been any reason for saying that the proper order on the hearing of the last application should have been one which could hold the decision in suspense pending the decision of the regular suit, it might well be that there would be some reason for saying that this application could be treated as an application to proceed with a pending application, but that is not the case here. The only proper order that could have been made in the circumstances was an order absolutely dismissing the application inasmuch as the order that preceded it had relegated the petitioner to a regular suit which he had not chosen to bring. We cannot therefore view the decision as one suspending the application for execution, nor can we agree that, where an order finally and properly dismisses an application for

(1) I.L.R., 14 Calc., 385.

(2) I.L.R., 10 Mad., 22.

execution, a fresh application for execution can be treated as a renewal of it, even though such application may contain apt words for the purpose. Moreover we know of no process by which an application, which has properly been dismissed, can be revived.

For these reasons, without going into the other contentions raised, we allow the appeal.

We reverse the order of the District Judge and restore that of the District Munsif. The respondent must pay the appellant's costs in this and the Lower Appellate Court.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

SASIVARNA TEVAR (ASSIGNEE-PLAINTIFF), APPELLANT,

v.

ARULANANDAM PILLAI AND ANOTHER (DEFENDANT NO. 2
AND HIS REPRESENTATIVE), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, arts. 178, 179—Application for execution “struck off the file”—Further application for execution—Renewal of previous application.

An application for execution of a decree of a District Munsif was made in April 1893, but was struck off the file on 20th July 1893, on a stay of execution having been ordered by the Subordinate Judge. After the termination of the proceedings in the Subordinate Court, the decree-holder applied again for execution on 6th July 1896:

Held, that the latter application should be regarded as a continuation of the former, and was not barred by limitation.

APPEAL against the order of S. Russell, District Judge of Madura, in Civil Miscellaneous Appeal No. 18 of 1896, affirming the order of N. Sambasiva Ayyar, District Munsif of Sivaganga, in Execution Petition No. 416 of 1896 (in Original Suit No. 365 of 1887).

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

“Application, dated 14th April 1893, was presented for execution. The Subordinate Court, by injunction, stayed the execution of the application. The District Munsif passed an

* Appeal against Appellate Order No. 23 of 1897.

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“order:—‘Execution stayed by the Subordinate Court, petition “‘struck off the file consequently,’ dated 20th July 1893. After “the suit in the Subordinate Court was disposed of, the plaintiff “filed the present application, dated 6th July 1896. This appli- “cation does not ask that the former application which was “stayed be proceeded with. It is a new application, and it dis- “tinctly refers to the fact that the application, dated 14th April “1893, was struck off by the District Munsif. If the present “application is a new application, it is admittedly barred by “limitation.”

The applicant preferred this appeal.

V. Krishnasami Ayyar for appellant.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and Gopalasami Ayyangar for respondents.

JUDGMENT.—The facts of the case are sufficiently stated by the District Judge, but we cannot agree with him in his conclusion that the District Munsif did, in fact, dispose of the application for execution, dated the 14th April 1893. The District Munsif's order on the petition is “Execution stayed by the Subordinate Court; peti- “tion struck off the file consequently.” Thus the District Munsif struck the petition off his file, simply because execution had been temporarily stayed by the Subordinate Court. The District Munsif had no legal authority to dismiss the petition, simply because the execution had been stayed, nor did he, in fact, dismiss it. He struck it off his file, by which we apprehend he merely ceased to show it as pending in his statistical returns, but the petition not having been dismissed or otherwise legally disposed of must be regarded as still pending. This was the view taken by Muttusami Ayyar, J., in an exactly similar case (*Sri Rajah Papamma Rau v. Venkatappayya*(1), in which he followed the rulings of both the Calcutta and Bombay High Courts (*Biswa Sonan Chunder Gossyamy v. Binanda Chunder Dibingar Adhikar Gossyamy*(2) and *Ohintaman Damodar Agashe v. Balshastri*(3)).

The next question is this: Are we bound to regard the present application for execution as a new application for execution, or may we regard it as in substance an application to continue the pending proceedings, i.e., the application of the 14th April 1893.

(1) Appeal against Appellate Order No. 34 of 1892 (unreported).

(2) I.L.R., 10 Calc., 416.

(3) I.L.R., 16 Bom., 294.

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In form it is a new application, and the decision of the District Judge that it must be dealt with as such, is based on the rulings in *Narayana Nambi v. Pappi Brahmani*(1). Parker, J., was a party to that decision, but in a later case (*Chathappan Nayar v. Kunhammed Kutti*(2), he held that an application similar to that now in question might properly be regarded as an application in continuance of an earlier application, and pointed out that in *Narayana Nambi v. Pappi Brahmani*(1), the application was to attach again the same property which had been released on an objection petition, but that in the case before him there had been no stoppage in the proceedings in execution. So in the present case we must hold that there has been no legal stoppage in the execution proceedings, and therefore the case in *Narayana Nambi v. Pappi Brahmani*(1) is not applicable. This view is in accordance with the decisions in *Chandra Prodhan v. Gopi Mohun Shaha*(3), *Chintaman Damodar Agashe v. Balshastri*(4) and *Thakur Prasad v. Fakirullah*(5).

For these reasons we consider that the present application may be properly regarded as one in continuance of the application of the 14th April 1893, which is still legally pending before the District Munsif.

We must, therefore, set aside the order of the District Judge and restore that of the District Munsif with costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

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

VENKATASUBRAMANIAM CHETTI AND OTHERS
(DEFENDANTS NOS. 1 TO 3), APPELLANTS,

v.

THAYARAMMAH AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu law—Law of inheritance—Stridhanam—Husband's nieces—Bandhu.

A Hindu widow, married according to one of the approved forms, died without issue leaving her surviving the plaintiffs who were the daughters of her husband's

(1) I.L.R., 10 Mad., 22.

(2) Appeal against Order No. 108 of 1895 (unreported).

(3) I.L.R., 14 Calc., 385.

(4) I.L.R., 16 Bom., 294.

(5) I.L.R., 17 All., 106.

* Original Side Appeal No. 50 of 1897,

1898.
February 7.
March 14.

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deceased brother, and the first defendant who was the adopted son of her sister's daughter, and the second defendant who was the adopted son of her maternal uncle, and the third defendant who was the widow of her brother. The defendants having taken possession of her stridhanam property on her death, the plaintiffs now sued as heirs under the Hindu law for possession:

Held, that the plaintiffs were entitled to succeed.

APPEAL against the decree of Mr. Justice Boddam sitting on the Original Side of the High Court in Civil Suit No. 149 of 1897.

Suit for possession of certain movable and immovable property constituting the estate and effects of one Rangammah, a Hindu widow, who died without issue on the 9th of June 1897. The plaintiffs were the married daughters of a deceased brother of Rangammah's husband. Rangammah had one brother and two sisters, all of whom predeceased her. The third defendant was the widow of the brother. The fourth defendant was the widow of the brother of the elder sister's husband. The first defendant was the adopted son of the younger sister's daughter and the second defendant was the adopted son of Rangammah's maternal uncle; and it was alleged that they had taken possession of Rangammah's property on her death.

It was stated in the plaint that "Ammayee Ammah, the lawfully married wife of Vemah Kondayya Chetti in an approved form of marriage and his widow, died in Madras on or about 11th or 12th January 1897, having, prior to her death and whilst in sound memory and understanding, left a will duly executed by her on 16th December 1896, appointing one Bheemavaram Rangammah as sole executrix and giving absolutely to the said Rangammah the properties left under it which were her (*i.e.*, Ammayee Ammah's) absolute stridhanam properties. That the said Rangammah also died in Madras on or about 9th June 1897, leaving, as her properties, those which she had acquired under the said will of Ammayee Ammah and those that she acquired herself and those that she had inherited from her husband Bheemavaram Chinna Varadayya, to whom she had been lawfully married in an approved form of marriage." The fourth defendant did not defend the suit. The other defendants denied the plaintiffs' title to succeed to Rangammah's property which they alleged had been acquired by her as logatee of her mother and her sister Ammayee Ammah and did not include any property inherited from her husband. The first three issues in this suit were framed as follows:—

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"*First*.—Whence did Rangammah acquire the property left at her death?

"*Second*.—Are the plaintiffs entitled to inherit it assuming that the first and second defendants are adopted as they claim to be?

"*Third*.—Are the adoptions set up by the first and second defendants true and valid?"

Mr. Justice Boddam gave judgment for the plaintiffs. He said:—"I think having regard to the current of decisions of this Court commencing with *Kutti Ammal v. Radakristna Aiyar*(1) down to *Ramappa Udayan v. Arumugath Udayan*(2), I must hold that the daughters of a brother of the deceased's husband in the absence of any male heirs are entitled to succeed as preferential heirs to the defendants who are related to the stock of the mother of the deceased.

"The deceased Rangammah took under the will of her sister certain property. This she traded with, lending money on pledges, and died intestate. At her death, intestate, the present question arises as to who is the person entitled to succeed. The pedigree in the plaint is admitted. The plaintiffs are the daughters of Rangammah's deceased husband's deceased brother, and there are no other living relatives of the husband. The defendants are all relatives on Rangammah's mother's side. It is practically admitted that the property passes to the husband's heirs if any; but it is contended that the plaintiffs being daughters of a deceased brother are incapable of inheriting. I have decided against this contention.

"I answer the first issue by saying upon the evidence Rangammah acquired the property left at her death from her sister Ammayee Ammah in the first place and afterwards she traded and increased it. To the second and third I say the plaintiffs are entitled to inherit even assuming as is admitted that the first and second defendants are adopted as they claim to be."

Defendants Nos. 1 to 3 preferred this appeal.

Sundara Ayyar and *Etiraju Mudaliar* for appellants.

Pattabhirama Ayyar and *Venkataramayya Chetti* for respondents.

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

(2) I.L.R., 17 Mad., 182.

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JUDGMENT.—The dispute in this case is as to the right of succession to the stridhanam of one Rangammah who had been married according to one of the approved forms but who died without issue, male or female, her husband having predeceased her. The learned Judge holds that the plaintiffs—the daughters of Rangammah's husband's brother—are, in the absence of nearer heirs, entitled to take property by succession.

In the argument before us two contentions were urged on behalf of the appellants (defendants Nos. 1 to 3), viz., firstly, that the plaintiffs are, under the law, not in the line of heirs at all; secondly, that, if they are, the second defendant (assuming he is, as alleged by him, Rangammah's maternal uncle's adopted son) has a preferential right to the property in dispute.

With reference to the first of these contentions the question is whether the plaintiffs are in the line of heirs to their uncle, since, in the admitted circumstances of the case, the heirs entitled to take Rangammah's stridhanam would, under the Mitakshara, be her husband's heirs. Now, undoubtedly, the plaintiffs are sapindas of their uncle, in the Mitakshara sense of the term 'sapinda,' inasmuch as they have community with him of particles of the same body as explained in the *Acharya Kanda* of the Mitakshara. And as persons liable to be transferred by marriage to a gotra other than that of their birth, they (plaintiffs) must be looked upon as sapindas of a different gotra and would, therefore, be their uncle's bandhus unless, as was argued on behalf of the appellants, they were precluded from claiming such heritable right in consequence of their sex. But such an argument it is too late in this Presidency to raise, it being opposed to the *ratio decidendi* of several decisions in this Court beginning with *Kutti Ammal v. Radakristna Aiyar*(1) decided more than twenty years ago and which recognized the right of a sister to inherit her brother's estate. No doubt in that case her right was not in terms stated to be that of a bandhu; but not being a sagotra, sapinda or samanodaka, she could have been let in only as a bandhu, and that it was in that right her claim was admitted has been repeatedly pointed out. See *Lakshmanammal v. Tiruvengada*(2), *Mari v. Chinnammal*(3), *Nallanna v. Ponnal*(4), and *Balamma v. Pullayya*(5).

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

(3) I.L.R., 8 Mad., 107 at p. 130.

(5) I.L.R., 18 Mad., 168 at p. 170.

(2) I.L.R., 5 Mad., 241 at p. 250.

(4) I.L.R., 14 Mad., 149 at p. 150.

Following the decision upholding the sister's right, that of other female relations to succeed as bandhus has also been recognized; see *Nallanna v. Ponnal*(1) already cited and *Ramappa Udayan v. Arumugath Udayan*(2). It may also be added that in *Chinnammal v. Venkatachala*(3), a man's father's sister was expressly referred to by the learned Judges, who decided the case, as a bandhu. Great stress was laid on behalf of the appellants upon the language used in *Sundrammal v. Rangasami Mudaliar*(4) with reference to a sister's daughter's right to come in as a bandhu. But we must take those observations as intended to draw a distinction between the less preferential right of female bandhus and that of the more favoured male bandhus or 'regular bandhus' as they were otherwise spoken of by the learned Judges. We ought not, we think, to understand those observations as intended to deny that female sapindas in general do come within the definition of bandhus under the Mitakshara, especially when we consider that the same learned Judges had not only in *Nallanna v. Ponnal*(1) in unequivocal terms decided that a man's son's daughter is a bandhu, but also subsequent to *Sundrammal v. Rangasami Mudaliar*(4) pointed out that *Kutti Ammal v. Radakristna Aiyar*(5) proceeded "on the view that any 'relative who is also a cognate may be treated as coming within 'the definition of bhinna gotra sapinda, and that the term sapinda, 'as used in chapter 2, section 6, of the Mitakshara included 'females' (*Balamma v. Pullayya*(6)). We must therefore hold that the plaintiffs are not precluded from claiming as bandhus of their uncle by reason of their sex and that consequently they are in the line of heirs to the deceased Rangammah's stridhanam. The only other contention urged on behalf of the appellants is shortly disposed of. It rests entirely upon a misconception as to the import of a text of Vrihaspati referred to in paragraphs 622-3 of Mayne's Hindu Law. The learned author, no doubt, mentions among others a woman's maternal uncle's son as one of the persons entitled, according to Vrihaspati, to claim her stridhanam. But that the whole explanation of the text given by Mr. Mayne is erroneous will be evident from a careful examination of the text

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(1) I.L.R., 14 Mad., 149 at p. 150.

(3) I.L.R., 15 Mad., 421.

(5) 8 M.H.C.R., 88.

(2) I.L.R., 17 Mad., 182.

(4) I.L.R., 18 Mad., 198 at pp. 198, 199.

(6) I.L.R., 18 Mad., 168 at p. 170.

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itself. It runs as follows :—"The sister of a mother, the wife of "a maternal or of a paternal uncle, the sister of a father, the "mother of a wife, and the wife of an older brother are declared "equal to a mother. If they leave no male issue of their body "nor the son of a daughter nor a daughter, the sister's son and "the rest shall inherit their property." (Guru Doss Banerjee's *Marriage and Stridhanam*, 2nd edition, page 387.)

The meaning of the text, borrowing the language of Dr. Banerjee, is as follows :—"To a male, the females related as the "sister of his mother, the wife of his maternal or of his paternal "uncle, the sister of his father, the mother of his wife and the wife "of his elder brother are like his mother; and so to a female, "the males related in the reciprocal way as her sister's son, her "husband's sister's son, her husband's brother's son, her brother's "son, her daughter's husband and her husband's younger brother "are like her son. And these last-mentioned relations of a female "being like her sons inherit her stridhanam if she leave no male "issue, nor son of a daughter, nor a daughter." (*Ibid.*, 387 and 388.)

The second defendant, assuming that he is Rangammah's maternal uncle's adopted son, is not a relation specified in the text and, consequently, he cannot under it set up any right as against the plaintiffs. It is unnecessary, therefore, to consider and express any opinion on the question, much discussed in the argument, whether the passages in the *Smriti Chandrika*(1) and other Southern Commentaries, which refer to and rely on the text, are to be accepted as modifying the rule laid down by the *Mitakshara* with reference to the devolution of the stridhanam of a woman married in one of the approved forms but dying without issue.

The decision of the learned Judge is right. The appeal fails and is dismissed with costs.

(1) Chapter IX, section III, § 86.

APPELLATE CIVIL.

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

KASTURI CHETTI (CLAIMANT), APPELLANT,

v.

DEPUTY COLLECTOR, BELLARY (REFERRING OFFICER),
RESPONDENT.*

*Court Fees Act—Act VII of 1870, ss. 5, 8, 28, sched. II, art. 17 (iv)—
Appeal against award under Land Acquisition Act.*

An appeal against an award made by the District Judge under Land Acquisition Act I of 1894 was filed in the High Court, the appeal memorandum bearing a Court-fee stamp of Rs. 10 only and was admitted by the Registrar, no question having been raised as to the sufficiency of the stamp. On the appeal having been posted for hearing, it was objected on the part of the respondent that the stamp paid was insufficient :

Held, that the appeal memorandum should have borne an *ad valorem* stamp under Court Fees Act, section 8, and that there having been no decision by the taxing officer under section 5, it was open to the respondent to raise the objection on appeal at the hearing.

APPEAL against an award of T. M. Horsfall, Acting District Judge of Bellary, under Land Acquisition Act I of 1894 in claim No. 3 of 1896.

The claimant was the owner of certain land proposed to be acquired for sanitary purposes for the Bellary Municipality under the Land Acquisition Act. The Head-Quarters Deputy Collector awarded Rs. 370-4-9 under section 11. The land-owner being dissatisfied with this award, preferred a claim to the District Court for a sum of Rs. 4,600. The District Judge awarded Rs. 463.

The land-owner now preferred this appeal.

Venkataramayya Chetti for appellant.

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

JUDGMENT.—The Government Pleader draws our attention to the fact that this appeal should have been on a stamp of Rs. 235 under section 8 of the Court Fees Act, instead of being as it is on a stamp of Rs. 10 under article 17 (iv) of schedule II of the Court Fees Act. There can be no doubt but that the objection is well founded. Article 17 (iv) of schedule II of the Court Fees Act

* Appeal No. 138 of 1897.

1898.
February
14, 15, 24.

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prescribes generally the proper stamp for a suit to set aside an award, but section 8 of the same Act is a special provision applicable to appeals against all orders including awards, relating to compensation under the Land Acquisition Act, and the special provision overrides and governs the general provision in accordance with the ordinary and well-established rules of construction.

The Vakil for the appellant, however, contends that the appeal having been admitted by the Registrar on a stamp of Rs. 10, no objection as to the amount of the stamp can now be taken, and he relies on the authority of the decision in *Ranga Pai v. Baba*(1).

In that case, however, the court assumed that there was a "decision" by the taxing officer under section 5 of the Court Fees Act, and the whole of the reasoning in that case proceeds on that assumption. In the present case, however, there was no "decision" by the taxing officer within the meaning of section 5 of the Court Fees Act. That section requires that there should be, in the first instance, a difference of opinion between the officer whose duty it is to see that the proper fee is paid and any suitor or attorney as to the fee payable, and, secondly, that there should be a reference to the taxing officer, who should then give a "decision" on the question raised. In the present case there was no such difference or reference, nor was there any decision by the taxing officer except such as might be implied from the admission of the appeal. That, in our opinion, is not such a "decision" as the section requires. We think that, unless the question was raised before the taxing officer and unless he brought his mind to bear on the question and decided it, section 5 of the Court Fees Act had no application. Otherwise there would be no remedy for the most obvious error, or even for a deliberate trick to defraud the stamp revenue, unless detected by the routine establishment in the first instance, and before the admission of the appeal or the reception of the paper, as the case might be:—Section 23 of the Court Fees Act clearly contemplates the possibility of such mistakes and provides a remedy even in the High Court. We are, therefore, of opinion that the case relied on is not on all fours with the present case, and that section 5 of the Court Fees Act does not prevent our now taking notice of the deficiency in the stamp duty.

(1) I.L.R., 20 Mad., 398.

Under section 582-A, Civil Procedure Code, we allow the appellant to pay the deficient stamp duty within one week from this date; failing which, the appeal will stand dismissed with costs.

This appeal coming on for final hearing and the appellant's Vakil not having complied with the above order, the Court delivered the following judgment:—

JUDGMENT.—The deficient stamp duty not having been paid, the appeal is dismissed with costs. The costs will be calculated on the appellant's valuation of the appeal.

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APPELLATE CIVIL.

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

KOTI PUJARI (PLAINTIFF), PETITIONER,

v.

MANJAYA AND OTHERS (DEFENDANTS NOS. 1 AND 3 TO 17),
RESPONDENTS.*

1897.
December 15.

Suit's valuation—Pecuniary limits of jurisdiction—Suit filed in superior Court.

In a suit on a mortgage, in which the amount claimed was in excess of the pecuniary limits of the jurisdiction of a District Munsif, and which was filed in the Court of a Subordinate Judge, it appeared that there had been an adjudication by a District Munsif in a previous suit affecting the rights of the parties now in issue, and that the present claim was largely composed of interest. The Subordinate Judge having framed issues relating to the claim for interest and having tried them as preliminary issues, decided that the suit was within the pecuniary limits of the jurisdiction of a District Munsif, and that the claim had been unwarrantably exaggerated with a view to filing the suit in a superior Court, and so avoiding the plea of *res judicata*, and he thereupon returned the plaint to be presented in the proper Court:

Held, that the procedure adopted was wrong and that the whole suit should have been tried.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the proceedings of H. G. Joseph, District Judge of South Canara, in Civil Miscellaneous Appeal No. 30 of 1896, dismissing an appeal against order of U. Achutan Nayar, Acting Subordinate Judge of South Canara, in Original Suit No. 8 of 1896.

* Civil Revision Petition No. 165 of 1897.

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Suit on a mortgage to recover Rs. 999 principal, and Rs. 1,800 interest, with further interest and costs. The defendants pleaded that the mortgagor was not competent to mortgage validly the premises which belonged to the family, and that it had been held in a previous suit tried by a District Munsif that Rs. 599 forming part of the mortgage money was not chargeable on the property, that the interest was calculated under a penal and unenforceable stipulation, and that the claim included *post diem* interest. The instrument sued on contained, *inter alia*, the following clauses:—

"We have received Rs. 999 as per above particulars; we shall pay every year from this day on the 30th Bahula of the month of Magha Rs. 70, being interest on the amount at 7 per cent.

"The principal amount we shall pay you, together with arrears of interest, if any, in one lump sum, on the 30th April of any year after the 30th April 1881 and within the 30th April 1886, and take back from you this mortgage bond, together with mortgage bond taken back from Dujé Prabhu and handed over to you, and the prior documents referred to therein and the decree in English evidencing the title to this land.

"If interest is not paid on the due date, and should fall in arrears, we will pay at the rate of 12 per cent. interest on the principal sum from the date of default."

The Subordinate Judge framed and tried as preliminary issues the following:—

1. "Whether the plaintiff is entitled to interest after the date fixed for repayment in the absence of a covenant to that effect?"
2. "If plaintiff is entitled to interest at all, to what rate is he entitled?"

In the result he held that the suit was within the jurisdiction of the Court of a District Munsif and he returned the plaint for presentation in the proper Court. He said:—"In the present case the bond fell due on the 30th April 1886, and the claim for *post diem* interest is barred by limitation more than six years having elapsed before the presentation of the plaint on the 30th January 1896. The defendants argue that the plaintiff knowing well that the claim for *post diem* interest is not sustainable has included it in this suit and put it so high as to oust the jurisdiction of the Munsif and to give jurisdiction to this Court. Though, in case of default, 12 per cent. interest is made payable from the date of default, yet the original rate fixed in the bond being

"7 per cent., it is contended that the plaintiff, who is entitled only to a reasonable rate, cannot claim as *post diem* interest, a rate higher than that fixed in the bond, and that the claim for 12 per cent. interest is an unwarrantable addition to give jurisdiction to this Court. *Lakshman Bhatkar v. Babaji Bhatkar*(1). I think this ruling is in point.

"I am also of opinion that plaintiff's error is not a *bonâ fide* one. In Original Suit No. 333 of 1884, the Puttur Munsif decided that out of the consideration of Rs. 999, Rs. 599 was not chargeable on the family property. This decision was confirmed in Appeal Suits Nos. 24 and 25 of 1888. To avoid the plea of *res judicata*, the plaintiff delayed the institution of this suit for nearly 12 years from the date of that decision, and nearly 10 years from the date in which the bond fell due."

The plaintiff preferred an appeal to the District Judge who dismissed it agreeing with the Subordinate Judge.

The plaintiff preferred this petition.

Mr. C. Krishnan and Madhava Rau for petitioner.

Narayana Rau for respondents.

JUDGMENT.—We think that the Courts below were in error in holding that the claim either for *post diem* interest or for the portion of principal said to have been disallowed in a previous suit were unwarrantable additions to the claim made for the purpose of changing the *venue*, nor do we think that the Courts could properly entertain such a plea as a matter preliminary to determining the Court in which the suit ought to be brought. There is, in the present case, no question of over-valuation of the subject matter of the suit. The contest is as to whether the plaintiff can recover the whole or only a part of the sums claimed by him in the suit, viz., a portion of the principal and *post diem* interest. These are the very questions involved in the suit and are not preliminary questions connected with the proper valuation of the subject matter of the suit. Very grave inconvenience and confusion would result if pleas raised by the defence as to the right of the plaintiff to portions of the relief sought by him and which he would be entitled to on establishing the allegations of the plaint, were allowed to be treated as preliminary questions affecting the valuation of the suit, and which ought to be determined in order to ascertain the Court

(1) I.L.R., 8 Bom., 31.

KOTI PUJARI v. MANJAYA. In which the suit should be brought. In the present case the claim for *post diem* interest is one which the plaintiff is entitled to raise, having regard to the recent decisions on the subject, while the claim for the sum said by the defendant to be *res judicata* is one which the plaintiff can establish if he can show that there is no *res judicata*, and that the debt was incurred for purposes binding on the defendant. If the valuation of the suit is right, no question of *res judicata* by virtue of the decision in the District Munsif's Court can arise, since that Court could not have tried the present suit.

We have not overlooked *Lakshman Bhatkar v. Babaji Bhatkar*(1) on which much stress was laid by the respondents' pleader, but we think that the present case is distinguishable from it. Were it otherwise, we should hesitate to go so far as the learned Judges seemed disposed to go in applying the principle enunciated by him with reference to the duty of the Court in cases of alleged over-valuation.

We must therefore set aside the orders of the Courts below, and direct that the District Judge do receive the plaint and dispose of it according to law.

Costs throughout will abide and follow the result.

APPELLATE CIVIL.

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

JAGAPATI MUDALIAR (DEFENDANT), PETITIONER,

v.

EKAMBARA MUDALIAR (PLAINTIFF), RESPONDENT.*

Pleader and client—Authority of pleader—Compromise entered into by pleader without the client's consent.

It is not competent to a pleader to enter into a compromise on behalf of his client without his express authority to do so.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the proceedings of V. Saminada Ayyar, District Munsif of Trivellore, in Small Cause Suit No. 1088 of 1896.

(1) I.L.R., 8 Bom., 81.

* Civil Revision Petition No. 99 of 1897.

The defendant in the suit retained a pleader and signed a vakalat in the following terms:—"I, the defendant in the above suit, have appointed you as my vakil to conduct the suit on my side. Therefore, I shall accept, as having been conducted by me in person, all the acts done by you in the Court, concerning the suit, such as applications written by you for me and those that are spoken, signed and argued for me."

"Subsequently" said the District Munsif, "a compromise petition signed by the plaintiff and his pleader and by the defendant's pleader, but not defendant, was put in in this suit on 18th December 1896. According to a practice which it is generally found convenient to follow, the defendant was ordered by the Court on that day to turn up in person or send a special power to compromise, the vakalat already filed by his pleader containing only a general power to act without an express power to compromise. It is conceded that there was nothing limiting the scope of the pleader's general authority to act, as for instance, by an express direction not to compromise. The defendant turned up in person on 4th January 1897, and orally stated that he did not agree to the compromise signed by his pleader and put into Court on 18th December 1896. The only question for consideration, therefore, on which there has been somewhat a conflict of opinion, is whether a compromise entered into by a pleader on behalf of his client without a special power to compromise and without express instructions to the contrary is binding on the client as against third persons."

The District Munsif answered the question thus stated by him in the affirmative referring to *Jagannathdas Gurubakshdas v. Ramdas Gurubakshdas*(1), *Jang Bahadur Singh v. Shankar Rai*(2), and he passed a decree in accordance with the terms of the compromise.

The defendant preferred this petition.

Champion & Biligiri for petitioner.

Sivasami Ayyar for respondent.

JUDGMENT.—We are unable to accept the view taken by the District Munsif. In England, no doubt, as urged for the plaintiff, an attorney, though he has not obtained express authority from his client for the purpose, has yet power to enter into a compromise

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(1) 7 Bom. H.C.R. (O.C.J.), 79.

(2) I.L.R., 13 All., 272.

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on behalf of the latter. However, as pointed out in the note to section 24 of Story on Agency (9th edition, page 27), such power has given rise to much litigation in England. It is not surprising, therefore, that even many of the American Courts, administering the English Common Law have declined to follow the English rule referred to. It is true that in the note in Story, cited above, it is said that the American decisions on the point generally agree with those of the English Courts. But the accuracy of that observation has been questioned in *Levy v. Brown*(1), where the Court says:—"In the elaborate note to section 24 in "Story on Agency, and also in Wharton on Agency, section 592, "it is said that the American rule is the same as the English. "If these learned authors mean to say that a majority of the "American Courts recognize an inherent right in the attorney to "compromise the original demand placed in his hand, so as to "receive in full satisfaction less than the amount due, or to substitute claims upon other parties, or to take property in satisfaction "of a money demand, or to release any security existing when he "received the claim, we cannot agree with them. That there are "cases going to this extent is true, but we think that the decided "weight of authority in this country is the other way." When such is the case in countries advanced as those American States are, it would scarcely be safe to apply the English rule to practitioners in the position occupied by the majority of vakils here. *Prem Sookh v. Pirthee Ram*(2), *Musumat Hakeemoonnissa v. Buldeo*(3), *Musumat Sirdar Begum v. Musumat Issut-ool-Nissa*(4), *Gour Pershad Doss v. Sookdeb Ram Deb*(5), *Chunder Coomar Deo v. Mirza Sudakat Mahomed Khan*(6), and *Sheikh Abdul Sabhan Chowdhry v. Shibkisto Daw*(7), are clear and distinct authorities against the view adopted by the District Munsif. Moreover, so far as this Presidency is concerned, it has been hitherto tacitly understood by all that a vakil has no implied authority to enter into a compromise on behalf of his client, as is manifest from the practice of the Courts which invariably insist upon the production of special authority from the client expressing consent to the compromise entered into on his behalf by the Vakil before the

(1) 80 American Reports, 359.

(3) 8 Agra H.C.R., 309.

(5) 12 W.R., (C.R.), 279.

(7) 3 B.L.R., Appx., 15.

(2) 2 Agra H.C.R., 222.

(4) 2 N.W.P. H.C.R., 149.

(6) 18 W.R., (C.R.), 436.

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compromise is accepted by the Court. It is scarcely necessary to say that there is a considerable difference between the case where a pleader by way of compromise purports to give up a right claimed by the client, or to saddle him with a liability that is not limited, and the case on which stress was laid in the argument, viz., where a pleader makes admissions as to relevant facts in the usual course of litigation, however much those admissions affect the client's interest. The power to bind by such admissions, which, in effect, is but dispensing with proof of the facts admitted, is one of the well-recognized incidents of a pleader's general authority. To deny power so to bind the client or to do any similar act obviously necessary for the due conduct of litigation would so embarrass and thwart a pleader as in a great measure to destroy his usefulness. But no such undesirable results would follow from holding that in the absence of specific authority, a pleader cannot bind by compromises strictly such. It is true that the opinion of a pleader as to the advisability of a compromise is often valuable. But it must be conceded that a client ought to have the power of deciding for himself whether a right asserted should be relinquished, and whether a liability denied should be accepted.

Having regard to all the considerations bearing on the matter, we think we ought to follow the Indian cases to which we have referred, and hold that the compromise in the present instance entered into by the defendant's vakil without the defendant's authority and the decree passed thereon in spite of his opposition are not binding on him. The decree is therefore set aside, and the suit remanded for disposal according to law. Costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

IN APPEAL No. 81 OF 1897:—

1898.
February 28.
March 1, 15.

ALAGIRISAMI NAICKAR AND OTHERS (DEFENDANTS NOS. 2, 4,
5 AND 6), APPELLANTS,

SUNDARESWARA AYYAR AND OTHERS (PLAINTIFFS AND
DEFENDANT No. 7), RESPONDENTS.

IN APPEAL No. 83 OF 1897:—

SUBBAYYAR (DEFENDANT No. 7), APPELLANT,

SUNDARESWARA AYYAR AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

*Limitation Act—Act XV of 1877, s. 28, sched. II, art. 124—Right to a temple office
and its endowments—Adverse possession—Civil Procedure Code—Act XIV of
1882, s. 13, expl. II—Res judicata.*

Certain offices in a temple and the endowments attached thereto were held jointly by the members of two branches of a family, represented respectively by the plaintiff and the defendant. Long previously to 1872 the defendant's branch got into sole possession, and in that year a family settlement was arrived at by which it was arranged that the offices should be held in rotation and the lands in equal shares; and, in accordance with this settlement, a certain village forming part of the endowment was delivered to the plaintiff's branch of the family. In 1889 the defendant brought a suit to recover a moiety of that village and an issue was raised whether he enjoyed the offices and the landed property in his independent right or as a servant for wages. His suit was dismissed on the ground that the offices and emoluments were indivisible and went by right to the older branch of the family. The plaintiff now sued in 1895 to establish his right to the entire offices and to recover possession of the other village:

Held, that it was open to the defendant to assert in this suit a title by adverse possession as that had been made a ground of attack, though not the basis of his claim in the former suit, and that the defendant had acquired a divisible right to a moiety by twelve years' adverse possession and that the suit should, to that extent, be dismissed.

APPEALS against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in Original Suit No. 40 of 1895.

Plaintiff No. 1 claimed to be entitled by hereditary right to the offices of Nagara Mutharai and Kattiyam in a temple and

to the villages constituting the endowment of the offices, viz., Vandavasi and Thandayanendal. Plaintiff No. 2 was a lessee from plaintiff No. 1 of the last-mentioned village which was in possession of defendant No. 7, the representative of another branch of the same family to which plaintiff No. 1 belonged. The case of defendant No. 7 was that he and his ancestors had the right to perform and did perform half the duties and enjoyed half the emoluments attached to the offices in question; he also pleaded estoppel and adverse possession. The remaining defendants were the members of the committee and the manager of the temple.

It appeared that the branch of the family to which defendant No. 7 belonged had claimed half the offices and the endowments for nearly forty years and that, when the first plaintiff's father was dismissed in 1863, defendant No. 7 had been appointed to succeed him and placed in possession of that part of the endowments, of which he was not already in enjoyment; and that shortly after plaintiff No. 1 attained majority, viz., on 2nd September 1872, an arrangement was come to between the two branches of the family, which was embodied in a document filed in the suit as exhibit XXVIII. That document after setting out the names of the parties, viz., plaintiff No. 1 and defendant No. 7 and their respective brothers and referring to the offices above mentioned as mirasi offices and describing the endowments attached to them, proceeded as follows:—

"That out of our ancestral mirasis above referred to the
"sons of Seshayyan should enjoy the Rajakara Nagara Mutharai
"mirasi attached to the said Meenatchi Sundareswarar temple from
"Tamil 1st Tai up to the end of Margali of the year Srimukha
"next, have the Mutharai therefor in their hands and enjoy the
"food and other perquisites due therefor; that the said Chinna
"Gurusami Ayyan, &c., should, until the aforesaid time, be looking
"after Kalasanthi Kattiyam duty and the Rishabha Mutharai
"Nirvaga duty in Tiruppuvanam and enjoy the food and perqui-
"sites due therefor, that in the same way year after each sharer
"should look after the duty of the other and enjoy the respective
"perquisites that special incomes should be enjoyed by both in
"equal shares that in respect of the money found short in the
"Meenatchi Sundareswarar temple at Madura, we should make
"it good in equal portions just like the Nirvaghis (servants); that
"in the event of losses like this occurring in future we should make

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"good those too in equal portions in the same way (.....) the
"said Tiruppuvanam (.....) amount the said Seshayyan."

Since the date of this settlement the village of Vandavasi was in the enjoyment of the first plaintiff's family and the village of Thandayanendal in that of defendant No. 7. In Original Suit No. 108 of 1889 on the file of the Subordinate Court of Madura (East), the present defendant No. 7 sued the present plaintiff and his two brothers and various tenants in occupation of the village of Vandavasi to establish his right to a moiety of that village and the proceeds thereof, claiming title on the ground that he discharged half of the duty attached to the offices above mentioned, and he relied upon the document just referred to which was filed as exhibit Y. His claim was admitted by the present plaintiff as well as certain of the other defendants, and among other issues the third was framed as follows:—"Whether the plaintiff has been performing the duties of his office in his independent right and he participated in the enjoyment of the property till 1295, as alleged by plaintiff, or whether the plaintiff was employed to do the work for wages for a time and received the income of the property only as such wages, as pleaded by first defendant?" The Subordinate Judge as to this issue recorded the following finding:—"There is not an *iota* of evidence that the plaintiff's father or plaintiff's brother or plaintiff ever did work for the first defendant's family for wages. On the other hand, the evidence shows that plaintiff's branch enjoyed the village either conjointly with first defendant's branch or in antagonism to it and never as its servant." In the result the Subordinate Judge held the plaintiff was entitled not to partition of the property but to a half share in the income. The decree was upheld (on appeal by the first defendant) by the District Judge of Madura who said, *inter alia*, as follows:—

"The principal ground of appeal urged on behalf of the appellant (first defendant) is that the terms of the original grant, which the Subordinate Judge accepted as proved, having established that the office and its emoluments should be held without partition by the elder branch of the family, the Subordinate Judge was not warranted in decreeing a division of the income. It has also been urged that the grant being of the nature of a grant for charitable purposes, the holder of the office had no such proprietary interest therein as would enable him

"to make a disposition of the property, and that this being so, the arrangement evidenced by exhibit Y for partition of the property is inoperative and invalid, and that the appellant cannot be prejudiced by the illegal or improper acts of his predecessors in office."

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"In 1872 came the partition-deed, exhibit Y, between plaintiff and his elder brother and defendants Nos. 1 to 3 and their elder brother. If this document is valid it is admitted on behalf of appellant that his case must fail."

"It is clear on the evidence that exhibit Y was recognised and acted on in a most unmistakable manner by all concerned therein including the appellant."

"As regards the argument that the nature of the property is such that no disposition could be made of it by the holder for the time being, it has not, in my opinion, been shown that the grant is of the character contended for. The grant was given simply, as far as has been shown, by way of emolument for the performance of certain services in the Madura temple and has, in itself, nothing of a special character."

"No doubt the terms of the original grant precluded partition, and the only question now remaining is whether, notwithstanding the conduct of the parties since the partition of 1872, effect should now be given to the original terms of the grant, and subsidiarily to the terms of the renunciation-deed of 1829."

"It appears to me on consideration that this should clearly not be done. The parties and their predecessors have now, for a long series of years, agreed to ignore the original terms of the grant and the renunciation of 1829. The latter certainly was not acted on since about 1852, and was never so far as appears sought to be enforced. The partition-deed of 1872 (exhibit Y) was deliberately entered into between all the then representatives of the family and has been recognised and acted on not only by the parties themselves, but by the controlling authorities since that date, and no valid or well-founded argument has, in my opinion, been advanced at the bar to show that the Court is bound to upset a family compact for the tenure of the property which is the deliberate act of the parties themselves and which has now,

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"for a considerable time, been acquiesced in and acted on by all concerned."

On Second Appeal (No. 1895 of 1891) the High Court (COLLINS, C.J., and PARKER, J.) reversed the decree, and dismissed the suit making the following observations:—

"We observe that the plaint does not base the alleged right to partition upon exhibit Y, but upon plaintiff's right as a member of the family to an equal share in the property or to an equal share in the income, if the property itself cannot conveniently be divided. On referring, however, to the terms of the grant as evidenced by exhibits XII and XII (a), we agree with the District Judge that it must be taken that the office and its emoluments were to be held by the elder branch and without partition, and this being so, it is clear that the agreement evidenced by exhibit Y was *ultra vires*.

"The indivisibility of the property was for the benefit of the office, and it was not competent to the holder of the office to vary the trust. As the income of the property which was itself inalienable, was for the support of the holder of the office, it follows that a partition of the income is as impossible as a partition of the property itself.

"The respondent's pleader endeavoured to support the decree on the ground that the office itself had now passed into the possession of the plaintiff who had acquired a title to it by adverse possession. In reply to the cases quoted by the learned Advocate-General to show that the trust was inalienable, it was urged that the case was not one of a trust but of an office with emoluments attached thereto. We are not able to see the distinction, but we do not think it necessary to go into the cases which have been cited for the simple reason that we cannot allow the plaintiff in second appeal to change the whole basis of his claim. His claim was based in the plaint upon his alleged right as a member of the family to demand a partition, and it is quite clear that, on that basis, he cannot possibly succeed. The plaint so far from alleging adverse possession, set up the joint possession of the office and its emoluments."

In the present suit the issues Nos. 3, 4, and 5 were as follows:—

"Whether the entire office in question belongs exclusively to first plaintiff's family and was held by the elder branch, or whether it belongs to the family of the first plaintiff and seventh

"defendant and the emoluments were enjoyed in two moieties by the two branches, and whether the claim so far as it relates to the moiety of the office held by the seventh defendant is barred by limitation?"

"Whether the decree passed by the Madras High Court in Second Appeal No. 1895 of 1891 is binding upon the defendants in this case and whether first plaintiff forfeited his right to the office by the alienations he has made of the lands endowed for its support?"

"Whether the first plaintiff by reason of his admission in Original Suit No. 108 of 1889 is estopped from maintaining this suit and alleging that the office should be held by the elder branch of his own family?"

As to these issues the Subordinate Judge recorded the following findings:—(1) "My finding is that the offices in question belong exclusively to first plaintiff's branch, but that the emoluments were enjoyed in two equal moieties." (2) "I am of opinion that the judgment in the former suit is binding upon the defendants, and they are estopped by *res judicata* from denying the first plaintiff's right to the office." (3) "At the date of the first plaintiff's admission in the former suit, his right to the offices had not accrued as his elder brother Venkateswara Ayyar was alive. It was only after his death in 1894 that the first plaintiff became entitled to them. There is no principle of law or justice by which his admission can prevent him from setting up his real right when that right has accrued. I hold, therefore, that the circumstance of his having supported the seventh defendant's claim in the former suit cannot operate as estoppel (*Mussumat Oodey Koovur v. Mussumat Ladoo* (1))."

He accordingly passed a decree for the plaintiff declaring him to be entitled to the entire offices and decreeing that the defendants do put him in possession of the village of Thandayanendal. Against his decree these appeals were preferred on behalf of the members of the temple committee and defendant No. 7, respectively.

V. Krishnasami Ayyar, Sundara Ayyar and Srinivasu Ayyangar for appellants.

Rama Rau, Ramakrishna Ayyar and Seshachariar for respondents.

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JUDGMENT.—The first plaintiff (who will hereafter be called the plaintiff as the second plaintiff was only formally joined) brought this suit to establish his right to the entire office or offices of Nagara Mutharai and Kattyam in the temple of Sri Meenatchi Sundareswarar at Madura and to recover from the possession of the seventh defendant the village of Thandayanendal, one of two villages, the profits from both of which form the emoluments of the offices aforesaid. The other village Vandavasi was already in the plaintiff's possession and it had been the subject of a previous suit, to which reference will soon be made. The plaintiff impleaded defendants Nos. 1 to 5 as the committee men and the sixth defendant as the manager of the devastanam in question, on the ground that they were supporting the seventh defendant in his usurpation of the offices in suit and the emoluments thereof. The seventh defendant set up his right to a moiety of the offices and of the emoluments, and apparently claimed to keep the village of Thandayanendal in his sole possession as the other village was in the plaintiff's possession. The Subordinate Judge, though he was of opinion on the merits that the seventh defendant was entitled to half the offices and half the emoluments, found that the question was *res judicata* against the seventh defendant by the final judgment of the High Court in the previous suit, and he therefore gave the plaintiff a decree declaring his right to the entire offices and the entire emoluments and directed the delivery by the seventh defendant of the plaint village, Thandayanendal, to the plaintiff. At the same time he issued an injunction to the other defendants not to interfere with the rights declared by the decree in the plaintiff's favour. In Appeal No. 81 of 1897, the committee represented by defendants Nos. 2, 4, 5 and 6 appeal on the ground that they have full power to appoint to the offices in question, and that the plaintiff is a man of bad character and unfit to hold the office: and added to these grounds of appeal they champion the seventh defendant's cause and support his appeal which is Appeal No. 83. Now, on the grounds which strictly appertain to themselves, that is, the power of appointment and the unfitness for office of the plaintiff they have no case whatever. As observed by the Subordinate Judge, they were hardly necessary parties to the suit, for they have no real power of appointment in themselves. They have simply to appoint to the offices the person hereditarily entitled to hold the same provided he is competent: and as to the

alleged unfitness of the plaintiff there was absolutely no proof, so that the committee's appeal may be dismissed *in limine*.

It remains to deal with the substantive appeal of the seventh defendant. In the previous suit which was Original Suit No. 108 of 1889 terminating in Second Appeal No. 1895 of 1891 in this Court, the seventh defendant was the plaintiff and the present plaintiff was the second defendant. Therein the seventh defendant claimed his right to a moiety of the offices and the emoluments, and this very plaintiff in that suit admitted the seventh defendant's right, and both the Court of First Instance and the Lower Appellate Court found in favour of the right. The High Court, however, dismissed the seventh defendant's claim on the ground that the offices and the emoluments were indivisible, and went by right to the older branch of the family to which the plaintiff does and the seventh defendant does not belong. The seventh defendant urged in support of the decrees of the Lower Courts in his favour that whatever the original grant might have been, yet he had acquired a title to the moiety of the offices and the emoluments by adverse possession for over twelve years. The learned Judges who heard that case however refused to hear him on that point, because they considered that he had not alleged it as the basis of his claim. In this suit, however, he has alleged adverse possession as the basis of his defence and we are unable to agree with the Subordinate Judge in his statement that the High Court decided in the previous suit that there was no adverse possession and so the subject was *res judicata*. As already observed, the High Court refused to decide upon that question and all they did decide on this point was that they would not hear it as it had not been pleaded in the plaint. The plaintiff's vakil thereupon urges that whether the point was decided or not the seventh defendant ought to have made it a ground of attack in his previous suit and by his omission to do so he is now barred from setting it up under the terms of Explanation II of section 13 of the Code of Civil Procedure. If it were certain that the claim by adverse possession had not been made in the previous suit, the provision of law quoted might operate as a bar; but we find on a perusal of the judgments in the previous suit that on the question raised by the third issue in that suit as to whether the seventh defendant enjoyed the offices and the property in his independent right, or as a servant for wages, the question of the character of

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the seventh defendant's possession was necessarily brought into consideration, and it was found by both the Courts that he had long enjoyed half the offices and either the whole or half of the village then in suit adversely to the plaintiff's family. So that it cannot be said that this right by adverse possession was not made a ground of attack in the former suit. Now upon the evidence in this suit there is not a shadow of doubt that from at least the year 1863 onwards, the seventh defendant has been in adverse possession of a moiety of the offices and the emoluments. It is not so clear whether there had been adverse possession previous to 1863, though there is ample proof that the seventh defendant's branch of the family were claiming as of right half the offices and the property so far back as 1858 (see exhibit CXXXIX). In 1863 when the plaintiff's father was dismissed, the Collector appointed the seventh defendant and his brother to the entire offices and registered the two villages Thandayanondal and Vandavasi in their joint names (exhibits LXIII and LXVIII) and put them into actual possession of the plaint village Thandayanondal; and it would appear that they were not put into possession of the other village Vandavasi which was then registered in their name because they already had possession of it. The plaintiff was then ten years old and he came of age in 1869, the age of majority at that time being 16. His right to sue for the recovery of the offices and the villages which had been given to others in 1863 began in that year, and the period of limitation then was six years. But as the plaintiff was a minor he had three more years after he came of age to sue, *i.e.*, until 1872. In 1872, when the seventh defendant and his brother had been in adverse possession for nine years and their title by prescription was becoming almost ripe, a settlement was come to as evidenced by exhibit XXVIII, by which the plaintiff's branch of the family were to take half the offices and the emoluments and the seventh defendant's branch the other half, the actual arrangement being that the offices should be held in rotation and the lands in equal shares. The adverse possession of the seventh defendant which had commenced in 1863 and was nearly perfected in 1872 in respect of the entire offices and the property was thereafter continued and has continued up to date, which is, of course, much longer than the statutory period, with respect to a moiety of the offices and the property. The effect of the arrangement in 1872 thus was the giving up by the seventh defendant

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of half of the right, the whole of which he was on the point of acquiring by prescription.

As to the law, it is clear that the right to an office such as this with its emoluments can be acquired by adverse possession as such a right is treated like the right of the manager of a temple or an uraima right as a personal right where there is no question of the malversation of the trust property. (*Balvant Rao Bishwant Chandra Chor v. Purun Mal Chaube*(1), *Nilakandan v. Padmanabha*(2)), and *Lakshmi Ammah v. Kesavan*(3). So that although it has been held in the previous case that the offices and emoluments ought to have been held indivisibly, yet we must find that another has acquired a divisible right to a moiety by twelve years' adverse possession, and that plaintiff's right thereto is extinguished. (Article 124 of the Second Schedule of the Limitation Act and section 28 of the same Act.)

We therefore allow the appeal of the seventh defendant that he is entitled to one half of the offices and the emoluments in question in this suit, and the plaintiff will hence be entitled to a decree for only the other half. The injunction and the order as to the seals contained in the Lower Court's decree have, in view of our decision become unnecessary; and certain manyams which were claimed in the plaint were also wrongly included in the decree of the Subordinate Judge as the claim to them had been abandoned in the suit. The decree must be modified accordingly. The simplest way to give effect to our judgment will be to set aside the whole decree of the Subordinate Judge's Court and to substitute a decree to the following effect—that the plaintiff be declared entitled to half the offices of Nagara Mutharai and Kattiyam as described in the plaint and that the seventh defendant do forthwith put him in possession of half those offices, together with half of the village of Thandayanondal hereunder described. The parties having lost and gained equally will bear their own costs throughout. The costs in the Lower Court of defendants Nos. 1 to 6 may be paid out of the temple funds; but their costs in this Court must be paid by themselves out of their private funds, as their appeal was uncalled for, inasmuch as it was sufficient for the seventh defendant to have appealed.

(1) L.R., 10 I.A., 90.

(2) I.L.R., 14 Mad., 153.

(3) Second Appeal No. 500 of 1890 (unreported).

APPELLATE CIVIL.

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

RAMANADAN CHETTI (PLAINTIFF), APPELLANT,

v.

PULIKUTTI SERVAL AND OTHERS (DEFENDANTS, NOS. 1 TO 38
AND 1ST DEFENDANT'S REPRESENTATIVE), RESPONDENTS.*

*Ejectment Suit—Title to relief completed pending a suit—Amendment
of plaint.*

A having leased land to B, sold it to C. Persons having trespassed, B offered no objection, and it was alleged that he was in collusion with them. C now sued before the expiry of the lease to eject the trespassers; the lease expired while the suit was still pending :

Held, that the plaintiff was not entitled to the relief sought and could not be permitted, on appeal, to amend the plaint by adding a prayer for a declaration of his reversionary right, although the acts of the defendants were such as to be prejudicial to his rights as reversioner.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in Original Suit No. 40 of 1895.

This was a suit relating to property described in the plaint as eight items of land. In 1894 they were all the property of defendant No. 1. On the 1st of June in that year items Nos. 1 to 7 were sold by him to Sowmianarayana Ayyangar, who on the 8th leased them for a period of ten years to defendant No. 1, who gave item No. 8 as security for the rent. In the following month Sowmianarayana Ayyangar sold to the plaintiff items Nos. 1 to 7 and assigned to him his rights under the lease. The plaint after setting out these facts proceeded to state that certain of the defendants had unlawfully entered upon the property in collusion with the village raiyats (who were also joined as parties) with the intention of defrauding the plaintiff, and of creating evidence of title in themselves. It was also alleged that defendant No. 1 who had refused to join in the suit was in collusion with the other defendants intending to defraud the plaintiff of his right to a charge on item No. 8. The prayers of the plaint were as follows :—

“It is therefore prayed that a decree may be passed—

“1. Directing the defendants Nos. 2 and 3 and defendants
“from the fourth to hand over the possession of the suit properties

“to plaintiff so that first defendant may enjoy items Nos. 1 to 7 for
“Fasli 1305 alone on behalf of the plaintiff, and so that plaintiff may
“enjoy them thereafter, and so that item No. 8 may be enjoyed
“by first defendant subject to the plaintiff's security aforementioned.

“2. That the said defendants be restrained by a permanent
“injunction from entering upon the said properties.

“3. That mesne profits from Fasli 1306 be paid to plaintiff
“with interest.

“4. That costs of the suit with interest thereon be paid to
“plaintiff.

“5. And that such further or other relief as the nature of the
“suit may require be granted.”

The suit was filed on the 15th of August 1895 while the lease to defendant No. 1 was still current. It however expired while the proceedings were pending. The Subordinate Judge passed a decree on the 13th of April 1896 dismissing the suit on grounds which are immaterial for the purposes of this report.

The plaintiff preferred this appeal.

V. Krishnasami Ayyar and Srinivasa Ayyangar for appellant.

The Acting Advocate-General (*Hon. V. Bhashyam Ayyangar*)
and *Sundara Ayyar* for respondents Nos. 2 and 3.

Respondents Nos. 4 to 39 were not represented.

JUDGMENT.—The property in dispute in this case consists of 12 pangus or shares in an Inam village. The lands appertaining to the shares are in the occupancy of raiyats who own the Kudivaram right. The share-holders or Inamdars are the Melvaramdars and as such are entitled to take their share of the crops and enjoy the other incidents appertaining to the tenure. Admittedly, the plaintiff's vendor had, before the sale to the plaintiff, granted a lease of the shares in dispute to the late first defendant for Faslis 1304 and 1305. The present suit was instituted before the expiration of the term of the said lease and while it remained in force. The plaintiff claimed a decree for possession of the shares against the contesting defendants who, it was alleged, had ousted the first defendant, the lessee. On behalf of the defendants it was objected that the plaintiff's suit as framed was unsustainable, the lease being treated in the plaint itself as subsisting and valid. The Subordinate Judge overruled the objection. But we cannot agree with him, as he has overlooked the elementary rule that a plaintiff who seeks possession must show that at the date of the

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suit he was entitled to such relief (Cole on Ejectment, page 66). The observations of Sir Barnes Peacock in *Davis v. Kayee Abdool Hamed*(1) are a direct authority that in this country also a landlord in the position of the plaintiff could not sue to eject even a trespasser so long as the lease is outstanding. The case of *Bissessuri Dabeea v. Baroda Kanta Roy Chowdry*(2) cited by the Subordinate Judge does not lay down a rule to the contrary, and if it did, the decision could not be held to be sound. As we understand that case, the Court there only held that as the plaintiff had been deprived of the joint possession he had held with his nimhowladar he was entitled to be restored to such possession. Clause (u) of Section 108 of the Transfer of Property Act, on which also the Subordinate Judge relies no doubt imposes an obligation on the lessor to put the lessee in possession. But that provision certainly cannot be construed as affecting the rule of procedure that a plaintiff suing for possession must show that at the date of the suit he was entitled to that relief.

On behalf of the plaintiff, it was urged here that even if, at the date of the suit, the plaintiff's claim for possession was unsustainable, still as the term of the lease expired during the pendency of the litigation, the plaintiff might now be given a decree for possession, should his case be shown to be well founded on the merits. The cases of *Sakharam Mahadev Dange v. Hari Krishna Dange*(3) and *Sangili v. Mookan*(4) on which the learned pleader for the plaintiff laid stress in support of the above contention do not warrant the course suggested by him being adopted in cases like the present. If in suits for partition under the Hindu Law events occurring after the commencement of the action are to be considered in determining the rights of the parties, such cases must be treated as an exception to the general rule that the rights of parties must be ascertained as at the date of the action brought. (Compare the observations of Collins, J., in *Ruys v. Royal Exchange Assurance Corporation*(5).)

It seems to be clear therefore that the plaintiff's suit for possession was not maintainable in consequence of the existence then of the outstanding term under the lease to the late first defendant.

(1) 8 W.R., (C.R.), 55 at p. 58.

(3) I.L.R., 6 Bom., 113.

(5) [1897] 2 Q.B., 135 at p. 142.

(2) I.L.R., 10 Cal., 1078.

(4) I.L.R., 16 Mad., 350 at p. 353.

It was next urged for the plaintiff that the dispossession of the first defendant was on a claim of title which was inconsistent with the plaintiff's right to the reversion and such relief as would protect that right might and ought to be given in this suit. The relief appropriate in such circumstances would be a declaration (Per Peacock, C.J., in *Womesh Chunder Goopto v. Raj Narain Roy*(1)). But as the plaint was framed upon an erroneous view of the plaintiff's rights, no declaration was prayed for with reference to the view of the matter just stated, and the case is not one in which the plaintiff should be allowed to amend at this stage of the litigation, especially because even after such an amendment the case cannot be decided in favour of the plaintiff without taking further evidence as to whether Exhibit C, which is the very first link in the chain of the plaintiff's title, was executed by the parties who are alleged to have executed it, but which evidence the plaintiff had failed to call without, so far as appears, any proper reasons for such omission.

In these circumstances there is no alternative left but to dismiss the suit on the preliminary ground stated above. The appeal, therefore, fails and is disallowed with costs.

APPELLATE CIVIL.

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

ITTAPPAN (PLAINTIFF), APPELLANT,

v.

PARANGODAN NAYAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, s. 59—Oral agreement for kanom—
Suit for ejectment by a jenmi.*

A jenmi in Malabar sued to eject a tenant, who proved by oral evidence that he had one year before suit paid to the plaintiff a sum of money as a renewal fee and the plaintiff agreed to demise the land to him on kanom for a period of twelve years :

Held, that, although no instrument has been executed and registered, the plaintiff was not entitled to eject the defendant.

(1) 10 W.R., (C.R.), 15 at p. 18. * Second Appeals Nos. 1646 and 1647 of 1896.

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v.
PULIKUTTI
SERVAL.

1896.
March 22.

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v.
PARANGODAN
NAYAR.

SECOND APPEAL against the decree of J. A. Davies, District Judge of South Malabar, in Appeal Suit No. 238 of 1895, confirming the decree of P. P. Raman Menon, District Munsif of Nedunganad, in Original Suit No. 456 of 1893.

The plaintiff sued to recover, with arrears of purapad, twenty-three items of land alleged to be the jenm property of his tarwad and to have been let on an improving lease to the defendants' assignor. The document tendered in evidence of that lease was found to be forgery. The defendants however admitted the plaintiff's title as landlord, and their case was that, in September 1892, the defendant had paid a renewal fee to the plaintiff and that the latter agreed to demise to him the land on kanom under which he claimed to be entitled to hold it for a period of twelve years. This agreement was established by the evidence, but the District Munsif held that it did not constitute a bar to the suit for ejectment for the reason that the terms were not proved to be sufficiently definite to be specifically enforced. He accordingly passed a decree for the land. The District Judge was of opinion that the agreement was not indefinite and really afforded an answer to the claim, and accordingly he reversed the decree and dismissed the suit.

The plaintiff proffered this second appeal.

Sundara Ayyar for appellant.

Mr. C. Krishnan for respondent No. 1.

Ryru Nambiar for respondent No. 29.

JUDGMENT.—It is argued for the appellant that the whole of the renewal fees was not paid by the defendants. That, however, was not plaintiff's case in the Court of First Instance, nor is it a ground of appeal to this Court. The contention of the plaintiff was simply that the money paid was not paid as renewal fee, but as rent. The Courts found that it was paid as renewal fee. No question was raised as to whether the payment was the full fee or only a part of it, and we cannot allow the plaintiff's present contention that it was only part of the fee to be now maintained. We find that the full fee was paid. Then it is argued that a lease of the kind agreed upon between the parties can only be made by a registered instrument, and that, as no such instrument was executed in this case, the plaintiff can maintain the present suit in ejectment. In support of this plea reliance is placed on a *dictum*

in the case of *Papireddi v. Narasareddi*(1). That *dictum* has been doubted by the Full Bench of the Allahabad High Court (*Begam v. Muhammad Yakub*(2)), and by a Divisional Bench of this Court (*Pangi Achan v. Parameswara Patter*(3)). We must also say that we find difficulty in accepting it as correct, although, as pointed out by Edge, C.J., the decision could be supported on the ground that in that case the defendant had unsuccessfully brought a suit for specific performance and had in it set up a contract which differed from the actual contract. In the present case the plaintiff brought his suit for ejectment before the expiration of the time within which the defendants might have sued for specific performance of the contract to renew the lease. In such a case to allow the plaintiff to eject the lessee would, in our opinion, be to give the plaintiff a decree in fraud of his contract of lease. We, therefore, agree with the Lower Appellate Court that the plaintiff's suit was premature, and we dismiss this Second Appeal No. 1646 of 1896 with costs.

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APPELLATE CRIMINAL.

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

QUEEN-EMPRESS,

v.

AYYAKANNU MUDALI.*

1898.
February 16.

District Municipalities Act (Madras) — Act IV of 1884, s. 189—Keeping a private cart-stand without a license.

It is not necessary, in order to establish the offence of using a place as a cart-stand without a license under District Municipalities Act IV of 1884 (Madras), section 189, to prove that the cart-stand is offensive or dangerous or that fees are levied there.

APPEAL on behalf of Government under Criminal Procedure Code, section 417, against the judgment of acquittal pronounced by P. Rajagopala Chari, Second-class Magistrate of Chengam, in Calendar Case No. 220 of 1897.

(1) I.L.R., 16 Mad., 464.

(2) I.L.R., 16 All., 344.

(3) Second Appeal No. 730 of 1894 (unreported).

* Criminal Appeals Nos. 14 and 15, of 1898.

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The accused was charged with the offence of keeping a private cart-stand without a license within the limits of a municipality under District Municipalities Act IV of 1884 (Madras), section 189, amended by Act III of 1897. The Magistrate said :—"It is pleaded, on behalf of the accused, that the place cannot be considered as a cart-stand in the sense used in the Act, as no fees are levied, and that the place exists purely for purposes of facilitating his trade as a broker. It is alleged that carts bringing paddy, &c., for his bazaar stay there temporarily until the price of the articles is settled, the brokerage due to him being either deducted at once on the spot or adjusted subsequently between himself and the bandyman. The Sanitary Inspector has been examined as an only witness for the prosecution. He swears that, after a license has been applied for and refused, to the accused, a large number of carts was allowed to stand on the site belonging to the accused on the 17th and 18th April; but, when he visited it, he further found the place uncleanly and otherwise objectionable from a sanitary point of view The question now for my consideration is whether, in the circumstances described by the accused, he is liable for an offence under the Municipal Act. In my opinion, he is not liable; section 188 of the Act and the following sections purport apparently to make provision against offensive and dangerous trades being carried on in a municipality. The trade carried on by the accused, viz., that of receiving brokerage in the circumstances represented by him, is certainly not a trade falling under either of the above two categories; for the trade by itself is neither offensive nor dangerous."

The present appeal was preferred on behalf of Government.

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

Pattabhirama Ayyar for the accused.

JUDGMENT.—We do not agree with the Sub-Magistrate that it is necessary for the prosecution to prove that a cart-stand is "offensive" or "dangerous," or that fees are levied in the cart-stand in order to justify a conviction under section 189 of the Madras District Municipalities Act IV of 1884, though, no doubt, those are matters regarding which the Court would usually require evidence to be given in order to guide it in finding whether the alleged cart-stand is such as the section contemplated and also to guide it in passing sentence in the event of conviction.

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The heading "Offensive and dangerous trades" is manifestly not exhaustive of the matters dealt with in the succeeding sections, nor can it be taken to restrict the plain terms of the sections. Again, the levying of fees is not necessary in order to constitute a place where carts stand a "cart-stand" within the meaning of the section. On the other hand, we think that a place is not necessarily a "cart-stand" within the meaning of the section, merely because one or more carts stand there. It cannot have been intended to apply to the keeping, let us say, of one or two carts on the premises of the owner of the carts any more than the words "horse lines" in the same section can be held to include the ordinary stables attached to a dwelling house. The term must be construed reasonably with due regard to all the circumstances of the case, e.g., how many carts use the place from time to time, whether they belong to one or more persons, whether fees are levied, how long the carts remain there, and the purpose for which they go there, whether for the sale of goods to the owner of the premises or to others, or for the purpose of being engaged for hire, and so forth.

In the present case it appears that the place was licensed as a cart-stand last year, but that the municipality refused to renew the license this year for some reason which is not stated. It also appears that as many as thirty carts are found there at one time, and that they belong to different persons, and, according to the first witness for the defence, carts for hire go there and carts from that place go for hire elsewhere. These facts would seem to indicate that the place is used as a cart-stand within the meaning of the section. These matters have not been sufficiently considered by the Magistrate.

We, therefore, resolve to set aside the acquittal and direct the Magistrate to re-try the case, taking further evidence as to the character of the alleged "cart-stand," and to dispose of the case according to law and with reference to the above remarks.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS,

v.

POOMALAI UDAYAN.*

1898.
January 26.

Penal Code—Act XLV of 1860, ss. 99, 186, 353—Local Boards Act (Madras)—Act V of 1884, ss. 77, 78, 81, 94, 163—Service of notice of demand of house-tax—Omission to fill up the house-register completely—Illegal distraint—Resistance to distraining officer.

A notice of demand of a house-tax under the Local Boards Act V of 1884 (Madras) was affixed to the house. The owner, who was a potter and cultivator by occupation, was in the village at the time. He did not pay the tax. A warrant of distress was issued, the house-register not having been completely filled up, and a bucket and spade belonging to the defaulter were attached. The defaulter successfully resisted the distraint:

Held, that the provisions of the Act had been sufficiently complied with as regards the preliminary steps for making the demand and the service of notice, and the fact that the spade and the bucket were protected from attachment under section 94 did not justify the resistance, and accordingly that the defaulter was guilty of offences under Penal Code, sections 186 and 353.

APPEAL on behalf of Government under Criminal Procedure Code, section 417, against the judgment of acquittal pronounced by T. Varada Rau, Assistant Magistrate of South Arcot, in Criminal Appeal No. 20 of 1897, preferred against the judgment of V. Ponnambala Mudaliar, Stationary Second-class Magistrate of Kallakurichi, in Calendar Case No. 95 of 1897.

The accused, who was a potter and a cultivator by occupation, was tried and convicted in the Court of the First Instance of the offences of voluntarily obstructing a public servant in the discharge of his public functions under Penal Code, section 186, and using criminal force to a public servant with intent to deter a public servant. The South Arcot District Board, under the Local Boards Act V of 1884 (Madras), section 60, notified that a tax on all houses situated within Kallakurichi Union should be levied at the full rates specified in schedule A of the Act. The accused failed to pay the tax due on his house after service of a notice of demand. A warrant of distress was then issued and a bucket and spade belonging to him which was found within his house were attached. The distraint was resisted by the accused who recovered and retained these articles. There had been an omission to fill up

* Criminal Appeal No. 792 of 1897.

one column of the house-register and it was objected that the service of notice of demand was irregular and also that the articles attached were not liable to distraint. On these grounds the Magistrate on appeal who referred to *Queen-Empress v. Kalian*(1), *Queen-Empress v. Pukot Kotu*(2), *Queen-Empress v. Tulsiram*(3), *Rakhal Chandra Rai Chowdhuri v. The Secretary of State for India in Council*(4), and *Cohen v. Nursing Dass Auddy*(5), reversed the conviction holding that the charges had not been substantiated. As to the second point he said: "Section 163, clause (1), gives the manner of service of notice regarding any money due in respect of assessment or tax. It shall, if practicable, be presented to or served personally upon the person to whom the same is addressed In this case the demand notice is said to have been pasted on the wall of the appellant's house by the monigar on 3rd December 1896. The appellant, it is admitted, was in the village and in fact in the house three hours before the monigar appeared. The question is should any attempt be made to discover or find the person to whom the notice is addressed or would his mere absence from his usual place of abode or business suffice, to adopt the other modes of service specified in the section quoted above."

The present appeal was preferred on behalf of Government.

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

Mahadeva Ayyar for the accused.

JUDGMENT.—Upon the facts, we agree with the finding of the Subordinate Magistrate that there was a resistance by the accused to the attachment, and we cannot agree with the Assistant Magistrate that such resistance was not proved. The evidence of the Union servants is corroborated by the probabilities as well as by the official report that was submitted at once, and it is impossible to believe the defence story that the Chairman of the Union with a large escort should have come to make the distraint and then have gone away without doing so, although there was no resistance.

The next question is whether the resistance was lawful as has been ruled by the Assistant Magistrate on the ground that the provisions of the Local Boards Act (V of 1884) under which the distraint was made were not regularly complied with in regard to (1) the preliminary steps for making the demand, (2) the service of the notice, and (3) the subjects of seizure. In regard to (1) the

(1) I.L.R., 19 Mad., 810.

(3) I.L.R., 13 Bom., 168 at p. 170.

(5) I.L.R., 19 Cal., 201.

(2) I.L.R., 19 Mad., 349.

(4) I.L.R., 12 Cal., 603.

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only defect appears to have been an omission to fill up one column in the house-register, which defect may be taken to be cured by section 155, clause (1) of the said Act (V of 1884), inasmuch as the provisions of the Act were in substance and effect complied with. The Assistant Magistrate was wrong in saying that no house-register was kept, and also in saying that it is not shown the demand notice was served ten days after the tax was payable, because the Chairman gives evidence proving both these points. In regard to (2) we consider that there was no real departure from the procedure prescribed in the Act (V of 1884) for the service of notices. As regards (3) we must admit that the articles seized—a spade and a bucket—were either tools of an artisan, such as a potter or implements of husbandry, and were therefore exempt under section 94 of the Act (V of 1884) from attachment. The question then is whether this circumstance justified the resistance, and rendered it no offence. We clearly think that it did not as the act, however irregular or illegal it may have been, was the act of a public servant acting in good faith under color of his office, and against such an act, the accused had no right of self-defence under section 99 of the Penal Code, inasmuch as there was no apprehension of death or of grievous hurt. This case is governed by the rulings of this Court in several previous cases (*Queen-Empress v. Ramayya*(1), *Queen-Empress v. Pukot Kotu*(2), and *Queen-Empress v. Tiruchittambala Pathan*(3)). The case, *Queen-Empress v. Tulsiram*(4), referred to by the Assistant Magistrate, was a case in which it was found that the person acting was in effect not a public servant. The other case, *Queen-Empress v. Kalian*(5), has no application here, the question there being only in regard to the lawfulness or otherwise of the custody from which the accused escaped.

We must therefore set aside the judgment of acquittal passed by the Appellate Court and uphold the conviction of the accused under sections 136 and 353 of the Penal Code. As regards the sentence of two months' rigorous imprisonment and Rs. 50 fine imposed by the Subordinate Magistrate, we consider it to be excessive as no violence was used. We reduce the imprisonment to the 26 days' imprisonment, which the accused has already undergone and remit the fine which, if paid, must be refunded.

Ordered accordingly.

(1) I.L.R., 13 Mad., 143.

(2) I.L.R., 19 Mad., 349.

(3) *Idem*, p. 78.

(4) I.L.R., 13 Bom., 163 at p. 170.

(5) I.L.R., 19 Mad., 310.

PRIVY COUNCIL.

RAJA VELLANKI VENKATA RAMA RAU (PLAINTIFF),

v.

RAJA PAPAMMA RAU (DEFENDANT).

[On appeal from the High Court at Madras.]

Construction—Title under a will followed by a family arrangement adding to the property devised.

The will of a proprietor, who died in 1864, disposed of a zamindari, and of one village within it, as two distinct properties, giving the zamindari to the testator's two widows, and, on the other hand, giving the village in equal shares, in perpetuity, to the two brothers of his junior wife. Neither of the two brothers took possession of their respective moieties on the testator's death, and the whole village was treated for some time as part of the zamindari, the profits of it being received by, or on behalf of, the widows. In 1869, one of the brothers having died, leaving a son, who succeeded to his rights in the village, a family arrangement was made that the entirety of it should be made over to the surviving brother, the present claimant, the son of the other receiving from the widows satisfaction in lieu of his moiety.

The junior widow having died, the senior got possession of the village, alleging that the surviving brother had merely been appointed to act as manager of it, on behalf of herself and her co-widow:

Held, that under the will the claimant had been originally entitled to one-half of the village including its rents, from the testator's death; and that to this half had been added the other, with title, in 1869, in pursuance of the transaction in regard to it. An order, given by the widows in that year making over the village, was not a revocable one; and the interest in the additional half, conferred upon the claimant, was commensurate with what was already his own. No writing was then necessary to vest the other half in him. Such a transaction was good and valid as a family arrangement; and he had made out his title to the whole village.

APPEAL from a decree (15th March 1892) of the High Court, reversing a decree (29th June 1889) of the Subordinate Judge of Eillore.

This suit was brought on the 7th February 1888 by Raja Vellanki Jagannatha Rau, who died in that year, and was succeeded on the record by his son, Raja Vellanki Venkata Rama Rau, to obtain possession of a village, Vundrazavaram; as entitled to the proprietary right. This village formed part of a zamindari belonging to Raja Narayya Appa Rau, who died on the 7th December

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

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1864, having by his will bequeathed half of the village to the plaintiff, Jagannatha Rau, and the other half to Sura Rau, both being brothers of the testator's junior wife. The zamindari, Nidudavolu, by the same will was separately given to the late Raja's two widows, Papamma, the senior, and Chinnamma. The younger widow died before 1883, in which year Jagannatha, who had received possession, of which the character was now disputed, was dispossessed of the village by Papamma, against whom he brought this suit to recover it.

The principal question raised by this appeal was whether the plaintiff had obtained a title to the village, as the First Court had decided, or had as manager only on behalf of the widows obtained a possession to which the surviving widow had lawfully put an end. The High Court had taken the latter view, and had held that any claim by the plaintiff under the will of 1864 was barred by time. The question was mainly as to the character and capacity in which the plaintiff had held the village while in possession from 1869 down to 1883 when he was dispossessed. The answer to this turned on the proper conclusion to be drawn from the facts stated in their Lordships' judgment.

The late Raja's bequest to the brothers was in these terms:—"To my brothers-in-law, Jagannatha Rau and Sura Rau, the village of Vundrazavaram. It is settled that they should be paying every year as by kistbund (instalments) the pesheush, and be enjoying the profits from their sons to grandsons, and so on in succession."

The will gave the widows a power to adopt which was exercised in the adoption of Venkata Ramayya, who dying left a son Narayyan. The latter was made a defendant, and was a party to this appeal, but he died in 1895. Papamma under an order, dated 7th January 1897, represented him as his guardian. On his death she was the sole respondent.

No steps were taken to carry the Raja's bequest of the village into effect until 1869. At that time Sura Rau had died leaving a son, Venkata Krishna Rau; and in that year it was arranged that a separate provision should be made for the latter.

In 1869 possession of the whole village was given to Jagannatha alone, an order, dated 22nd January 1869, signed by the two widows, having been given by them to an amildar of the zamindari in the following terms:—"Sanction having been given that out of

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"Rs. 6,400, the annual rent fixed on the village of Vundrazavaram, included in the Parganna of Nidudavolu, Rs. 3,200 should be paid annually to the Sircar, and the balance of Rs. 3,200 enjoyed by Vellanki Jagannatha Rau Garu as vasati, and that he should be managing the affairs of that village, the management of that village should be delivered to the man sent by him, and arrangements made so that he may get business managed on his behalf. If the collections already made for the present year are in excess of Rs. 3,200, payable to the Sircar, such excess should be made over to him, and a receipt taken. But if they fall short of Rs. 3,200, the deficit should be recovered from him, and further the sum of Rs. 3,200 should be collected from the ensuing year according to the kists of the Parganna. Moreover, the water-cess and the road-cess charged according to the rules for that village, in proportion to its extent, should every year be collected through Jagannatha Rau Garu himself, and arrangements made for that sum being remitted to the Tana. Therefore the money relating to the said items, as may be found due every year according to the accounts, should be collected from him according to the kists. We have arranged to collect through him alone also the past arrears outstanding on that village up to date, and this matter too is, therefore, made known to you."

The plaintiff, alleging title under the will of the Raja, stated that possession was held by the plaintiff from the 29th January 1869 till 1883 when the raiyats, at the instigation of Papamma, began to withhold their rents; and that he was finally deprived of possession in 1886. The defendant Papamma asserted in her written statement that the plaintiff had not obtained possession under the Raja's will, but by her permission and that of her deceased co-widow, on condition that he should pay an annual rent of Rs. 3,200; the understanding being that his possession should continue only so long as he did their behests, to which he had not attended. That her co-widow, who died on the 15th April 1881, had in 1878 joined with her in requiring possession of the village. The statement filed on behalf of the other defendant Narayyan was to the same effect, with a further allegation that the Raja could not alienate property that was ancestral in his line.

The issues raised the above questions.

The Subordinate Judge was of opinion that the plaintiff's representative had made out a title to the village. The widows

had granted possession of it, with the consent of the son of Sura Rau, the co-legatee, to Jagannatha, who entered into occupation of it. He considered that the widows did so, being inclined to act according to the will of their late husband, whose directions they were bound to carry out. Their making over possession was not a mere act of grace on their part; but they, being under an obligation to carry out the will of their late husband, had delivered over the property bequeathed by him to Jagannatha; in so doing adding the share which the co-legatee's son consented to abandon. The Judge referred to Lord Chancellor Talbot's expression in *Lechmere v. Earl of Carlisle*(1) that when a man lies under an obligation to do a thing it is more natural to ascribe his act, in so doing, to the obligation under which he lies, rather than to a voluntary grace independent of the obligation. He cited also Snell's Equity, 10th edition, page 264. He accordingly awarded possession of the village to the claimant.

The High Court reversed this decree, being of opinion that the claimant had not obtained possession of the village under the will, but by the act of the widows, who had put him in occupation as a manager only, and had lawfully put an end to the management. The Judges (COLLINS, C.J., and PARKER, J.), besides advertg to other evidence to that effect, referred to letters addressed by Jagannatha to his sister the Rani Chinnamma, and considered that they contained "an unequivocal admission that the writer could "only hold the village for the short remainder of his life, and was "liable to be called upon to surrender it at any time at the will of "the Rani." This they regarded as in accordance with the terms under which possession was given under the order of the 22nd January 1869, signed by the widows. The alleged title rested upon the will, and, so founded, was barred by time.

On an appeal by the plaintiff, Mr. J. D. Mayne, for the appellant, argued that the High Court had not drawn the right conclusion from facts as to which the evidence, taken altogether, left no doubt. The proprietary right to the village in dispute was given by the will of the last male owner to Jagannatha and Sura. The rights of those two had not been given up by them, and the delay in enforcing their rights carried no presumption that they, or either of them, had ever ceded rights to the widows. According

to the terms of the will the widows had no right to the village at all. Resting as the title originally did in Jagannatha and Sura, it was not disputed that Sura's son consented to the delivery of the entire village to the former. To this the son consented upon an arrangement that was satisfactory to him and to the parties interested, whereby he was provided for; and Jagannatha obtained the whole village. The terms of the order of the 22nd January 1869, signed by the widows, and directed to the amildar, to deliver possession to Jagannatha, were perfectly consistent with an intention on their part to carry out the will of their late husband; and there was no evidence of any other intention. Limitation had been referred to in the judgment of the High Court, but this could only apply on the supposition that this was a suit brought to enforce the will, which it was not. The plaintiff's case was that the will had been acted on, as a basis for the subsequent arrangement, in pursuance whereof possession followed. The defence consisted of an attempt to establish a supposed agreement, between the plaintiff and the widows, that he should become manager only, on their behalf. Of this last state of things there was no sufficient evidence, and there had been nothing to show that it was supported by any consideration. In connection with the alienation of part of an ancestral zamindari, such as Nidudavolu, and Regulation XXV of 1802, section 8, *Syed Ali Saib v. The Zamindar of Salur*(1) was referred to.

Mr. J. H. A. Branson and Mr. R. Harrington, for the respondent, argued that the judgment of the High Court had rightly dismissed the suit. So far as it was based upon the will it was barred by limitation, and apart from the will the appellant had made out no title. His possession as manager could be terminated by the widow, and his capacity in that respect was one that he had himself accepted. There was nothing in the order of the 22nd January 1869, showing that the widows intended to act upon the will only, but rather to carry out a new arrangement in which the appellant had acquiesced. The management conferred upon him was in substitution for a claim of title on his part to one half of the village. The evidence had not shown, and no presumption had arisen, that the widows intended to enlarge his interest therein, to the extent of conferring upon him an absolute title to the whole.

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(1) 3 P. Wms., 211; Cases temp. Talbot, 80.

(1) 3 M.H.C.R., 5.

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The High Court had rightly construed the order of the 22nd January 1869 as revocable. It must have been so, as it contained no words showing that it accompanied the grant of an absolute interest, and as there were no circumstances indicating that there had been such a grant of the whole village. Reference was made to *Baboo Lekhraj Roy v. Kunhya Singh*(1).

Mr. J. D. Mayne was not heard in reply.

Afterwards, on the 8th March, their Lordships' judgment was delivered by Lord MACNAGHTEN.

JUDGMENT.—This suit was brought to recover possession of the village of Vundrazavaram lying within the zamindari of Nidudavolu, which was formerly the property of the zamindar Narayya Appa Rau. Narayya died without issue on the 7th of December 1864, leaving a will which dealt with the zamindari and the village separately.

The suit was commenced in February 1888. The original plaintiff was Jagannatha, the appellant's father. He died at an early stage of the proceedings, and the appellant was substituted as plaintiff in his stead. The defendants were Papamma, the surviving widow of Narayya, and an infant also called Narayya Appa Rau, whose late father Ramayya had been adopted by Papamma some time after the completion of the transaction, the effect of which is now in question. The infant Narayya died in the course of the litigation and on his death his interest became vested in the respondent Papamma.

It is common ground that Jagannatha was in possession of the village in dispute from 1869 to 1879 and that during this period his possession was undisturbed. From 1879 to 1883 he was continually in trouble and litigation with the raiyats who withheld their rents and refused to accept pattas at the instigation, it is said, of Narayya's widows or their manager Venkatadri. In 1883 Papamma having survived the younger widow Chinnamma, who was Jagannatha's sister, came forward openly and dispossessed Jagannatha.

The sole question at issue is this.—In what character or in what capacity did Jagannatha hold the village while he was in possession? Was he absolute owner, as the appellant contends, or was he, as the respondent has variously asserted, tenant for life or

tenant at will, or grantee upon certain conditions for the breach of which he was liable to be dispossessed, or lastly was he, as the High Court has held, merely manager under a revocable appointment?

By his will, which was dated the 6th of December 1864, the day before his death, Narayya gave his zamindari and all his other property to his two wives—Papamma and Chinnamma. To Jagannatha and Sura, who were brothers of his junior wife, he gave the village of Vundrazavaram in perpetuity. The testator gave three other villages to Sura's son Venkata Krishna. He enjoined his wives to live in harmony with Venkatadri, whom he described as his younger brother, but whose exact relationship to the testator does not appear. And he gave his wives authority to adopt a relative.

The testator's wives signed the will in token of their consent to abide by its terms, and on the 9th of December 1864 they sent a copy of the will to the Collector and notified their intention of acting in accordance with its provisions.

It appears that neither Jagannatha nor Sura took any steps to obtain possession of Vundrazavaram on the testator's death. There was no opposition on the part of the Ranis, nor was there so far as appears any unwillingness on their part to carry out the testator's wishes. But Jagannatha considered that he had not been fairly treated by the testator who had made a more liberal provision for the family of his younger brother, and so he refrained from accepting the bequest in his favour in the hope that the Ranis would increase it. In the meantime, the village remained part of the zamindari and the rents were received by, or on behalf of, the Ranis and went into their treasury.

In 1869 Sura being then dead and his son Venkata Krishna who had married Venkatadri's daughter having succeeded to his rights, the family differences were composed. It was arranged that the entirety of the village of Vundrazavaram should be made over to Jagannatha as from the commencement of the current year with the consent of Venkata Krishna, who was to receive satisfaction for his moiety from the Ranis. The meeting at which the arrangement was completed took place on the 22nd of January 1869. There were present among others Venkatadri Jagannatha, the appellant, and Venkata Krishna and one Prakasa, the Raja of Vutukuru, a near relative, who is now dead. The Ranis were there too, though of course in their own apartments, and communications

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(1) L.R., 4 I.A., 223; s.c., I.L.R., 3 Cal., 210.

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took place with them from time to time through Prakasa, the appellant and Venkata Krishna. Before Venkata Krishna consented to place his moiety at the disposal of the Ranis for the purpose of the arrangement, he was assured by them that he should either have the moiety bequeathed to him by the testator or receive other villages instead. When he was satisfied Venkatadri dictated to his clerk an order addressed to the amildar directing him to make over the management of the village to the person sent by Jagannatha on behalf of his master. The order was then given to Venkatadri. He handed it to Prakasa and then to Jagannatha. They both read it. Jagannatha read it aloud and expressed his approval. It was then taken to the Ranis. They read it and signed it in the presence of Prakasa, the appellant, and Venkata Krishna, and again repeated their assurances to Venkata Krishna. In conformity with this order, Jagannatha was put into possession of the village. Nothing further is to be found in the record about Venkata Krishna. It must be taken that he received adequate compensation in accordance with the assurances that he had been given him.

That is in substance the whole of the evidence about the transaction which resulted in Jagannatha being put into possession of the village of Vundrazavaram. The only witness at the trial who appeared before the Ranis was the appellant himself. The Subordinate Judge, who observed his demeanour, was satisfied that he was a truthful witness. Neither the respondent nor Venkatadri came forward to contradict him. They were both cited as witnesses for the appellant. But "the former," as the Subordinate Judge states, "threw so many difficulties to her examination on commission that plaintiff was obliged to abandon her as his witness, and the latter was reported to be too seriously ill to subject himself to any examination."

The transaction seems to be a very simple and a very intelligible arrangement, if the position of the parties at the time is considered. Jagannatha was entitled to one moiety of the village and one moiety of the rents from the testator's death. His grievance was that the testator had not given him as much as he thought he was fairly entitled to. With the consent of the person entitled to the other moiety the Ranis made over to him the whole of the village as from the commencement of the current year. In the absence of any evidence it is impossible to suppose that it

could have been intended that his interest in the one moiety should be less than or different from his interest in the other. It was not suggested that he should surrender his absolute interest in his own moiety. Sura's moiety was made over to him as an addition to his own. The natural inference and indeed the only reasonable inference that can be drawn from the surrounding circumstances is that he was to hold the entire village in the same way as he was entitled to hold his own moiety, and that his interest in the two moieties should be commensurate. Such a transaction would be perfectly good as a family arrangement. Jagannatha was put in possession of the whole, and as the law then stood no writing was necessary to vest Sura's moiety in him.

Jagannatha's complaint was that one moiety of the village was not enough for the maintenance of himself and his large family. It is difficult to conceive that he would have surrendered his absolute interest in one moiety for a life interest in the whole which would have left his family unprovided for at his death. It is equally inconceivable that he would have accepted any interest less than a life interest. The suggestion that the village was granted to him on condition of personal attendance on the Ranis or on any terms involving a right of resumption is not supported by any evidence.

Of course, if there were anything in the order of the 22nd of January 1869 inconsistent with an absolute interest in Jagannatha, it would be a different matter. It would be impossible for the appellant to rely on possession obtained under a document which would have contradicted his present claim. But the order so far as it goes is consistent with an absolute interest in the person in whose favour it was issued. It directs the amildar to deliver up the management of the village to the messenger of Jagannatha, "so that he may get business managed on his behalf." It states no doubt that the profits over and above the fixed rent required to cover the proportionate part of the Government revenue of the whole zamindari were to be enjoyed by Jagannatha as "vasati," that is, for support or maintenance. But it must be remembered that it was just because he complained that the profits of half the village were not enough for the maintenance of himself and his family that he was put in possession of the whole. There is not a word in the order cutting down Jagannatha's interest to a life

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interest or to a tenancy at will or imposing any terms as the condition of his continuing to hold the village.

The whole difficulty seems to have arisen from the singular way in which the appellant insisted in presenting his case to the Court. He would have it that his interest was derived solely and directly from the testator and that Jagannatha was put in possession in conformity with the testator's will as indeed the Subordinate Judge held, whereas it is perfectly plain that Jagannatha took Sura's moiety from the Ranis who purchased it from Venkata Krishna by giving him some equivalent. The respondent, on the other hand, insisted that all parties ignored the will and treated the bequest of Vundrazavaram as a nullity. And so the learned Judges of the High Court have held. They say that "for 24 years the will has been ignored and the estate has not been given to the first plaintiff," that is Jagannatha, "in accordance with its terms. On the contrary he himself was a party to ignoring it." That seems to their Lordships to be going too far in the other direction. The fact is that the will was plainly the foundation of the whole transaction, though Sura's moiety was derived immediately by gift from the Ranis.

Their Lordships are, therefore, unable to agree with the opinion of the learned Judges of the High Court, who seem to have thought that Jagannatha's title to the possession of the village depended simply and solely upon the terms of the order of January 1869, which they construed as a revocable order committing the management of the village to Jagannatha during the pleasure of the Ranis.

One matter on which the learned Judges of the High Court very much relied as confirming their view ought, perhaps, to be noticed. Some letters were produced which the Subordinate Judge held to have been written by Jagannatha, though there was a dispute about it. They are undated, but they seem to belong to the period when Jagannatha was in difficulties with his raiyats. The letter on which most reliance was placed purports to be addressed to his sister Chinnamma. It is abject and servile in tone and incoherent in its language. In it the writer says:—"if you and Papamma should now write to say 'you should give up that village' I will do so without entertaining any contrary intention . . . the longest I should live would be two or three years more; it (the village) will then be added only to your

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"possessions irrespective of any one else. You must take a little trouble and show an affectionate regard by thinking 'these persons belong to a high family, and we will treat them with so much fairness'; if you do not think in that manner I only lose my livelihood. I did not wish in the beginning for any right." Then there is a letter to the manager in which the writer says:—"I have prepared and sent an account of some sort. You will, after perusing the same, write to me how I shall act in the matter of recovering the moneys payable by the raiyats. Hitherto I have acted wisely so as to avoid disputes. As it is not possible to do anything without your permission in Vundrazavaram, I have expressed my opinion in detail and shall remain at Kadiyam till a reply is received and shall manage in such manner as you tell me to manage." The learned Judges say that "the words amount to an unequivocal admission that the writer can only hold the village for the short remainder of his life and is liable to be called upon to surrender it at any time at the will of the Rani." The Subordinate Judge thought that such letters written at such a time were not worthy of serious consideration. Their Lordships are disposed to think so too. The letters were apparently written at a time when the Ranis by their manager were covertly interfering with Jagannatha's possession, and he was maintaining his title by legal proceedings against the raiyats. He may well have thought that his sister would not openly declare herself his antagonist or proceed to extremities against him, and that peace might be obtained at any rate in his time by abasing himself before the Ranis and their manager.

Their Lordships are of opinion that the judgment of the High Court must be reversed and that the appeal from the District Judge ought to have been dismissed with cost, and they will humbly advise Her Majesty accordingly.

The respondent will pay the cost of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Burton, Yeates & Hart*.

Solicitors for the respondent: Messrs. *Lawford, Waterhouse & Lawford*.

APPELLATE CIVIL.

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

1898.
February 9.
March 14, 15,
16, 30.

KUMARA TIRUMALAI NAIK AND OTHERS (PLAINTIFFS),
APPELLANTS,

v.

BANGARU TIRUMALAI SAURI NAIK AND OTHERS (DEFENDANTS
Nos. 1 TO 30 AND 32 TO 34), RESPONDENTS.*

Pensions Act—Act XXIII of 1871, s. 4—Suit relating to inam land granted before the time of the British Government—Confirmation of inam—Construction and enforceability of compromise of suit between members of grantee's family—Removal of manager—Appointment of receiver.

Early in the eighteenth century two villages were granted by the samindars of Sivaganga and Guntamanaikanur to the last of the Naik rulers of Madura for the maintenance of the rank and dignity of his family which was now represented by the plaintiffs and defendants Nos. 1 to 23. The property was long managed by the representative, for the time being, of the senior line. In 1844 one of the junior members instituted a suit for partition, which terminated in a decree declaring the corpus of the property to be indivisible and the annual produce to be divisible in certain shares. Subsequently in 1857 a compromise was entered into, by which the parties agreed to vary the distribution of the shares, but they agreed that the management of the estate, indivisible and inalienable, should continue to be vested in the eldest line subject to certain supervision on the part of the other members. The compromise was long acted upon by the family; but in 1892 the representative of the senior line died, leaving only his widow and infant sons. The widow, as guardian of the elder son, then entered on the management, and, being gosha, delegated it to a stranger. The plaintiffs representing a junior line now sued for the removal of these persons from management and the appointment of another manager, alleging both that they had no right to the managership and that they had been guilty of mismanagement. All the members of the family were made parties to the suit. It appeared that the plaintiffs had not received their proper share of the produce and the defendants in management denied in the pleadings their right thereto. The plaintiffs had not obtained a certificate from the Collector under the Pensions Act XXIII of 1871, and it appeared that the grant of the villages had been confirmed as an inam by the British Government:

Held, (1) that the suit did not fall within the provisions of Pensions Act, section 4, and a certificate of the Collector was accordingly unnecessary.

(2) that the compromise was binding on the parties, and that under the compromise the plaintiffs had no right to joint management; and

(3) that the widow of the last manager should be removed from the managership, and that until one of her sons came of age the estate should be managed by a receiver appointed from among the members of the family.

APPEAL against the decree of C. Gopalan Nayar, Subordinate Judge of Madura (East), in Original Suit No. 11 of 1896.

This suit was brought by plaintiff No. 1 and two of his sons against thirty-two persons, of whom defendants Nos. 1 to 23 were together with the plaintiffs, the descendants of Raja Bangaru Tirumalai Naikar. Defendant No. 24 was the mother and guardian of defendants Nos. 1 and 2 and the nominal manager of the two villages to which the suit related. Defendant No. 25 was her agent, and the remaining defendants were persons who had obtained from him on favourable terms leases of part of the lands. The plaintiffs' case was that they and defendants Nos. 1 to 23 were all interested in various decrees in the two villages, that the twenty-fourth and twenty-fifth defendants had no rights of management and had been guilty of acts of mismanagement by granting the leases above referred to and refusing to render accounts and otherwise. The prayers of the plaint were as follows:—

“That defendants Nos. 1 and 24 be declared incapable of managing the affairs of the two villages hereunder mentioned in schedule A, and they and twenty-fifth defendant be removed from the said management.

“That the Court be pleased to appoint first plaintiff or other persons among the family whom the Court may think fit for the management of the plaint properties with all the powers incidental to the management, such as grant of patta to the raiyats, distribution of the income among pangalies, &c.

“That it be declared that the power of agency granted by twenty-fourth defendant to twenty-fifth defendant is invalid and not binding on plaintiffs.

“That twenty-fourth and twenty-fifth defendants be decreed to give plaintiffs personally, and from the estate of first defendant, Rs. 421-6-9 on account of plaintiffs' share of produce, which they could, on proper managements, have got for fasli 1304 as per schedule C, and also produce of subsequent faslis.

“That the Court be pleased to declare that cowles in favour of defendants Nos. 26 to 32 by defendants Nos. 1 and 24 specified in schedule B are not binding on plaintiff and other members of the family, and to decree possession of the lands on behalf of the family to whomever the Court may appoint as manager.”

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It appeared that the villages had been granted to the family of Raja Bangaru Tirumalai Naik after his capture by the Nawab of the Carnatic early in the eighteenth century, and that the grants, as to the terms of which there was no evidence, had been made by the Rajas of Sivaganga and Guntamanaikanur to provide for the maintenance of the rank and dignity of the family. Up to about 1822 the head of the family enjoyed the property and maintained the younger members of it. Subsequently disputes arose, which were for a time set at rest by a decision of the Collector to the effect that the property was impartible and descended in the eldest male line; but in 1844 a suit for partition was brought by the father of the present first plaintiff who represented a junior branch of the family, and this suit was terminated by a compromise on the basis of which the present relief was asked for. The suit was carried on appeal to the Court of Sadr Adalat, which decided that the property itself was indivisible, but that the annual produce should be enjoyed by the respective claimants in such portion as they might be found legally entitled to, and directed an inquiry by the Court of First Instance as to the parties by whom and the shares in which the joint participation of the annual produce of the estate is to be enjoyed (see *Viswanadha Naik v. Bungaroo Teromala Naik*(1)). On the 8th December 1852, the Civil Judge made a decree declaring "that the income of the estate having been ordered to be distributed shall and must as heretofore be collected by and paid to Raja Vijaya Kumara Viswanadha Bangaru Tirumalai Sauri Ayyar, son and heir of Bangaru Tirumalai Naik, the first defendant in this suit, deceased, and to his heirs according to the rules and law of primogeniture for ever, or during the subsistence of the grant, to be by him and them appropriated and distributed as follows, viz. :—

"*First* : To the liquidation, by instalments, or in such manner as the members of the family may judge best, of the outstanding debts which may have been contracted by the head of the family for the joint benefit, during the subsistence of the ancient custom and arrangement now and hereby subverted.

"*Second* : To the payment of such annual charges and expenses on account of charitable and religious purposes as have from ancient times, and by common consent, been incurred and paid

"on account of the family collectively and which cannot now be discontinued without impiety, and disgrace in public opinion, and so frustrating the object of the grant, viz., the maintenance of the dignity and rank of the family.

"*Third* : To the payment, the above being deducted, of one-half of the remaining net income to the descendants of Rangappa Naik, the second son of Raja Bangaru, who are at present. . . .

"If the said five individuals choose to subdivide and draw their respective shares separately, then to each of them one-fifth of the said moiety.

"*Fourth* : To the payment and division of the remaining half should they desire it, among the descendants of Vijaya Kumara Muttu Tirumalai Naik, the eldest son of Raja Bangaru.

"*Fifth* : This award will not, of course, prevent the elder branch of the family from remaining united and enjoying their portions in common if they please. It only declares that those who may desire separate allowances are entitled to demand them to the extent also of one-fifth of their moiety of the income five shares existing in this branch likewise."

On the 23rd March 1857 the parties entered into a compromise, which was marked as exhibit C in the case, and was in the following terms :—

"That, although the decree in this suit provides that the shareholders should divide among themselves into ten shares, the net income after deducting the common expenses mentioned in the said decree from the income of the villages of Vellikurichi and Thekkampatti, less service, &c., maniams and Beerathayam and Brahmahayam, the tirwa income for faslis 1263 and 1264, as per accounts submitted to the Court by the first defendant's heir and by the Amin appointed by the Court for the said faslis, after deducting therefrom the service, &c., Inams, and Devathayam and Brahmahayam, should be divided into twelve and-a-half shares as follows :—One and-a-half shares for the common expenses provided for by the decree, one share to the first defendant's heir according to his share, the first defendant's heir's share on the whole therefore amounting to two and-a-half shares, three shares to the three pauper plaintiffs, one share to the second defendant, one share to the third defendant, one share to the fourth defendant, one share to the deceased fifth defendant, one share to the sixth and seventh defendants, one share to the eighth defendant, and one share to the ninth defendant, and the twelfth defendant's heir should cause the shares of the other shareholders to be given to them as provided above, and take receipts from them in support thereof; that, in pursuance of the meaning conveyed by the decree, the first defendant's heir should, as the managing member of the family, have for the Thekkampatti village only such of the holders of service inams as are employed there now, such as Kanakkan (Karnam), Nattanmai (Moniagar), and Samprathu (clerk), but

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(1) Sadr Adalat Decisions of 1851, p. 87.

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"should not increase the establishment by appointing more hands; that he should, out of the common money, get a manager and clerk appointed for the village of Vellikurichi on a salary of 20 kulams of paddy per annum each; that he should take upon himself and manage the several business of the said two villages; that the power of appointing and dismissing the said manager and clerk, &c., should be with the first defendant's heir; that although the business of threshing the crops, collecting the produce, and dividing the melvaram, &c., and that of the collection of Swarnathayam, &c., taxes rest with the twelfth defendant's heir alone, and he himself should get them done, yet if the shareholders, inclusive of the pauper plaintiffs, or any of them, should desire to be with him and have an eye upon the business, he should admit them or him without any obstruction or delay; that he should get, by the clerk of each village, a copy of the accounts kept for the cultivation, threshing of crops, division of varam, amount of tax to be collected, and amount of tax collected, &c., furnished to that particular shareholder, who may be appointed by the others for that purpose; that, if the other shareholders, inclusive of the pauper plaintiffs, or any of them, should desire that their respective share in the paddy, &c., grain due for the melvaram and the occupancy right of the people in the village of Thekkampatti and for melvaram in the village of Vellikurichi be paid in the threshing-floor itself according to the above shares, the first defendant's heir should accordingly divide the grain and give to such shareholders their share; that, if the first defendant's heir should fail to get things done as aforesaid, or if there should be any room to think that he is deceiving others by not keeping correct accounts for the income of the villages, or if there should be any room to think that he, without properly dividing and giving to the plaintiffs their shares, wants to deceive or is deceiving or has deceived them, the plaintiffs should have their shares put in their possession by means of precepts of writ that both parties are responsible for their respective debts and should themselves discharge them from their respective shares; that, if any repairs should be necessary for the said villages, the first defendant's heir should get them done from the common fund, according to the consent of all the shareholders or according to the intention of the majority of them; that, if any litigation or other dispute should arise in respect of the said villages, the first defendant's heir should meet the necessary expenses thereof in the manner above described; that, he has no right to hypothecate or mortgage to any one, as he liked, the several kinds of right possessed by the said families in the said villages, on the ground that he is the managing member of the family and looks after all business; that, if, on the other hand, he should hypothecate or mortgage, it shall not be valid; that, further, he has no right to give in darkhast or otherwise to any one as he liked and without the consent of the other shareholders the several kinds of income derived from the said villages for the benefit of the said families, that is, all the shareholders; that, similarly, the other shareholders also should not sell or mortgage their respective shares; that, if, on the other hand, the first defendant's heir or the other shareholders should do as aforesaid, it shall not be valid; that, if the other shareholders or any of them should, owing to any inconvenience to be present at the time of profit and to receive the income due to their shares or his share, transfer or otherwise give to any one the share of one year, the first defendant's heir can have the shares or share of the transferring shareholders or shareholder given to

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"the transferees or the transferee; that the first defendant's heir should get a voucher from the shareholders who may have so transferred their shares; that, if, without such a voucher, the first defendant's heir should say that he has, according to the transfer, given to any one (the transferee) the share of any shareholder, it shall not be valid; that if, besides the two and a half pangus, determined to be given the first defendant's heir inclusive of the share for the common expenses mentioned in the decree, he should put forth other expenses such as expenses for charity and money paid for debts, it shall not be valid; that out of the one pangu now determined to be given to the deceased fifth defendant, quarter pangu is to be divided and taken by his brother the fourth defendant, and the remaining three-fourths pangu by the seventh defendant, who, out of the sixth or seventh defendants, the sons of the elder brother of the fifth defendant, alleges himself to be the Abimanaputra of the said fifth defendant; that this three-fourths share together with the one share determined to be given to the sixth and seventh defendants amounting to one and three-fourths shares in all should be divided equally between the sixth and seventh defendants, who are brothers, and taken in halves; that the fourth defendant should discharge the debts due by the said fifth defendant to the extent of one-fourth and the sixth and seventh defendants, to the extent of three-fourths, that out of Rs. 30, the amount of maintenance determined by all the shareholders to be paid annually to Pallisami Ammal, the widow of the said fifth defendant till her death, the fourth defendant should pay Rs. 7-8-0; the sixth defendant Rs. 11-4-0 and the seventh defendant Rs. 11-4-0; that as the several kinds of income for faslis 64 and 65, by way of produce, have been given up in favour of the first defendant's heir, without any connection in them to the pauper plaintiffs and the other shareholders, all the shareholders are to act up to the terms of this razinamah from the current fasli 66; that if the first defendant who is not present should raise any objection to the terms of this (razinamah) Vijaya Kumara Muttu Tirumali Naikar alias Dorasami Naikar Avergal, son of the eighth defendant, should be answerable for it and that the first defendant's heir himself should obtain back Rs. 659-0-9 deposited by him in Court for the plaintiffs for fasli 64, and as all the shareholders, the eighth defendant's son taking the part of the first defendant, who is not present, having come to a settlement consenting to the above terms, we pray that the Court will be pleased to accept this razinamah and stay all proceedings taken by the Court on account of faslis 64, 65 and 66."

The father of defendants Nos. 1 and 2 representing the eldest line managed the estate until his death in 1892, when his widow defendant No. 24 entered on to management. It was pleaded by defendant No. 1, *inter alia*, as follows:—

"The suit in question is barred by the execution of the decree of Original Suit No. 1 of 1844 alleged in the plaint, to have been obtained by first plaintiff's father as plaintiff in it.

"The relief claimed by plaintiffs to enforce the terms of the razinamah, dated 23rd March 1857, mentioned in the plaint in a separate suit after a lapse of 39 years cannot be granted under law as he failed to obtain the same in execution proceedings in the said Original Suit No. 1 of 1844.

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"This suit, brought without obtaining the sanction of Government under the Pensions Act and without adding the Collector as a party, is not maintainable.

"The defendants do not admit the razinamah mentioned in paragraph 4 of the plaint. It is a fraudulent one. It cannot bind these defendants. As the decree in the said Suit No. 1 of 1844 has not been passed in accordance with the said razinamah, it (the said razinamah) was not acted upon and therefore became useless."

The most important issues framed in the suit were as follows:—

"2. Whether the suit is barred by reason of the decree in Original Suit No. 1 of 1844 or by reason of the present non-enforceability of that decree as alleged by first defendant?

"3. Whether a suit will now lie to enforce the razinamah of the 23rd March 1857 referred to in the plaint?

"4. Is the Collector a necessary party to this suit? and should the suit fail for his non-joinder as alleged by first defendant?

"5. Whether the suit should fail for want of sanction under the Pensions Act?

"6. Are the plaintiffs entitled to any and what share in the plaint property? and, even if entitled, is the suit barred by limitation by their non-enjoyment of any share of the produce within the last twelve years?

"7. Is the first defendant the absolute owner or only manager of the plaint estate?

"10. Are the cowles for the lands in B schedule binding on the estate?

"11. Whether plaintiffs are entitled to any and what mesne profits?

"12. Are there sufficient grounds to remove defendants Nos. 24 and 25 from management and to appoint somebody else for management if first defendant is entitled to the management of the property?"

As to the second issue the Subordinate Judge answered the question in the negative. As to the third issue he pointed to evidence showing that the compromise had frequently been acted upon, and said:—"The plaintiffs do not now sue to enforce the terms of the razinamah. They say that those terms have always been acted upon and their shares of produce given them till

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"1892, and they merely rely upon it as a piece of evidence in support of their right in modification of the final decree in Original Suit No. 1 of 1844." With regard to both of these issues he referred to *Darbha Venkata Sastri v. Vurella Gangaia*(1), *Calapatapu Kristnayya v. Rajah Lakshmi Venkamma Row*(2), *Sabhanatha v. Lakshmi*(3), *Ram Dial v. Indar Kuar*(4), *Ashutosh Bannerjee v. Lukhimoni Debya*(5), and *Vishnu Shambhog v. Manjamma*(6). As to the fourth and fifth issues he decided them in the negative, and his decision as to the seventh and the first part of the sixth issue was:—"that the plaintiffs are entitled to no share in the plaint property but only to one out of twelve and a half shares out of their income." He held "the first defendant to be the inam-holder of both villages burdened only with the obligation to give the specified shares to the other pangalis as settled by the razinamah (exhibit C)." As to the cowles referred to in the tenth issue he held them to be good and valid. On the twelfth issue he said he saw no reason to remove defendants Nos. 24 and 25 from management or to appoint any one else. In the result (see the eleventh issue) he passed a decree for Rs. 184 being the share of the produce to which he found them to be entitled in arrears.

The plaintiffs preferred this appeal against his decree to which objection was taken by defendant No. 24 and her two sons.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar), V. Krishnasami Ayyar and Venkatasubbaramayya for appellants. Sankaran Nayar and Rangachariar for respondents.

JUDGMENT.—The following are the undisputed facts of the case. About the beginning of the last century, the zamindars of Sivaganga and Guntamanaikanur made a free grant of the two villages of Vellikurichi and Thekkampatti, respectively, to Raja Bangaru Tirumalai Naikar, the last of the Naik rulers of Madura, for the maintenance of the rank and dignity of his family. The plaintiffs and the defendants Nos. 1 to 23 are his descendants. In 1844 a suit was brought by the present first plaintiff's father for a partition of these villages between the members of the family, but it was held by the Court of Sadr Adalat, after consultation with its pandits in Hindu law, that the *corpus* of the property was

(1) 2 M.H.C.R., 305.

(3) I.L.R., 7 Mad., 80.

(5) I.L.R., 19 Cal., 139.

(2) 5 M.H.C.R., 93.

(4) I.L.R., 16 All., 179.

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

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indivisible, but its annual produce was divisible, and they directed the Civil Court to determine the parties by whom and in what shares the joint participation of the annual profits of the estate was to be enjoyed. The Civil Judge thereupon, in September 1852, passed a decree, defining the shares of the produce to which the several members of the family were legally entitled. In the course of the execution of that decree, the parties entered into a *razinamah* (exhibit C of the year 1857), whereby they agreed slightly to vary the distribution of the shares ordered by the decree as they had to include another member of the family who had been omitted from the decree to take a share. They further agreed that the estate should be held indivisible and inalienable in consonance with the decree, and they also agreed that the management of the estate should continue to be vested in the eldest line subject to certain supervision on the part of the other members. The father of defendants Nos. 1 and 2 represented the eldest line and managed the estate until his death in June 1892. The first and second defendants now represent the eldest line on whom the sole right of management has devolved; but they are minors, and their mother, the twenty-fourth defendant, is managing the estate on their account with the help of an agent, defendant No. 25, appointed by her. The plaintiffs bring this suit to remove defendant No. 24 from the management and with her, her agent, the twenty-fifth defendant, on the ground that she is not entitled to manage the estate and has, moreover, been guilty of mismanagement thereof, in that she has not only not given them their share of the produce, but has also denied their right thereto, and that she has been improperly granting *cowles* for valuable pieces of land in favour of defendants Nos. 26 to 34. They pray that, on the removal of the twenty-fourth defendant from the management, either the first plaintiff or another fit member of the family may be appointed to the management and that the *cowles* granted by the twenty-fourth defendant to defendants Nos. 26 to 34 may be cancelled. The plaintiffs also pray for the recovery of their share of the produce for *fasli* 1304 which has been withheld from them. Defendants Nos. 3 to 23, all the other members of the family, but defendants Nos. 1 and 2, support the plaintiffs' claim. The twenty-fourth defendant contests it on behalf of defendants Nos. 1 and 2, her sons, and defendants Nos. 26 to 34 also contest it so far as the *cowles* which they hold are concerned, which they allege were validly granted to them by the

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twenty-fourth defendant. The twenty-fourth defendant contends that she has the right of management as the natural guardian of her sons in whom the sole right to manage lies and that there has been no mismanagement on her part. She also takes objection to the suit on two grounds—(1) that it does not lie upon the *razinamah* (exhibit C) and (2) that it could not be brought without a certificate from the Collector under the Pensions Act XXIII of 1871. The Subordinate Judge has found that there was no objection to the suit on the two grounds just stated, but that there was no ground for the removal of the twenty-fourth defendant from the management which she was entitled to hold on behalf of her sons, defendants Nos. 1 and 2, and that the other members of the family had no right to the management. He also held that the *cowles* granted to the defendants Nos. 26 to 34 were good and valid and simply gave the plaintiffs a decree for what he found to be the produce due to them for *fasli* 1304.

The plaintiffs appeal against the decision of the Subordinate Judge refusing to remove the twenty-fourth defendant from the management and to cancel the *cowles*, while the first, second and twenty-fourth defendants, by way of a memorandum of objections, still maintain that the suit is not maintainable on the *razinamah* and that the Pensions Act applies to it. It will be more convenient to dispose of these two objections first. On the first point we find that the *razinamah* (exhibit C) is binding upon the parties. It was an agreement or contract entered into by them for a settlement of disputes which arose subsequent to the decree which it did not vary in any material matter. It has been frequently acted on without either party impugning its validity, and its terms being merely declaratory of the rights of the parties can be enforced only by a separate suit. We, therefore, overrule the first objection to the suit.

As to the second objection taken under section 4 of the Pensions Act XXIII of 1871, namely, "no Civil Court shall entertain any suit relating to any pension or grant of money or land "revenue conferred or made by the British or any former Government" without a Collector's certificate, it is evident from the history of the case as contained in the extract from the *inam* register upon which the *inam* title-deeds were issued and from the statements in the pleadings of both plaintiffs and defendants, that the grant was not "conferred or made" by the British

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Government or any former Government, for it was made by the zamindars of Sivaganga and Guntamanaikanur. It was then contended that, although the original grant may not have been by any Government, yet the British Government by recognising and confirming the inam granted by the zamindars has itself made a grant of the land revenue. Assuming, however, that the act of this Government in confirming the inam amounted to a re-grant of it, it cannot be said that the giving of land free of revenue is a grant of land revenue so as to bring the case within the provisions of the Pensions Act. "Freedom from liability to land revenue is not identical with holding a grant of land revenue, any more than the extinction of an easement by becoming sole proprietor of the property, servient as well as dominant, is a grant of an easement. The land revenue arising from a man's own holding, when it is remitted, and the land pays nothing, is rather extinguished than granted." (See *Babaji Hari v. Rajaram Ballal*(1)). But, as a matter of fact, this Government had no power to tax this inam and therefore made no grant of it. Although by section 4 of Regulation XXV of 1802, the 'right' of this Government was reserved to continue or abolish the exemption from revenue of lakhiraj lands such as this, yet by Regulation XXXI of 1802 passed the same day as Regulation XXV that power was taken away in respect to this particular inam, that is assuming that it was situated in the district of Dindigul, inasmuch as it had been granted previously to the 18th day of March 1792. By section 2 of this Regulation, the grant was declared valid subject only to its registration under section 15. Further, supposing that it was not in the district of Dindigul, or that such registration had not been effected so as to give the inamdars a complete title as against Government, it is clear that when in 1859 or 1860 the Government made their rules for the adjudication and settlement of the inam lands in this presidency, they declared, under Rule 1, that all inams which had been held uninterruptedly for a period of fifty years should be treated as possessed under a valid title whatever may have been their origin. This admittedly is such an inam, and it was confirmed to the grantee under Rule 5 of the Inam Rules. The Government having retained to themselves no power to resume it, cannot be held to have made any

(1) I.L.R., 1 Bom., 75 at p. 81.

fresh grant of it. On all these grounds, therefore, we are of opinion that this case does not fall within the provisions of section 4 of the Pensions Act. The memorandum of objections must, therefore, be dismissed with costs.

Coming now to the appeal, we agree with the Subordinate Judge that the grant of the cowles to defendants Nos. 26 to 34 by the twenty-fourth defendant was not an act of mismanagement. We consider that it was within the competence of the manager of the estate to grant such cowles. Similar grants had been made by the first and second defendants' father without objection on the part of the other members of the family, and we find nothing in the terms of the razinamah (exhibit C) prohibiting such grants by the manager as was urged for the plaintiffs. There is nothing to show that the rents secured by the cowles are not fair and advantageous to the estate, and we do not believe the plaintiffs' story that they were corruptly obtained by the payment of nuzzers. We therefore dismiss the appeal so far as it concerns defendants Nos. 26 to 34 with costs.

The most material question in the suit which is now left for our decision is, whether the twenty-fourth defendant should not be removed from the management, and if she is removed therefrom how the management is to be carried on during the incapacity of defendants Nos. 1 and 2 by minority or otherwise. The settlement of this question depends very much upon the settlement of the question of what interest in the estate the members of the family other than defendants Nos. 1 and 2 possess. The Subordinate Judge has found that the first and second defendants are the absolute owners, and that the other members have only a right to maintenance according to the shares agreed upon. But we cannot concur in this view. The right, which the other members of the family undoubtedly have to specific defined shares out of the net income of the estate, is certainly greater than the right to mere maintenance. An absolute right to take the rents of land ordinarily involves a right to the land itself (see *Mannox v. Greener*(1), and section 159 of the Indian Succession Act, where the same principle is laid down). But, where there is a clear intention that only the profits of the land are to be taken and not the corpus, the general rule would not apply. Now, here we have

(1) L.R., 14 Eq., 456.

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both in the decree in the suit of 1844 and in the razinamah (exhibit C) a clear prohibition against the division of the *corpus* which is declared to be impartible. But for this prohibition, the members of this family would be entitled by virtue of the division of the shares of the produce to a division of the lands, and it is only the decree, which we cannot question, that prevents such division. But that the members of the family have a common right in the property is declared in the answers by the pandits. In their first answer, they say that the estate having been granted for the maintenance of this family belongs to all its descendants, and in their second answer they refer to the property as common to all the members of the family. Their opinion so clearly expressed is no doubt in accordance with the law. So that we must view the plaintiffs and defendants Nos. 3 to 23 as co-owners of the property with defendants Nos. 1 and 2. That being so, they would have an equal right to management with defendants Nos. 1 and 2, had it not been for their own agreement in the razinamah that the sole right of management should remain in the eldest branch of the family represented by defendants Nos. 1 and 2. That precludes them from claiming such a right now. It is urged on their behalf that the razinamah (exhibit C) itself contemplates a right to joint management. But we are altogether unable to read it in that light. It seems to us clear that the only right reserved to the other members of the family after placing the sole right of management in the senior branch of the family is that of supervision only. Although they have thus bartered away their right to joint management, they yet have a right to see that their interest in the joint property is protected, and they very naturally complain that the affairs of their estate are now being actually managed by a complete stranger, the twenty-fifth defendant, the agent of the twenty-fourth defendant. The twenty-fourth defendant is clearly not a proper person to be entrusted with the management of the whole estate, for she is a gosha lady and is, in consequence, compelled to employ an agent to do work for her. Moreover, he or she or both together have not only omitted to distribute to the plaintiffs their proper share of the produce of the land, but have gone further and denied their right to it in this suit. These circumstances are quite sufficient to disentitle her to hold the management any longer. As the natural guardian of the first and second defendants she

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may be entitled to look after their interest, but their interest is, as we have shown, only a small portion of the whole interests involved. We shall, therefore, direct her removal from the management and with her, of course, the twenty-fifth defendant, her agent. It remains to determine who is to look after the estate, while the first and second defendants, who are entitled by right to do so, are incapacitated by reason of their non-age. The razinamah contains no provision for a case like this, where the person entitled to manage is incompetent, and we have found that the other members of the family are not entitled as of right to take up the management. In the absence then of a competent hereditary manager, we think the proper course will be to direct the appointment of a receiver for the proper preservation of the property, until the first or second defendant is competent to undertake the duties of hereditary manager. We shall, therefore, direct that one of the parties interested in the property, either the first plaintiff or such a one of the defendants Nos. 3 to 23 as is a major and otherwise eligible, be appointed as receiver of the estate without remuneration, until the first or second defendant attains majority, or until further orders. It will be left to the Subordinate Judge to select the individual and he will take security from him to the amount of one year's income. We accordingly add to the decree of the Subordinate Judge a direction for the removal of the defendants Nos. 24 and 25 from the management of the estate and for the appointment in their place of a receiver on the terms above stated, and we shall modify the Lower Court's decree as to costs by directing that the costs of defendants Nos. 1, 2, 24 and 25, namely, Rs. 298-14-6, be borne by themselves, instead of being borne by the plaintiffs. In this Court also the plaintiffs, who have not succeeded on the case they set up, and defendants Nos. 1, 2, 24 and 25 will bear their own costs and so will defendants Nos. 3 to 23. As already ordered, the plaintiffs will pay the costs of defendants Nos. 26 to 34, and will get costs from defendants Nos. 1, 2 and 24 on the memorandum of objections.

APPELLATE CIVIL.

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

1897.
December 16.

SANKARALINGA MUDALI (PETITIONER-DEFENDANT No. 2),
APPELLANT,

v.

RATNASABHAPATI MUDALI AND OTHERS (COUNTER-
PETITIONER-PLAINTIFF AND HIS REPRESENTATIVES), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 80, 101, 108—*Ex-parte* decree—
Substituted service of summons.

A decree was passed *ex parte* against defendants on whom the summons was served by affixing it to their house. The defendants who had applied unsuccessfully under Civil Procedure Code, section 101, to be heard in answer to the suit, now preferred a petition under section 108 that the decree be set aside. This application was dismissed. On an appeal by one of the defendants :

Held, as it appeared from the serving officer's return that, according to the information given to him, there was no prospect of his being able to serve the defendant personally within a reasonable time, that he was justified in affixing the summons to the door of the house.

Per cur :—The fact that an order under section 101 has been made against a defendant and has not been appealed against is no objection to an application being made by him under section 108.

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, in Original Suit No. 42 of 1892 on Miscellaneous Petition No. 120 of 1895.

The petitioners were the defendants against whom a decree was passed *ex parte* on the 30th of March 1895. On this application they alleged they had not been duly served the summons, and were not informed of the suit until after the settlement of the issues and the petition proceeded as follows :—“ Subsequently these defendants “ have put in petitions with affidavits under section 101 of the “ Code of Civil Procedure to set aside the *ex-parte* order and accept “ their written statements filed by them in Court and proceed with “ the suit on merits. Their applications were then rejected. Now “ as a decree is passed *ex parte* against these defendants, they most “ humbly pray that it may be set aside, and the suit proceeded “ with for a decision upon merits.” The application was dismissed

* Appeal against Order No. 6 of 1897.

by the District Judge who was not satisfied under Civil Procedure Code, section 108, that the summons was not duly served, or that the applicants were prevented by any sufficient cause from appearing when the suit is called on for hearing. As to the service of the summons he said :—“ The summons to the defendants were “ affixed to first defendant's house on the 25th February, and the “ District Munsif who had the summons served after such enquiry “ as he thought fit declared the summons duly served under section “ 82 of the Civil Procedure Code. That his decision was right inas- “ much as the house is first defendant's residence appears from the “ fact admitted by first defendant in his affidavit that he returned “ on the 20th March to this house from Bangalore The “ second defendant is first defendant's brother The “ return on the summons which is certified by the Village Munsif “ states that second defendant lived in the first defendant's house “ and had only left it three days before the notice was affixed.”

Defendant No. 2 preferred this appeal.

Mr. J. Satya Nadar and V. Krishnasami Ayyar for appellants.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and Gopalasami Ayyangar for respondents.

JUDGMENT.—The Advocate-General raises a preliminary objection to the effect that inasmuch as an order was passed against the second defendant (appellant) under section 101, Civil Procedure Code, and as no appeal was made against the *ex-parte* decree so as to enable the appellant to impeach that order, the appellant was not entitled to make an application under section 108 raising the same question as had been already decided against him under section 101, nor should he be now allowed to appeal against the order made against him under section 108.

This contention at first sight may seem to be reasonable, but having regard to the very wide words “ in any case ” used in section 108 we are unable to hold that the defendant was not entitled to make an application under section 108. That being so he was, under section 588, entitled to prefer the present appeal.

Nor can we agree with the Advocate-General's contention that even if an appeal lies and the *ex-parte* decree is set aside, the proceedings will be futile inasmuch as the order passed under section 101 could not be interfered with in an appeal like the present. We think, if under section 108 an *ex-parte* decree is set aside this necessarily carries with it a reversal of any order previously made

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under section 101 refusing to allow the party to appear and defend the suit. To hold otherwise would lead to an absurdity.

Turning now to the merits the question whether the serving officer "cannot find" the defendant within the meaning of section 80 is one which must be determined with reference to the circumstances of each case. If the information given to the serving officer leads him to think that the defendant is only to be absent for a short time, it may well be that the serving officer should, if possible, wait and endeavour to effect personal service (*Bhomshetti v. Umabai*(1)). Otherwise, and if there is no person who can be served in the absence of the defendant, we see nothing improper in the serving officer affixing the summons to the outer door of the defendants' ordinary residence. In the present case the serving officer's return shows that according to the information given to him there was no prospect of his being able to serve the appellant personally within a reasonable time. He was, therefore, justified in affixing the summons to the door of the house, and the District Judge was justified in accepting it as a sufficient service.

We must, therefore, dismiss the appeal with costs.

APPELLATE CIVIL—FULL BENCH.

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

RAMACHANDRA RAYAGURU (PLAINTIFF), APPELLANT,

v.

[MODHU PADHI (DEFENDANT), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, arts. 132, 147—Mortgage—Suit for sale.

On 2nd July 1879 the defendant mortgaged to the plaintiff certain property to secure payment of a debt with interest. The instrument purported to be a mortgage with possession, and it contained a covenant to repay the mortgage amount on the 8th March 1882. The plaintiff never obtained possession and he brought a suit on the 29th June 1894 to recover the principal and interest by the sale of the land:

(1) I.L.R., 21 Bom., 223.

* Second Appeal No. 1699 of 1895.

Held, that the suit was governed by article 132 and not article 147 of Limitation Act, schedule II, and was accordingly barred by limitation.

SECOND APPEAL against the decree J. P. Fiddian, District Judge of Ganjam, in Appeal Suit No. 194 of 1894, affirming the decree of O. S. R. Krishnamma, District Munsif of Berhampur, in Original Suit No. 203 of 1894.

The plaintiff sued to recover principal and interest due upon a mortgage deed executed by the defendant in his favour. This instrument (therein described as a deed of mortgage with possession) bore date the 2nd July 1879, and omitting the names of parties and the boundaries it was as follows:—

"This twenty-five bharanams inam land situated within the said limits, I have mortgaged to you with possession and received from you thereon in cash this day Rs. 76. As to the said principal and interest thereon at Rs. 1-10-0 per cent. per mensem you should take on account thereof every year on the Dola full-moon day the rajabhagam produce accruing from the said lands and be granting the receipts for the same. Thus in three years, that is, on the Dola full-moon day of the 28th year of reign, we shall settle the account, pay up the amount that may remain due and take our land and this document. If in this regard any hindrances arise whether from act of State or by my heirs, we alone shall be responsible therefor, and you shall not be concerned therewith. This deed of mortgage with possession of land is executed of my own consent."

The plaintiff filed the present suit on the 29th of June 1894 to recover principal and interest by sale of the mortgage premises, averring that possession was never delivered to him, nor anything paid on account of the debt or interest. The District Munsif dismissed the suit as barred by limitation, and his decree was affirmed on appeal by the District Judge who said:—

"I agree with the Lower Court that the time fixed in the bond for repayment of the balance found due and for surrender by the mortgagee is 8th March 1882 and, therefore, if article 132 applies, the suit is admittedly out of time, as it was filed in June. Plaintiff (the only witness examined) deposed that he never got possession, and therefore if he wished to enforce the mortgage, he should have sued for specific performance for which he had three years from the date on which, according to the bond, he was to get possession. In this view, the suit as on a mortgage with

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"possession was barred before the end of 1882. In any case, however, the contract for usufructuary mortgage not having taken effect, plaintiff cannot have more than twelve years from the due date, and as this is found to be 8th March 1882, the suit brought in June 1894 was time-barred."

The plaintiff preferred this second appeal.

Rangachariar for appellant.

The respondent was not represented.

The case first came on for hearing before COLLINS, C.J., and SHEPHARD, J., who made the following order of reference to the Full Bench:—

ORDER OF REFERENCE TO THE FULL BENCH.—The question, being one of general importance on which the authorities are conflicting, ought, we think, to be referred to a Full Bench.

Whether the suit for sale by a mortgagee holding such a mortgage as that in the present case, is governed by article 132 or article 147 of the second schedule to the Limitation Act?

The case subsequently came on for hearing before the Full Bench as constituted above after a previous hearing before a bench of four Judges who differed.

Rangachariar for appellant.—The question referred for decision is divisible into two parts as follows:—(1) Is this a suit by a mortgagee? and, (2) if so, the suit being for sale, does article 147 or article 132 apply? The Courts below have treated this case as a case governed by *Rangasami v. Muttukumarappa*(1). That is clearly wrong. The instrument is not a hypothecation but a mortgage though possession was not taken—the right to possession is enough. See also *Motiram v. Vitai*(2). Here a usufructuary mortgagee having a covenant to pay sues for sale. A suit for sale does lie in such cases. See *Nanu v. Raman*(3), *Ramayya v. Guruva*(4), and *Sivakami Ammal v. Gopala Savundram Ayyan*(5). As to the wording of article 147 of the Limitation Act "suit for foreclosure or sale," see *Rangasami v. Muttukumarappa*(1). The Full Bench concedes that article 147 would apply if the suit was one by a mortgagee. See also *Aliba v. Nanu*(6). The ground of decision there is that it was not a mortgage but a mere charge; and not that

(1) I.L.R., 10 Mad., 509.
(3) I.L.R., 16 Mad., 335 at p. 338.
(5) I.L.R., 17 Mad., 181.

(2) I.L.R., 13 Bom., 90.
(4) I.L.R., 14 Mad., 232.
(6) I.L.R., 9 Mad., 218.

article 147 is inapplicable under such circumstances as the present, which would be the case if the decision in *Girwar Singh v. Thakur Narain Singh*(1) were right. This suit for sale comes within the plain meaning of article 147. Articles 147 and 148 have to be read together. With the provisions of the Act of 1877 compare Act XIV of 1859, section 1, clauses 12 and 15, and Act IX of 1871, articles 132, 135, 148 and 149. There is no reason why the Legislature should not make similar provisions with regard to mortgagors and mortgagees: thus in England there is a uniform period of twelve years. Moreover, generally, the right to redeem and the right to foreclose are co-extensive. See *Vadju v. Vadju*(2). See also Coote on Mortgages, page 26. Compare sections 86 and 88 of the Transfer of Property Act. If a shorter period were provided for suits by a mortgagee than that applicable to a suit by a mortgagor, the transaction would cease to be a mortgage, so far as the mortgagee is concerned, while it continued to be a mortgage as concerns the mortgagor. In a suit for foreclosure by a mortgagee by conditional sale, it was held that the period of limitation is sixty years applying article 147 of Act XV of 1877. See *Ammanna v. Gurumurthi*(3). In a suit on a covenant, COLLINS, C.J., and BENSON, J., held that the period of limitation is sixty years. See *Anantha Bhatta v. Holeyay Deyyu*(4). But in no case in Madras, I think, is *Girwar Singh v. Thakur Narain Singh*(1) distinguished or even considered, although the idea underlying it was considered with reference to the similar wording in section 67 of the Transfer of Property Act, and abandoned. See *Chathu v. Kunjan*(5) and *Venkatasami v. Subramanya*(6). The reason for this reference is the decision in *Girwar Singh v. Thakur Narain Singh*(1) where the Full Bench held that article 147 only applies to English mortgages. The effect of that decision would be to read into the article 'by an English mortgagee.' Where the Legislature wished to limit the meaning of the word 'mortgagee,' it has taken care to so express itself. Compare the immediately preceding article 146. Three reasons are given for coming to that decision. First, there is a sudden advance from twelve years to sixty years when in England the law was reducing the period from twenty years to twelve years. That is hardly a sufficient reason to limit the plain

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(1) I.L.R., 14 Cal., 730.

(2) I.L.R., 5 Bom., 22.

(3) I.L.R., 16 Mad., 64.

(4) I.L.R., 19 Mad., 437.

(5) I.L.R., 12 Mad., 109 at p. 111.

(6) I.L.R., 11 Mad., 88.

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meaning of the article. There is an advance anyhow even with regard to an English mortgagee, who had only twelve years before. No explanation could be suggested why he alone should have this extension. The opinion had been expressed in Bombay at the time, that it was desirable to extend the period for suits by all mortgagees. The Legislature in order to deal in a uniform manner with the rights of mortgagors and mortgagees had either to cut down the period of sixty years which had been previously allowed to suits by mortgagors or to extend the period in case of mortgagees. The latter was the course least open to opposition and that the Legislature adopted. The second reason assigned was that, in suits for possession by a mortgagee, only twelve years was allowed, and that for that reason it could not be held that in a suit for sale he had sixty years. The answer to that is that the correlative rights only of mortgagors and mortgagees, i.e., redemption, foreclosure and sale, are provided for in articles 147 and 148. The mortgagee's right to possession is an independent right. The third reason assigned is that article 132 itself which was applied to suits of this kind remains unaltered. It is difficult to see what alteration could be made in the language of that article. Such an article is even now necessary in the case of mere chargeholders. The case of *Girwar Singh v. Thakur Narain Singh*(1) is dissented from in *Motiram v. Vitai*(2). See also *Manekji Framji v. Rustomji Naserwanji Mistry*(3), *Bulakhi Ganu Shet v. Tukaram-bhat*(4), *Onkar Ramshet Marwadi v. The Firm known as Govardhan Parshotamdas*(5) and *Venkatesh Shetti v. Narayan Shetti*(6). The same view has been accepted in the Allahabad High Court. See *Shib Lal v. Ganga Prasad*(7), *Sheoratan Kuar v. Mahipal Kuar*(8) and *Kishan Lal v. Ganga Ram*(9). And as already pointed out the Full Bench in *Rangasami v. Muttukumarappa*(10) concedes that article 147 would apply in the case of a mortgage. No reason is suggested why the course of decisions in Madras should be departed from, adopted, as it is, by two other High Courts. [SUBRAMANIA AYYAR, J.—If you read the article 147 in the distributive sense, what article would you apply when a mortgagee entitled to

(1) I.L.R., 14 Cal., 730.
(3) I.L.R., 14 Bom., 269 at p. 272.
(5) I.L.R., 14 Bom., 577.
(7) I.L.R., 6 All., 551.
(9) I.L.R., 18 All., 28.

(2) I.L.R., 13 Bom., 90.
(4) I.L.R., 14 Bom., 877.
(6) I.L.R., 15 Bom., 183.
(8) I.L.R., 7 All., 258.
(10) I.L.R., 10 Mad., 509.

sue in the alternative does sue in the alternative?] The same article would apply. It would be a suit for foreclosure or sale within the meaning of the article. [SUBRAMANIA AYYAR, J.—Then you would read it in the distributive sense in some cases and in the alternative sense in other cases?] A mortgagee can only get one of those remedies. Statutes of Limitation should be construed liberally in favour of the subject and when a given case comes within the plain meaning of article 147, that article should be applied.

The respondent was not represented.

COLLINS, C.J.—The question referred to the Full Bench is whether article 132 or article 147 of the second schedule to the Limitation Act applies to a suit for sale by a mortgagee holding such a mortgage as that in the present case.

The Allahabad High Court has held in *Shib Lal v. Ganga Prasad*(1) that article 147 is applicable to all mortgage instruments.

The Calcutta High Court has held in *Girwar Singh v. Thakur Narain Singh*(2) that article 147 applies only to a special kind of mortgage known as "English mortgage," and in other cases article 132 applies.

The Bombay High Court in *Motiram v. Vitai*(3) differs from *Girwar Singh v. Thakur Narain Singh*(2) and holds that section 147 applies.

The Madras High Court in *Davani v. Ratna*(4) and *Aliba v. Nanu*(5) has held that article 132 governed a suit upon a mortgage bond to recover the mortgage money by sale of the mortgaged property—although in later cases that view has been dissented from. This case has been twice argued before the Full Bench, but no one appeared for the respondent. The point, in my opinion, is one of great difficulty, and it is to be hoped that the Legislature will see fit to make the Law of Limitation definite on this very important point.

I have read with great care the decisions of the Calcutta and Bombay Courts, and the reasons given in the judgment of the learned Judges of the Calcutta High Court in *Girwar Singh v. Thakur Narain Singh*(2) appear to me to be sound in law, and I,

(1) I.L.R., 6 All., 551.
(3) I.L.R., 13 Bom., 90.
(5) I.L.R., 9 Mad., 218.

(2) I.L.R., 14 Cal., 730.
(4) I.L.R., 6 Mad., 417.

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therefore, answer this reference by saying that the suit in question is governed by article 132.

SHEPARD, J.—The instrument in this case is dated the 2nd July 1879, and purports to be a mortgage with possession of certain immovable property. In addition to the ordinary words used in such an instrument there is a covenant to repay the mortgage amount. The right to possession has never been put in force, and it was presumably lost by the bar of limitation before the present suit was brought. The plaintiff comes into Court seeking to put in force the alternative remedy which the covenant in his favour gives him. If that had been the only remedy open to him under the instrument of mortgage and that remedy had been barred by the Law of Limitation, it appears to me that it must be none the less barred by the same law, because there was at one time another remedy available to the plaintiff. I think, therefore, the case may be considered without reference to the right of possession and on the supposition that the instrument is an ordinary instrument of hypothecation.

Previously to the passing of the Act of 1877 there can be no dispute that the time limited by law for suits upon such instruments brought in the Provincial Courts was twelve years. That is the period limited by the Regulation, by the Act of 1859 and by the Act of 1871. It is equally clear that no such limitation was put on the mortgagor's right of redemption. Under the Regulation there was no limit prescribed. By the Act of 1859 a limitation of sixty years in the case of immovable property and thirty years in the case of movable property was introduced, and the law has to that extent remained unaltered to the present day. Before the Act of 1859 came into force there was for the Supreme Court no statutory law affecting suits in equity to redeem or to foreclose. Presumably the Court acted on the principles enunciated in the English Courts prior to the passing of the Statute of William IV—I cannot find any reported cases. According to the law as then understood in England the possession of the mortgagor was a possession held by the sufferance of the mortgagee under a tacit agreement which the latter might determine at his pleasure. His possession was not wrongful or adverse, and therefore, time did not run against the mortgagee (*Keech v. Hall*(1), *Pugh v. Heath*(2)).

(1) 1 Smith's L.C., 574.

(2) L.R., 7 App. Cas., 235.

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In the Courts of Common Law, therefore, it was always open to the mortgagee to bring ejectment against his mortgagor. In the Court of Chancery, though no time was limited for the redemption of a mortgage, the Court did in its discretion act upon the analogy of the statute and generally refused to relieve a mortgagor after twenty years' possession by the mortgagee. Fonblanque's 'Equity,' Volume I, page 323; Spence's 'Equity,' Volume II, page 709. The Act of 1859 follows the Statute of William in taking away the discretionary power of the Court and fixing a precise limit of time, which for the case of a mortgagee's suit was twelve years, no distinction being made between mortgages and mere hypothecations. Evidently this was thought to be a mistake, because in the Act of 1871 special provision of sixty years is made for the mortgagee's suit in a High Court to eject his mortgagor, though no specific or appropriate provision was made for the case of a foreclosure suit. Such being the state of the law before the Act of 1877 was passed, the contention that article 147 of the Act was designed for all suits upon instruments of mortgage or hypothecation in which a sale only could be demanded, involves the idea that the Legislature intended to alter the law for all such suits in a direction favourable to the plaintiff. Now, if that was the intention, which in itself is not probable, one would have expected an alteration of that particular part of the Act of 1871 which referred, or had been held to refer, to suits by mortgagees upon instruments of hypothecation. The particular article of the schedule, which, as the Legislature must have known, was held applicable to such suits, was article 132. The fact that it re-appears in the new schedule, unaltered in any point material to the present case, must, I apprehend, be taken to show that the Legislature considered it adequate for the purposes for which it had been used, and since it cannot have been intended that the two articles 132 and 147, should apply to the same class of suits, it is more reasonable to suppose that the former was intended to perform the same functions as had been performed by the repealed article, and that the latter, a new article, was designed for some other or special class of cases. There is no difficulty in naming the class of cases which the Legislature may have had in mind. As is pointed out in *Girwar Singh v. Thakur Narain Singh*(1) the deficiency of the Act of 1871 in this

(1) I.L.R., 14 Cal., 730 at p. 739.

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respect had been brought to light by the argument used in a case decided by Sir Charles Sargent a few months before the Act of 1877 was passed (*Ganpat Pandurang v. Adarji Dadabhai*(1)) and it may well have been apprehended that the Courts, considering in accordance with *Wrixon v. Vise*(2) that a suit to foreclose was not a suit to recover money, might hold that to such a suit article 132 was not properly applicable. The phrase "suit for money charged upon immovable property" or "to enforce payment of money charged upon immovable property" does not fitly describe a suit which, while it may lead to the payment of money, is directly addressed to the recovery of the equity of redemption. On the other hand, the phrase "suit for foreclosure or sale" is a familiar mode of indicating suits such as are possible in connection with mortgages in the English form—suits which, though generally they would be brought in the High Court, might also be instituted in Provincial Courts. It must be remembered that in a suit for foreclosure, sale of the mortgaged property is not what the plaintiff immediately demands. His primary object is to call on the mortgagor to exercise his right of redemption now or never. Sale may be decreed in a foreclosure suit, but it is not so decreed as a matter of course, and it is generally in the interest of the mortgagor that it is decreed. The case is wholly different with a suit like the present or a suit brought by a person entitled to a charge. Then it is a sale that the plaintiff demands, his object being the recovery of money.

To hold that article 132, which may be compared with section 40 of the Statute of William IV, applies to such suits and that article 147, serving the purpose which sections 2 and 24 of the Statute were held to serve, applies to suits for foreclosure only, requires no strain on the language of either article, whereas, according to the contrary view, article 147 has to be read as applying to two wholly different classes of suits. Such a construction of the article appears to me unreasonable. And in addition it has to be said against it that it increases the difficulty of explaining why the long period of sixty years should have been given.

For some reason it is clear the Legislature has all along thought fit to make a distinction between such suits according to

(1) I.L.R., 3 Bom., 312 at p. 330.
(2) 3 Dru. & War., 104 at p. 120.

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the class of the Court in which they are instituted, and in effect the result of the distinction must be to favour the holder of a mortgage in the English form as compared with the holder of an ordinary hypothecation, for, generally speaking, it is only in the High Court that English mortgages have to be dealt with. It may not be easy to explain why such long periods as sixty years and thirty years are given for such latter mortgages, but it would be still less easy to explain why in the case of a mortgage in the ordinary form the mortgagee should be restricted to twelve years when suing for possession, but have five times as long a period when suing for sale of the mortgaged property. The construction, which I prefer to put on article 147, involves no charge of inconsistency against the Legislature. They have consistently given an extended period to mortgagees' suits in the High Court. They have been consistent in giving the uniform period of twelve years to mortgagees' suits in other Courts. On the other hand, if the double meaning is to be assigned to article 147, the Legislature has made a strange distinction, giving twelve years only for the mortgagee's suit for possession and sixty years for other suits by the mortgagee. That has to be explained. And further it has to be explained why the Legislature should have altered the law at all in a direction favourable to the plaintiff. It is said that it must have been thought expedient to equalize the periods for mortgagors' and mortgagees' suits. No particular reason was suggested why they should be made equal, and there are reasons why greater latitude should be allowed to the mortgagor, seeking to recover his land and at the same time offering to pay off his debt, than to the mortgagee who is only prosecuting the remedies of a creditor. If the Legislature did not approve this principle, but considered that no distinction should be made between a suit by a mortgagor and a suit by a mortgagee, it might have been expected that article 147 in the Act of 1871, which prescribes thirty years for a suit by a pledgor of chattels to recover them from his pledgee, would disappear in the Act of 1877. It is, however, reproduced in a modified form in article 145 of the schedule.

It was contended that this Court was committed to a view favourable to the plaintiff owing to a series of decisions on the point. That is not the view which I take of the reported cases. In the case of *Alibu v. Nanu*(1) this Court dealing with an instrument of

(1) I.L.R., 9 Mad., 218 at pp. 220-22.

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hypothecation held that article 132 was applicable, distinctly overruling the contrary opinion expressed by the District Judge. In that case the learned Judges followed an earlier decision of this Court (*Davani v. Ratna*(1)). In the next case decided by a Full Bench the same view was taken, and again stress is laid on the distinction to be made between instruments executed before and after July 1882 (*Rangasami v. Muttukumarappa*(2)). Then follows *Ammanna v. Gurumurthi*(3). The report does not give the text of the instrument under discussion, but it shows that the plaintiff asked for a decree for foreclosure or sale. Assuming that the instrument justified that form of prayer, the Court could hardly have hesitated to hold that article 147 was applicable. That case, therefore, has, in my opinion, no bearing on the present. The last case is *Udayana Pillai v. Senthivelu Pillai*(4). It is undoubtedly an authority in the plaintiff's favour. As far as the report shows, however, the point was not argued and anyhow the case stands by itself. It is, however, argued that in some of the cases sanction is given to the theory that in construing the Limitation Act, regard must be had to the provisions of the Transfer of Property Act. In *Aliba v. Nanu*(5), Mr. Justice Muttusami Ayyar no doubt says that, if the instrument before him had been executed after July 1882, he should have been disposed to agree with the view taken by the Allahabad High Court, and as I have already mentioned the distinction is insisted upon in the Full Bench case (*Rangasami v. Muttukumarappa*(2)). That decision being a decision of five Judges, would be conclusive in the present case, because here also the instrument was executed before the Transfer of Property Act came into force, but for the circumstance that, in the present instance, there was something beyond a mere hypothecation of the property, it was intended that the mortgagee should enjoy the usufruct. But, in my opinion, the distinction founded on the date of the instrument—a distinction which is practically disregarded by the Bombay High Court—does not merit the importance which has been attached to it. In interpreting an Act of 1877, I cannot see how a Court can properly take into account a Statute passed five years later. It may be true that a measure relating to the transfer of property was under consideration at the time when the Act of

(1) I.L.R., 6 Mad., 417.

(3) I.L.R., 16 Mad., 64.

(5) I.L.R., 9 Mad., 218 at pp. 220-22.

(2) I.L.R., 10 Mad., 509.

(4) I.L.R., 19 Mad., 411.

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1877 was before the Legislature; but if Judges may not, in construing an Act, legitimately refer to the debates and discussions which preceded the passing of it, how can they be justified in taking into consideration mere projects of legislation? Surely the construction which should be put upon the Act by a Court sitting after July 1882 should be the same as it would have been before that date, or if the Transfer of Property Act had never in fact been passed. This observation appears to me to dispose of a material part of the argument used in the Allahabad High Court (*Shib Lal v. Ganga Prasad*(1)) and adopted in Bombay (*Motiram v. Vilai*(2)). When the point is considered apart from the Transfer of Property Act and with reference to the antecedent law and the decisions on the Act of 1871, and the Statute of William IV, the construction of article 132 appears to me to present little difficulty. Agreeing with the decision in *Girwar Singh v. Thakur Narain Singh*(3), I think the article must be applied in any case where the sale of the property mortgaged or charged is demanded and a decree for foreclosure is not admissible.

I would accordingly answer the question referred by saying that the case is governed by article 132.

SUBRAMANIA AYYAR, J.—The instrument sued upon in this case is a usufructuary mortgage executed in 1879, though, as a matter of fact, possession remained with the mortgagor. The instrument contains a covenant to pay and the suit is for the sale of the mortgaged land. The mortgage money became payable in March 1882. The suit was, however, instituted in June 1894.

The question for determination is whether the case is governed by article 132 or by article 147 of the Limitation Act. If the latter article does not apply the case would, of course, fall under the former. The question is indeed a difficult one, as the conflict of decisions on the point shows. According to the Full Bench rulings of the Bombay and the Allahabad High Courts the case falls under article 147 (*Motiram v. Vilai*(2) and *Shib Lal v. Ganga Prasad*(1)). But according to the Full Bench ruling of the Calcutta High Court, article 132 applies (*Girwar Singh v. Thakur Narain Singh*(3)). Which of these conclusions is correct?

(1) I.L.R., 6 All., 551.

(2) I.L.R., 13 Bom., 90.

(3) I.L.R., 14 Calc., 730.

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Before I proceed to discuss and answer the question I ought to observe that it is difficult to agree in the suggestion on which so much stress has been laid, viz., that the slight alteration in the language of article 132 as compared with the corresponding article in Act IX of 1871 and the insertion of a new article, viz., 147, were made with reference to the distinction between a charge and a mortgage which in this country was for the first time distinctly drawn in the Bill relating to transfer of property that came before the Legislative Council about the time the Limitation Bill of 1877 was under consideration. It was early in 1877 that the Transfer of Property Bill was sent by the Government of India to the Secretary of State for permission to introduce it in the Legislative Council. Leave was granted in April and the Bill was introduced in June 1877. Though the Bill had thus seen the light in the Legislative Council a few weeks before Act XV of 1877 was passed, yet then and long subsequently serious doubts were entertained, if not with reference to the part thereof relating to mortgages, at any rate generally, about the propriety of allowing the Bill to become law. (See particularly the Hon'ble Mr. Plowden's speech—Proceedings of the Legislative Council for 1882, pages 78 to 83). Having regard to this circumstance and the numerous and important changes which were made in the Bill during the four years that intervened between its introduction and its becoming law, one need scarcely hesitate to say that it is exceedingly unlikely that the Legislature framed articles 132 and 147 or any other provision in the Limitation Act in reference to what was contained in a Bill which, at that time, could not have been confidently expected to become law. Further, a comparison of the provisions of the Limitation Bill of 1877 in regard to the present matter at the different stages of its progress in the Legislative Council shows beyond doubt that the suggestion under consideration is not well founded. Now, in the Bill as it stood at the time of its introduction, the article corresponding to the present article 132 was article 128, and the part thereof in the first column was (as in Act IX of 1871) "for money charged upon immovable property" (see *Gazette of India*, Part V, page 107). In the Bill, however, as revised by the Select Committee and submitted with their report of the 28th March 1877, the language of the article (numbered therein as 130) was altered as it now stands (*Ib.* page 142). That the alteration thus made was treated as unimportant (which

it could not have been if instead of its embracing cases of mortgagees as well as cases of charge holders it was to be confined to the latter only) is evident by the Select Committee noticing in their report certain alterations specially, but referring to the rest as merely verbal (*Ib.* at pages 127 and 128). And the provision which is now article 147 was not introduced into the Bill when the language of that which became article 132 was amended as stated above, but was inserted later on. Moreover, at the date of that amendment the Transfer of Property Bill had not even formally come before the Council, inasmuch as the amendment was made before the end of March, while the Transfer of Property Bill was introduced only in June. As regards the insertion of the provision forming article 147 subsequent to the amendment alluded to, that that also had likewise no connection with the Transfer of Property Bill is evident being supported by certain cogent circumstances. These, however, it would be convenient to state later on when I deal with an argument urged as to why article 147 was introduced. It seems, therefore, quite inadmissible to attempt to interpret the articles in question in the light of the provisions of the Transfer of Property Bill.

Turning now to article 147 itself on the proper construction of which the point entirely turns, the words in the first column are "By a mortgagee for foreclosure or sale." Now here the term 'or' may be read in the distributive or in the alternative sense. But it cannot be read in both the senses. If, according to the Bombay and the Allahabad Courts, it be read distributively the article would refer to suits where a mortgagee sues for foreclosure and also to suits where a mortgagee sues for sale. If so, what is the article governing cases where a mortgagee is entitled to claim in one suit either foreclosure or sale? Article 132 cannot apply to such a case, as according to the view taken by the said Courts that article is restricted to suits by persons having charges only. Is then the case of a mortgagee suing for foreclosure or sale in the alternative to fall under article 120, the only other article that could apply? Such a result could surely not have been intended. It follows that the term 'or' must be read in the other sense, and that is its ordinary grammatical sense. The article clearly, therefore, refers to mortgagees entitled to claim foreclosure or sale in one suit—the most familiar and prominent instance of whom is a mortgagee under an English mortgage. Nor are other considerations wanting

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to support the conclusion arrived at through the ordinary method of interpretation. It is quite true, as observed in *Datto Dudheshwar v. Vithu*(1) to allow mortgagees an unduly short term of limitation for enforcing their rights would act prejudicially upon mortgagors. But would other mortgagees than mortgagees under English mortgages have only such a short period for enforcing their rights? They would have from the time their cause of action accrues, and if there was an acknowledgment or a payment as provided in sections 19 and 20 of the Act, respectively, then from the date of such acknowledgment or payment a period of twelve years—a period which had been in vogue from the beginning of the century. The question whether the period of twelve years was generally sufficient was long ago discussed and settled. The Indian Law Commissioners pointed out in 1842 that the said period first came into practice in the days of the Muhammadan Sovereigns, that so far back as 1772 the Circuit Committee took the period as the established Indian term of limitation, and that hence it came to be adopted in the Bengal and the Madras Regulations. With reference to an objection raised as to the sufficiency of such period so far as the Bombay Presidency was concerned, the Commissioners said :—" We have no reason to think "that the period of limitation which has been observed from the first "establishment of the Courts of Bengal and Madras has been found "in practice to be too contracted or that there are any peculiar "circumstances which render it advisable to allow a longer period "for the acquisition of rights of the same kind in the Presidency of "Bombay " (see paragraphs 21 to 24 of the Special Report of the Indian Law Commissioners, dated the 24th December 1842). In these circumstances, it is a pertinent question to ask whether there was any good reason why the Legislature in 1877 resolved upon making the period in the case of mortgagees in general very much longer than it had been since regular administration of justice was introduced in this country. No such reason has, in my opinion, been shown. The only suggestion made as to it was, having regard to the fact that in point of law the two classes of rights are correlative, the framers of Act XV probably intended to give to the mortgagees for the enforcement of their rights the same period as that given to mortgagors with reference to their rights. That this suggestion, though plausible is not correct, seems to my mind to

(1) I.L.R., 20 Bom., 408 at p. 421

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admit of no doubt. Before, however, referring to the circumstances which go far to support the above statement, I would observe that if the ground which led to the introduction of a disparity in the periods allowed to mortgagees and mortgagors, respectively, be considered, the improbability of the idea that the Legislature extended in 1877 the period in the case of mortgagees in general would become apparent. Now, the ground for the disparity alluded to was explained in the report already cited by the Indian Law Commissioners who originally recommended the period of sixty years for mortgagors alone. The Commissioners said :—" Our provisions on the subject of mortgages and deposits were framed with "reference to the habits of the great bulk of the people. Amongst "them it is common for possession to be left for very long periods with "the mortgagee or depositary and then to be restored to the owner. "This is perfectly understood by both parties " (paragraph 39). The ground thus assigned was peculiar to mortgagors, and though the disparity in question had given rise to no practical inconvenience or difficulty, yet that the Legislature for the mere sake of theoretical equality in point of limitation resolved upon making the period in the case of mortgagees five times longer than it had been for three quarters of a century, is on the face of it very unlikely. The point, however, appears to be placed beyond question by what took place in the Legislative Council itself. Now under Act IX of 1871 the period of sixty years was allowed only in the three following cases :—(1) To mortgagors generally, when suing to recover possession of immovable property mortgaged (article 148). (2) Among mortgagees, to those instituting suits to recover possession of the mortgaged immovable property from the mortgagors on the original side of a Court established by Royal Charter, but not to those suing in any other Courts (article 149). (3) The Secretary of State's suits (article 150). But in the Limitation Bill of 1877 it was proposed to reduce the period in all the three cases to thirty years (see articles Nos. 143, 144 and 145, *Gazette of India* for 1877, Part V, page 109). Referring to this proposed reduction, the then Law Member, Sir Arthur Hobhouse, stated that the 'enormous' period of sixty years "was a continuation of old law and was generally felt to be inconvenient," and that the Bill proposed "to fix the more moderate period of thirty years" (Proceedings of the Legislative Council for 1877, page 48). This opinion commended itself to the Select Committee at first, and they made no change in

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the Bill with reference to the three cases (see articles 143, 144, and 145, *Gazette of India* for 1877, Part V, page 144). But later on the Committee took a different view as explained in the final report of the Select Committee, dated the 13th June 1877. There referring to article 147 the Committee observed that the article was introduced to make the limitation for the suits therein specified "clearer." From the above references and quotations it is evident as regards the case of mortgagees with which alone we are here concerned, that there never was any intention to enlarge the period of twelve years which mofussil mortgagees had under the law till then; and that in the case of mortgagees within the jurisdiction of the Chartered Courts, the Legislature actually abridged the period formerly allowed with reference to one class of suits, viz., those against mortgagors for recovery of possession (article 146), but allowed, or as the Committee stated, restored the sixty years with reference to another class, viz., those for foreclosure or sale. It is true that article 146, which refers to suits of the former class, expressly mentions Chartered Courts, while there is no such statement in the next article relating to suits for foreclosure or sale. But as suits by mortgagees against mortgagors for possession of mortgaged property were, of course, maintainable in the mofussil Courts as well as in Chartered Courts, and as the limitation of twelve years had by article 135 been already prescribed for such suits in the mofussil Courts, distinct mention of Chartered Courts was necessary in article 146. On the other hand, suits for foreclosure or sale in the alternative were before or in 1877 entirely unknown so far as the mofussil Courts were concerned, but were sustainable in the Chartered Courts only. Consequently express allusion to the *forum* was uncalled for in article 147. I need scarcely observe that I have referred above to the Proceedings of the Legislative Council, bearing on the present matter, not of course for the purpose of determining the meaning of the article in question, but to meet certain arguments as to the supposed intention of the Legislature founded on considerations extraneous to the language of the Statute—arguments which found acceptance in one or two cases cited for the appellant.

It remains only to add that a reason may be suggested as to why the long period of sixty years was allowed for suits for foreclosure or sale. Now the mortgagees entitled to claim such relief were mostly, if not exclusively, mortgagees under mortgages in the English form, and they had at the date of the enactment in question

the power to sell without the intervention of the Court. If in their case a shorter period than sixty years, say twelve years, were granted while the longer period provided in article 148 continued to be the term given to mortgagors to redeem, that would lead to a very curious result. For as in such a case though a mortgagee of the class under consideration had omitted to sue for sale before the expiry of twelve years, and had thus lost his remedy of selling through Court, yet even subsequently there could be nothing on principle to prevent his proceeding to exercise his power of sale out of Court. This would be an anomaly which could only have been avoided by prescribing sixty years for suits for foreclosure or sale.

For all these reasons I am convinced that article 147 ought to be construed in the alternative sense, and I would, in reply to the question referred for decision, say that the case is governed not by that article, but by article 132.

BENSON, J.—The mortgage (exhibit A) in this case is dated the 2nd July 1879. It purports to be an usufructuary mortgage, and it contains in addition a covenant to pay the money on a fixed date, viz., the 8th March 1882. No doubt the Courts have found that, as a fact, the mortgagor remained in possession. I do not, however, think that this circumstance is sufficient to render the transaction a mere hypothecation. The mortgagee had the right to immediate possession at any time, and there was, therefore, a transfer of an interest in the property to him. It was more than an hypothecation or a charge on the property. It was a mortgage, and, in my opinion, article 147 of the Limitation Act is applicable.

It has no doubt been held by the Full Bench of the Calcutta High Court (*Girwar Singh v. Thakur Narain Singh*(1)) that article 147 refers only to what is known as an English mortgage, but this view has never been adopted either by this Court or by any other High Court in India. The contrary has been either assumed or expressly held in a long series of cases in this Court (*Aliba v. Nanu*(2)), *Rangasami v. Muttukumarappa*(3), *Ammanna v. Gurumurthi*(4), *Udayana Pillai v. Senthivelu Pillai*(5). The present case is similar to *Motiram v. Vilai*(6), in which *Girwar Singh v. Thakur Narain Singh*(1) was fully considered and dissented from.

(1) I.L.R., 14 Cal., 730.

(3) I.L.R., 10 Mad., 509.

(5) I.L.R., 19 Mad., 411.

(2) I.L.R., 9 Mad., 218.

(4) I.L.R., 16 Mad., 64.

(6) I.L.R., 13 Bom., 90.

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The reasoning in the Bombay case commends itself to me. I am not aware of any decision of this Court, which is inconsistent with the view that article 147 is applicable to the case now before us.

In reply to the reference I would say that the suit is governed by article 147.

DAVIES, J.—I concur with BENSON, J.

PRIVY COUNCIL.

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February
18.
March 5.

SRI RAJA RAU LAKSHMI KANTAIYAMMI (DEFENDANT)

v.

SRI RAJA INUGANTI RAJAGOPAL RAU (PLAINTIFF).

[On appeal from the High Court at Madras.]

Decree explained by reference to the judgment—Title of nearest reversioner.

In a prior suit a decree of the High Court awarded to the plaintiff the substantial relief claimed by him as reversionary heir entitled to inherit after the mother of the last male owner, then deceased, she holding her limited estate in the property; and the decree declared that certain alienations made by her were invalid against the reversionary heir.

In the present suit the same plaintiff, as nearest reversioner, claimed possession of the property from the daughter of the mother, the latter having died since the prior suit; the daughter alleging title through her:

Held, that the judgment, in the prior suit, was admissible, and ought to be examined in the present suit, in order to see what that suit decided as to the reversioner's title.

Kali Krishna Tagore v. Secretary of State for India (L.R., 15 I.A., 186; s.c., I.L.R., 16 Calc., 173) referred to and followed.

The judgment showed that the question whether the plaintiff was the nearest reversioner having been raised in the prior suit, had been finally determined in the affirmative; and this was sufficient proof of his title in the present suit.

APPEAL from a decree (15th March 1892) of the High Court, affirming a decree (19th December 1890) of the District Judge of Vizagapatam.

The present suit was brought on the 18th April 1888 by the respondent to establish his right to possess three proprietary estates in the Vizagapatam district, with mesne profits since 1886.

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

The last male owner was Rayadappa, who died in 1861, childless and unmarried. On his death his mother Sitaiyammi inherited these estates for the limited interest which she could possess, and she died on the 4th April 1886. On her death her daughter Kantaiyammi, defendant in this suit and now appellant (being sister of the late Rayadappa), obtained possession of the estates alleging her right to the inheritance.

The plaintiff, respondent, claimed to be the nearest surviving reversionary heir of Rayadappa and thus entitled.

He was, in fact, the adopted son of Rayadappa's first cousin Sitaramasami, who was son of the brother of Rayadappa's father.

Sitaramasami died in 1877, during the pendency of a suit which he brought in 1869 against the widow and mother Sitaiyammi, for a declaration of his reversionary right to the same properties, for which his adopted son, Sri Raja Inuganti Rajagopal Rau, now sued; and Sitaramasami in that suit of 1869 sued to have declared invalid, as against himself, certain alienations which Sitaiyammi had made. She defended that suit on the ground that all the properties, except one, were her stridhanam, that they never had been part of the paternal estate of her late husband, the father of Rayadappa, and that her daughter, and her daughter's adopted son were entitled to succeed to them after her own death. That suit of 1869 was not decreed till the 2nd May 1882, when Sitaramasami had been dead nearly five years, and by that time his minor adopted son above mentioned had been substituted for him, at the instance of the Court of Wards in charge of the minor's estate. The decree of the 2nd May 1882 was the basis of the present suit, in which the plaintiff's claim, he having arrived at majority, was founded exclusively on the assertion that his right to immediate possession on the death of Sitaiyammi was, in that suit, finally determined and settled as between himself and the present defendant, appellant.

The question on this appeal was whether the plaintiff's title as the nearest reversioner had been substantially in issue and finally determined in the prior suit of 1869; and, in connection with this, whether the judgment of 1882 could be referred to as affording explanation as to the title, and its grounds, the decree of that year saying nothing further than to declare him, as the representative of the original plaintiff in that suit, to be reversioner.

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The particulars of the claim of 1869 of the defence made, and of the judgment and decree thereon, as well as all the facts material to the decision of this case, are given in their Lordship's judgment.

The District Judge decreed to the plaintiff the properties that had belonged to the deceased Rayadappa on the ground of the plaintiff's having been his nearest surviving sapinda at his death, as determined in the prior suit of 1869, the matter being, in the Judge's opinion, 'res judicata.'

On an appeal to the High Court by the daughter Kantaiyammi, a Divisional Bench (COLLINS, C.J., and PARKER, J.) affirmed the judgment of the First Court.

Referring to the present plaintiff having been substituted for his adoptive father in the prior suit, the Judges said that his adoption having been questioned in the proceedings in that suit, an issue was sent down on 15th April 1880 with the result that his adoption was found to be proved. They added that the appeal in that suit came on for final hearing on the 2nd May 1882, when the Advocate-General who appeared for Kantaiyammi admitted that the objection to the adoption could not be sustained; their judgment continuing thus—

"The High Court then held that it had not been shown that there was any nearer reversioner than the present plaintiff, and granted him a decree declaring that the alienations made by Sitaiyammi to four different defendants were ineffectual to bind the reversioner. The first point urged upon the Court is that the question of the plaintiff's adoption is not 'res judicata' as between the parties, and that he should be required to prove it. It is contended that under section 357, Civil Procedure Code, two courses are open to the Court when a dispute arises as to who is the legal representative of the deceased plaintiff, *i.e.*, the Court may either stay the suit until the fact has been determined in another suit, or may decide the point at or before the hearing. In this case the latter course was taken, and as the issue was tried by a Court of competent jurisdiction between the same parties litigating under the same title, we can see no reason why the question between them should not be 'res judicata' under section 13. We may point out that an appeal is provided from the order under section 367 by section 588, clause 18, which is sufficient to show that the order is not a mere

"interlocutory determination of a point necessary to be decided in order that the suit may proceed.

"It is then urged that the plaintiff's title as reversioner to the whole estate is not 'res judicata' by the decree in Appeal No. 96 of 1875, but only as to those portions of which the alienations were held not binding. It is pointed out that no declaration was given as to plaintiff's right to succeed as reversioner to the rest of the estates. As to this objection we may observe that no such declaration could have been given. There was no right to consequential relief with regard to the rest of the estate and therefore no declaratory decree could be made (*Kathama Natchiar v. Dorasinga Tever*(1)). We are of opinion, however, that the contention of 'res judicata' does not rest upon the fact that the subject-matter in this suit is the same as that in the former, but because of the issues and the findings thereon. The question (1) of the plaintiff's adoption and (2) as to whether the estates were Sitaiyammi's stridhanam or her husband's property were necessary issues in the former suit and they were decided. The decision upon these issues was necessary, even though the right to consequential relief and the declaration to be given thereupon only related to portions of the estates. Independently of this, however, we should still be of opinion that the first defendant had altogether failed to prove that these estates were her mother's stridhanam property."

Mr. J. D. Mayne, for the appellant, argued that the decree of 1882 had not definitely declared the plaintiff's title, as nearest reversioner, to the possession immediately upon the death of Sitaiyammi; and that the Courts below should not have decided in favour of the present respondent without having given to the appellant an opportunity of contesting, on the merits, her opponent's title. The High Court was in error in assuming that the decree of 1882, by implication, awarded such an immediate right of possession. There was little, if anything, in the judgment in the suit that could be said to go beyond what was specified in the decree; which, in result, affirmed only the right of the reversioner not to be affected by the alienations made by the widow, who for her life represented the estate. It did not attempt to fix the direct right of possession in the reversioner, now respondent,

(1) L.R., 2 I.A., 169 at p. 191.

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immediately consequent upon the termination of the limited interest, or interests preceding his right of inheritance. It fell short of establishing the present claim.

There had been no decision in the suit of 1869, whether the daughter was, or was not, entitled to possession after the death of her mother in priority to the cousin of her deceased brother. The judgment and decree of 1882 might be correct, but the construction that the judgment covered the respondent's claim to proprietary possession, immediately upon the death of the mother, was open to dispute. The daughter's claim to succeed had not been the subject of adjudication, and was not necessarily affected by that decision. It was for the respondent to establish in the present suit his title to possession against the appellant, and there was no sufficient ground for the construction that the declaration of the reversionary title carried with it the right to the possession. A succession of limited interests might intervene before the latter right, and was quite compatible with the existence of a reversionary title. Reference was made to *Kathama Natchiar v. Dorasinga Tever*(1).

Mr. J. H. A. Branson, for the respondent, contended that all that was necessary to show a complete title in the respondent to the possession of the property upon the death of Sivarammi was to be found in the judgment and decree of the High Court in 1882. That Court, upon all the facts, was in concurrence with, and had affirmed, the decision of the First Court. No part of what would belong to the plaintiff's case, if it were incumbent on him again to prove it, could be said to be additional to what had been established in the suit of 1882, so far as the plaintiff's title was concerned. The judgment of that year amounted to this, that the respondent in this case was entitled to the property as the nearest surviving male sapinda of Rayadappa, the last male owner. It had not been shown that any of the findings below were open to doubt, and on reference to the judgment it was clear that the same issue was raised then that was raised now. The plaintiff's title as nearest reversioner had been conclusively established by the judgment and decree of 1882.

Mr. J. D. Mayne replied.

Afterwards, on the 5th March, their Lordships' judgment was delivered by Sir RICHARD COUCH.

(1) L.B., 2 I.A., 189 at p. 191.

JUDGMENT.—The only question in this appeal is what is the effect of a decree of the High Court at Madras made on the 2nd of May 1882 in a suit brought by Sitaramasami against Sitaiyammi, the mother and heiress of Rayadappa deceased, who was the son of Ramarayanin, and had died unmarried and without issue. Sitaramasami was the son of a younger brother of Ramarayanin, and the plaintiff, which was filed in April 1869 in the Civil Court of Vizagapatam, alleged that the plaintiff was the nearest surviving heir of Rayadappa, and stated that the relief sought for was a declaration of the plaintiff's right to succeed after the death of Sitaiyammi to the enjoyment of the immovable property described in the plaintiff and the annexed schedule, and a declaration that the alienations of parts of the property which had been made by Sitaiyammi to the prejudice of the reversionary right of the plaintiff to a number of persons who were also made defendants might be declared invalid or to be of no effect beyond her life. The plaintiff also asked for an injunction and the appointment of a receiver. The written statement of Sitaiyammi alleged that the whole of the property, except a garden, which had been granted to her son by the Zamindar of Bobbili, was her stridhan, and the estate was managed for her by her husband and son, and even if it was considered to be the acquisition of her husband, her daughter and her daughter's son were entitled to succeed to it and the plaintiff was not entitled to it in any respect. The other defendants by their written statements asked that the suit might be dismissed. At the hearing before the Civil Judge of Vizagapatam he found that the families of the brothers were divided, and the property was not the stridhan of Sitaiyammi and was the self-acquired property of Ramarayanin, and therefore that the plaintiff was not reversionary heir and decreed that the suit should be dismissed.

Sitaramasami having adopted the present appellant before the hearing, he had been substituted in the suit as plaintiff and he appealed against this decree to the High Court at Madras on the ground, among others, that the Court below ought to have found that he was entitled to the property on the death of Sitaiyammi as heir of her son, the last full owner. It has been seen that Sitaiyammi alleged that her daughter and her daughter's son and not the plaintiff were entitled to succeed. The daughter is the present appellant and on the suit being remanded by the High Court to the Lower Court to enable them to be made parties to the

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suit that was done, and the Judge made a final decree declaring the adoption of the son to be invalid and again dismissing the suit. On the appeal again coming before the High Court it delivered the following judgment:—"The Advocate-General admitted "that the finding as to the adoption of the substituted plaintiff "could not be sustained, and that the only question remaining for "disposal was whether on the facts which have been found or are "no longer disputed the plaintiff is entitled to any portion of the "relief sought. It is not shown that there is any other nearer "reversioner than the plaintiff and we are unable to distinguish "this case from others in which it has been held that a reversioner "is entitled to a declaration that the acts of a Hindu lady in "possession in excess of her authority will not bind the reversion "if a case is made out for such relief." Then after saying that the Advocate-General had argued that no such case was averred or had been established the judgment says:—"He (the plaintiff) will "obtain a decree declaring these alienations ineffectual to bind "the reversion. He has not established any necessity for the "appointment of a receiver and the issue of an injunction to a lady "in possession who may alien a property for proper purposes would "not be justifiable except under extraordinary circumstances. "The residue of the claim is, therefore, dismissed." "Therefore "refers to the reasons given in the preceding paragraph and "residue of the claim" means the appointment of a receiver and an injunction. The other questions in the suit are in their Lordships' opinion decided in favour of the plaintiff. The decree declares the plaintiff entitled to the substantial relief claimed in the plaint, and although it does not contain a declaration that the plaintiff is the nearest reversioner the judgment may be and ought to be looked at to see what was decided. The present appellant in her written statement after she had been made a defendant alleged that she and her son would be the heirs after her mother's death, and that the respondent could not be the heir. The suit being dismissed by the District Judge the plaintiff appealed to the High Court, one of his grounds of appeal being that, on the death of Sitaiyammi, he was entitled to the property as the heir of her son. The question whether he was the nearest reversioner was thus distinctly raised.

Sitaiyammi died on the 4th of April 1886, and thereupon her daughter, the present appellant, took possession of the property. On the 18th of April 1888 the respondent brought a suit against

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the appellant and other persons, the heirs and representatives of deceased defendants in the original suit, to recover possession. The defence set up by the appellant in her written statement is that the respondent's right as the nearest reversionary heir had not been established by the decree in the suit of 1869, and he was therefore not entitled to recover the estates. The District Judge, on the 19th of December 1890, found that the respondent was the reversioner, and made a decree for possession against the first defendant Kantaiyammi, the appellant, and dismissed the suit against all the other defendants. Kantaiyammi appealed to the High Court on the ground that the Lower Court was wrong in deciding the plaintiff's title without framing an issue on that point and in holding that the decree in the suit of 1869 had in any way declared the title of the plaintiff. This has been the contention before their Lordships of the learned counsel for the appellant. And if only the decree could be looked at there might be some reason for it, but it would be wrong to look only at the decree. In *Kali Krishna Tagore v. Secretary of State for India*(1), the High Court of Bengal did this saying:—"We cannot look "to the judgment as we were asked to do in order to qualify the "effect of the decree," and their Lordships on appeal held that in order to see what was in issue in a suit or what has been heard and decided, the judgment must be looked at. They said:—"The "decree, according to the Code of Procedure, is only to state the "relief granted, or other determination of the suit. The determina- "tion may be on various grounds, but the decree does not show "on what ground, and does not afford any information as to the "matters which were in issue or have been decided." It is plain that in the suit of 1869 it was decided by the High Court that the respondent was the nearest reversionary heir. That is conclusive between him and the appellant, and is sufficient proof of his title to enable him to recover possession of the property from her. Their Lordships will, therefore, humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Surr, Gribble & Oliver*.

Solicitors for the respondent—Messrs. *Lawford, Waterhouse & Lawford*.

(1) L.R., 15 I.A., 186; s.c., I.L.R., 16 Cal., 173.

APPELLATE CIVIL.

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

KOMBI ACHEN AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

KOCHUNNI (DEFENDANT No. 20), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 561—Appeal dismissed for want of necessary parties—Memorandum of objections.

The plaintiffs sued to recover possession of lands demised on kanom in Malabar. The defendants were the representatives of the mortgagee, and one (defendant No. 20) who claimed title to part of the land sought to be recovered. As to the last-mentioned part of the land, the plaintiffs obtained a decree for a portion of it only. The plaintiffs preferred an appeal bringing on to the record only defendant No. 20 who preferred a memorandum of objections. The appeal was dismissed for the reason that the mortgagee's representatives were not joined:

Held, that the appeal had been heard within the meaning of Civil Procedure Code, section 561, and accordingly that the memorandum of objections should be heard.

SECOND APPEAL against the decree of R. S. Benson, District Judge of South Malabar, in Appeal Suit No. 14 of 1892, modifying the decree of V. P. DeRozario, Subordinate Judge of South Malabar, in Original Suit No. 4 of 1889.

This was a suit to recover certain property demised on kanom together with arrears of purapad. The defendants were the representatives of the kanomdars and other persons claiming to be interested in the land in question and included defendant No. 20 who stated that certain land which was his property had been fraudulently included in the plaint. The Subordinate Judge passed a decree for the plaintiff which was modified on appeal by the District Judge in favour of defendant No. 20.

The plaintiffs preferred this second appeal, bringing on to the record as respondent only defendant No. 20, whose claim to the land, they contended, should have been entirely overruled. Defendant No. 20 preferred a memorandum of objections.

Ramachandra Rau Saheb and Ranga Ramanujachariar for appellants.

Sundara Ayyar for respondent.

* Second Appeal No. 351 of 1896.

JUDGMENT.—The appellant has failed to join as parties to his second appeal the second defendant and eight others, who represent the mortgagee. In their absence, the decree of the Lower Court cannot be varied, and we see no sufficient reason for allowing the appellant at this stage to bring them on the record. On this ground we must dismiss the second appeal with costs.

As to the memorandum of objections, it was contended for the appellants that it cannot be heard inasmuch as the appeal has not been heard on the merits, and therefore there has been no hearing of the appeal within the meaning of section 561, Code of Civil Procedure. We cannot accept this contention, as we consider that the question of non-joinder is one that arises in the appeal itself, and is not extraneous to it, as would be a question as to whether it was presented in proper time or not (*Ramjiwan Mal v. Chand Mal* (1)). Upon this question of non-joinder the appellant was heard, and it follows that there was a sufficient hearing of the appeal to entitle the respondent to be heard on his objections.

As to the merits of the objections themselves they turn on questions of fact and accordingly we dismiss them also with costs.

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APPELLATE CIVIL.

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

SETHURAYAR (PLAINTIFF), APPELLANT,

v.

SHANMUGAM PILLAI AND ANOTHER (DEFENDANTS
Nos. 1 AND 2), RESPONDENTS.*

Specific Relief Act—Act I of 1877, s. 56, cl. (b)—Trusts Act—Act II of 1882, ss. 91, 95—Civil Procedure Code—Act XIV of 1882, s. 232—Decree obtained on a benami mortgage by benamidar—Suit by real mortgagee—Declaration—Injunction.

A mortgaged land to B as either agent or benamidar for C. B sued on the mortgage and obtained a decree. C now sued A and B for a declaration that he was entitled to the benefit of the decree and had the right to execute it, and for an injunction restraining A from paying the money to B and B from receiving the money from him:

Held, that the plaintiff was entitled to the declaration, but not to the injunction.

1897.
August 19, 24.

(1) I.L.R., 10 All., 587.

* Second Appeal No. 1303 of 1896.

SETHURAYAR
v.
SHANMUGAM
PILLAI.

SECOND APPEAL against the decree of H. T. Ross, District Judge of Tinnevely, in Appeal Suit No. 161 of 1895, reversing the decree of A. David Pillai, District Munsif of Ambasamudram, in Original Suit No. 213 of 1894.

The material allegations in the plaint were as follows :—

“ For the sum of Rs. 163-8-6 due for paddy and for Rs. 3 due in ready cash, both amounting to Rs. 166-8-6, payable by the second defendant to the said zamin according to the custom of the said zamin and as per terms of the patta for fasli 1296, a registered hypothecation deed was obtained for the plaintiff from the second defendant on the 7th September 1888 in the name of the first defendant, who was at that time the sampirathi of the said zamin on the security of the property mentioned in the list, with stipulations that, out of the said sum, Rs. 83 and the interest due on the whole (principal) sum at the rate of 1 per cent. per mensem should be paid on the 14th October 1888 (corresponding to 30th Perattasi of Andu 1064), and that the remaining sum of Rs. 83-8-6 should be paid with interest at the same rate on 10th April 1889 (corresponding to 30th Panguni of the said Andu), and that, if there be default in paying on the first instalment, the whole amount should be paid in a lump with interest at the said rate without regard to subsequent instalment, and with some other stipulations. The said deed was kept among the said zamin records.

“ It is come to be known that the first defendant had, before being dismissed from the said post of sampirathi, fraudulently taken away the said hypothecation deed and has, concealing the truth, fraudulently instituted a suit as plaintiff against the said second defendant in Original Suit No. 152 of 1892 on the file of the District Munsif of Ambasamudram as if the said document was only executed for his own benefit; that he has obtained a decree, and that, on his application for a public auction-sale of the said property, the sale of the said property is fixed for the 29th instant.”

The plaintiff claiming that defendant No. 1 had no right to the amount secured by the hypothecation deed or to the benefit of the decree obtained thereon, prayed for a decree as follows :—

“ (1) Declaring that, as the amount of the decree in Original Suit No. 152 of 1892 on this Court's file referred to above, namely, Rs. 338-5-3, together with subsequent interest thereon,

“ belong to the plaintiff, and as the first defendant has no right whatever therein, the plaintiff has the right to be in the position of the first defendant in the said decree in Original Suit No. 152 of 1892 and to take out execution and to recover the amount.

“ (2) Issuing a permanent injunction against the first defendant prohibiting him from ever recovering the amount, &c., of the said Original Suit No. 152 of 1892, and against the second defendant prohibiting him from paying the said amount, &c., to the first defendant.

“ (3) Granting such further relief as the nature of this suit may demand and as the Court may deem proper.”

The District Munsif held that the bond in question in Original Suit No. 152 of 1892 was executed for the benefit of the plaintiff and not for that of the first defendant, and that the former and not the latter was entitled to the benefit of the decree. He accordingly passed a decree as follows :—“ That plaintiff is declared to be entitled to the amount of the decree in Original Suit No. 152 of 1892 and to apply for execution of the said decree; that first defendant is restrained from receiving the said amount from second defendant and the second defendant from paying the said amount to first defendant.”

The District Judge reversed the decree and dismissed the suit on the ground that it was not maintainable by the plaintiff.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar and Sivarama Ayyar for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—Upon the allegations of the plaintiff, his case may be considered on the footing either that the first defendant was his agent, or that he was his benamidar. If first defendant was an agent, the plaintiff is entitled to obtain the advantage gained by the first defendant in securing a decree upon the bond. Whether first defendant's action in obtaining the decree was rightful or wrongful is immaterial. This has long been established law (*Taylor v. Plumer*(1)).

If first defendant was a benamidar, the result would be the same, for he would be in the position of a trustee (sections 91 and 95 of the Indian Trusts Act, 1882).

SETHURAYAR
v.
SHANMUGAM
PILLAI.

The only remaining question is as to the relief to be given. The injunction prayed for cannot be granted under section 56, clause (b) of the Specific Relief Act; but, if the plaintiff's case be true, he is entitled to the declaration granted by the Munsif subject to the plaintiff reimbursing the first defendant the costs incurred by him in obtaining the decree.

It was contended that such declaration would be fruitless and should not be granted, but we do not agree in this view. Such a declaration being binding on the parties would entitle the plaintiff to apply for the execution of the decree under section 232 of the Code of Civil Procedure, which has been held applicable to a case like the present (*Umasoondury Dassay v. Brojonath Bhattacharjee*(1)).

The Judge was therefore wrong in holding that this suit was not maintainable. We accordingly reverse his decree and remand the appeal for disposal on the merits in the light of the above observations. Costs will abide and follow the result.

No order is necessary on the memorandum of objections as the Lower Court's decree has been reversed.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

1897.
November 4.

RAMAYYAR (COUNTER-PETITIONER-PLAINTIFF), APPELLANT,

v.

RAMAYYAR (PETITIONER-DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 244, 258, 311—Uncertified adjustment out of Court with a decree-holder—Subsequent execution—Fraud of decree-holder.

An adjustment was made out of Court between a decree-holder and a judgment-debtor in August 1893, but it was not certified to the Court. The decree-holder falsely stated to the judgment-debtor's agent that the requisite petition certifying the adjustment had been presented; but nevertheless he proceeded with execution, applied for and obtained leave to bid at the Court-sale and himself purchased the property in September. The judgment-debtor preferred petitions in September and November praying that the sale be set aside.

Held, that the judgment-debtor was entitled to prove the adjustment, and to have the sale set aside.

(1) I.L.R., 16 Cal., 347.

* Appeal against Appellate Order No. 23 of 1896

APPEAL against the order of S. Gopala Chari, Subordinate Judge of Tinnevely, in Appeal Suit No. 95 of 1894, reversing the order of J. Solomon Gnaniyar Nadar, Acting District Munsif of Ambasamudram, in Miscellaneous Petitions Nos. 532 and 458 of 1893.

RAMAYYAR
v.
RAMAYYAR.

These were applications by a judgment-debtor whose property had been attached in execution of the decree and with the leave of the Court purchased by the decree-holder. The first application was preferred under Civil Procedure Code, section 311, and it was therein alleged that the decree had been adjusted by agreement and that it was arranged that the decree-holder should report the adjustment to the Court and it was prayed that the sale be set aside. The second petition was presented under Civil Procedure Code, section 244, and proceeded on the same facts. The first petition under section 311 was disallowed on the ground that the allegations made did not satisfy the requirements of that section. The second petition under section 244 was rejected on the ground that it could not be entertained, as the defendant had omitted to report the adjustment to Court under section 258. The Subordinate Judge, however, on appeal reversed the orders appealed against and set aside the sale, holding that the allegations of the judgment-debtor were proved.

The decree-holder preferred this appeal on the following among other grounds:—

"2. No facts have been proved by the defendant to justify the Court in setting aside the sale.

"3. No evidence ought to have been admitted by the Judge to prove the alleged agreement, as neither the decree-holder had certified it in Court, nor the judgment-debtor applied to compel the decree-holder to certify within the statutory period.

"5. Assuming there was such an agreement and breach, the defendant's remedy is not in execution proceedings."

Sankaran Nayar for appellant.

Ramakrishna Ayyar for respondent.

JUDGMENT.—On the 3rd August 1893 there was an adjustment out of Court between the decree-holder and the judgment-debtor. On the 19th August it was falsely represented to the judgment-debtor's brother-in-law who acted for him, that the requisite petition certifying adjustment to the Court had been presented; notwithstanding that, the decree-holder proceeded with the execution and obtained leave to bid at the sale which took place on the 1st

RAMAYYAR v. RAMAYYAR. September. The fact of the sale came to the knowledge of the judgment-debtor on the 3rd September and on the 21st September he put in a petition under section 311 of the Code following it up with another petition of the 15th November under section 244. In these petitions the above facts found by the Subordinate Judge are stated. The District Munsif dismissed the petition holding that, under section 258, the Court could not recognize adjustment made out of Court and not duly certified. We are of opinion that the proviso to section 258 does not absolutely preclude proof of an uncertified adjustment. It only declares that it shall not be recognized as such by the Court executing the decree. However, the judgment-debtor does not rely on the adjustment as an adjustment, but only as a step in proving the fraud committed on himself and on the Court.

We think, therefore, that this proviso does not stand in the way of the judgment-debtor proving the fraud of which he complains. That there has been a fraud on the Court and on the judgment-debtor is found by the Subordinate Judge, and there can be no doubt about it. It is clear that, if the Court had been apprised of the facts, the decree-holder would not have had leave to bid and the sale would never have taken place. It would be monstrous to hold that a Court upon which such fraud as is proved in the present case has been committed is nevertheless bound to confirm the sale (*Subbaji Itau v. Srinivasa Rau* (1)).

We dismiss the appeal with costs.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar,
Mr. Justice Davies, and Mr. Justice Boddam.

REFERENCE UNDER STAMP ACT, s. 46.*

1897.
November 5.

Stamp Act—Act I of 1879, s. 3, cls. (12), (13)—Lease—Mortgage.

An instrument, therein described as a lease, was executed in consideration of one hundred and twenty rupees, and it provided that the party paying that sum should remain in possession of certain land for twelve years but contained no provision for repayment of that sum or for the payment of rent;

Held, that the instrument was a usufructuary mortgage and not a lease.

(1) I.L.R., 2 Mad., 264.

* Referred Case No. 19 of 1897,

CASE referred by the Board of Revenue for the opinion of the High Court under Stamp Act, 1879, section 46. REFERENCE UNDER STAMP ACT, s. 46.

The case was referred with, *inter alia*, the following observations:—

“It will be observed that in satisfaction of a sum of rupees one hundred and twenty comprising rupees eighty made up of rupees fifty-three, principal and interest, due on a former document, and of rupees twenty-seven, loan taken on the date of the document, and rupees forty, future interest on the above sum of rupees eighty calculated at eight annas for every rupee, the claimant under the document is to enjoy for twelve years certain specified lands of the executant which are already in the claimant's possession at an annual rent of rupees ten as agreed between them, that the claimant should pay a road-cess of annas six every year for the said land and that he should deliver back the lands and the document to the executant at the end of the twelfth year.” *Reference under Stamp Act, s. 46 (1)*, was quoted as supporting the view that the document should be stamped as a lease and not as a mortgage.

The document in question was as follows:—

“Lease deed of a piece of land, dated 16th June 1896, corresponding to Tuesday the fifth day after the new-moon in the third month of Durmukhi year made in favour of Pedda Appala-sami Garu, son of Rapeti Appadu, Gavara caste, cultivator, residing in Venkapalam, hamlet of Sitanagaram, attached to Anakapalle sub-district, Anakapalle taluk, Vizagapatam district, by Ramadu and Ammatalligadu, both sons of Marvadapudi Gangadu, Chuckler's caste, service inamdars residing in Sitanagaram of Anakapalle sub-district of Anakapalle taluk of the said district.

“The amount of principal and interest as per document executed by us in your favour on the 31st July 1891 is rupees fifty-three and the amount due as per grain and cash account struck between us, both parties being present, is rupees twenty-seven, making a total of rupees eighty. Adding to this principal, rupees forty, future interest, at half a rupee for every rupee, the total comes to Rs. 120 (in letters rupees one hundred and twenty). For the above you are to enjoy for twelve years from

(1) I.L.R., 7 Mad., 203.

REFERENCE UNDER STAMP ACT, s. 46. "this date to the end of Plavanga year the income of our service inam dry half a visam land of our ancestors, lying within the boundaries hereunder given, already in your possession and enjoyment the rent of whereof has been agreed between us to be rupees ten a year. The said land is situated in Venkapalam to the south of Venkapalam of Sitanagaram, hamlet attached to Anandapuram Tana, Vizianagram Samastanam, Anakapalle sub-district, Anakapalle taluk, Vizagapatam district. Besides you will have to pay road-cess six annas for the said land. At the end of the period our land and document should be delivered to us."

Counsel were not instructed.

JUDGMENT.—In our opinion this is a usufructuary mortgage under which the rents and profits were estimated to satisfy both principal and interest, and accordingly no accounting on either side would become necessary. The case is quite different from that to which the Board refer.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Shephard, Mr. Justice Subramania Ayyar,
Mr. Justice Davies, and Mr. Justice Boddam.

QUEEN-EMPRESS

v.

JAYARAMI REDDI.*

1897.
September
16.
November
5, 10.

Arms Act—Act XI of 1878, s. 4—Possession of unserviceable fire-arm without a license.

A revolver with a broken trigger is within the definition of "arms" in Indian Arms Act, 1878, section 4.

Whether in any particular case an instrument is a fire-arm or not, is a question of fact to be determined according to circumstances, and the circumstance that it is in an unserviceable condition is not conclusive.

APPEAL on behalf of Government under Criminal Procedure Code, section 417, against the judgment of acquittal pronounced by W. G. Underwood, Sessions Judge of Cuddapah, in Criminal

* Criminal Appeal No. 411 of 1897.

Appeal No. 8 of 1897, reversing a conviction by A. T. Forbes, Acting Joint Magistrate of Cuddapah, under Indian Arms Act XI of 1878, section 19, clause (b).

The accused was prosecuted and convicted by the Acting Joint Magistrate of the offence of possessing a gun without a license after having been dispossessed of arms by the District Magistrate. It appeared that the revolver in question was of good make, but the spring of the trigger was broken, and it was accordingly not serviceable at the time when it was in the possession of the accused. It was also found that at the cost of a few rupees it could have been repaired and rendered serviceable. On these facts the Sessions Judge held that the revolver did not come within the definition of "arms" and accordingly reversed the conviction.

The present appeal was preferred on behalf of the Crown.

The appeal having come on for hearing before COLLINS, C.J. and BENSON, J., they made the following order of reference to the Full Bench:—

ORDER OF REFERENCE TO THE FULL BENCH.—In view to the manner in which the case of *The Queen v. Siddappa*(1) has been interpreted by the Lower Appellate Court, and as we find it impossible to hold that a revolver, the trigger of which is out of order, does not, for that reason, come within the definition of "arms" in section 4 of the Arms Act (XI of 1878), we resolve to refer the case to a Full Bench to decide whether the ruling in *The Queen v. Siddappa*(1) is correct, and to consider whether the revolver in the present case does or does not come within the definition of "arms" in the said Act.

This case next came on for hearing before the Full Bench constituted as above.

The Public Prosecutor (Mr. E. B. Powell) for the Crown: contended that the offence was established although the revolver was not serviceable as such in the condition in which it was purchased and was in the possession of the accused. The object of the Act was to secure that information of the possession of arms and ammunition should be furnished to Government, and the possession kept under the control of Government. The actual condition in which a weapon is, is immaterial. Whether for instance fifty thousand stocks and fifty thousand barrels are imported separately

(1) I.L.R., 6 Mad., 60.

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REDDI.

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REDDI.

or are imported together as fifty thousand complete weapons is entirely immaterial. Section 4 of the Act clearly applies to parts of weapons. [SUBRAMANIA AYYAR, J.—Would you contend that each portion or a part of a gun was within the definition of “arms” ?] If it were absolutely unserviceable, I would not contend that it were so, but it is otherwise, if it can be rendered serviceable. The decision in *The Queen v. Siddappa*(1) defeats the policy of the Act and places an unreasonable construction upon its terms. If that decision be maintained, it would be open to anybody possessing a revolver to remove the screw of the trigger and thus render it unserviceable as a weapon and thereby to evade the provisions of the law. Moreover, in the present case, the accused purchased with the revolver a supply of ammunition and in respect of this he is liable. [DAVIES, J.—He has not been charged with committing an offence as to the ammunition.] That is true, but the circumstance shows the intention with which the revolver was purchased.

Mr. N. Subramanyam for the accused: It has been found, as a matter of fact, that the revolver was unserviceable. [SHEPARD, J.—What has the question of its being serviceable to do with the matter? Is it not a gun?] It ceases to be a gun when it cannot be used as such. In its present state it is not a gun. The only possible test is that stated in *The Queen v. Siddappa*(1). Any other test would bring within the purview of the section arms which were kept as relics or curiosities.

JUDGMENT.—We think there is no doubt that the revolver in the case is a fire-arm within the meaning of the Act. The question is not so much whether the particular weapon is serviceable as a fire-arm, but whether it has lost its specific character and has so ceased to be a fire-arm. In referring to the serviceable character of the arm we think the decision in *The Queen v. Siddappa*(1) was not correct and that the proper test was lost sight of. Whether in any particular case the instrument is a fire-arm or not, is a question of fact to be determined according to circumstances. We answer the question in the affirmative.

This case again coming on for final disposal after the expression of the opinion of the Full Bench, the Court (COLLINS, O.J., and BENSON, J.) delivered the following judgment:—

(1) I.L.R., 6 Mad., 60.

JUDGMENT.—The ruling of the Full Bench renders it necessary to set aside the acquittal. We accordingly do this, and we restore the conviction and sentence passed by the Joint Magistrate.

QUEEN-
EMPRESS
v.
JAYARAM
REDDI.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

GIDDAYYA (PLAINTIFF), PETITIONER,

v.

JAGANNATHA RAU (DEFENDANT), RESPONDENT.*

Village Courts Act (Madras)—Act I of 1889, s. 73—Power of District Munsif on revision.

1897.
November
12.

A District Munsif has no jurisdiction to reverse the decree of a Village Munsif on a question of evidence; he can only revise the proceedings of village courts on the grounds mentioned in section 73 of the Village Courts Act.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the proceedings of the District Munsif of Kurnool, in Civil Miscellaneous Petition No. 560 of 1896, by which he reversed the decree of the Village Munsif of Kurnool in Original Suit No. 118 of 1896.

This was a suit for Rs. 9-10-7, and the Village Munsif passed a decree for the plaintiff. The District Munsif reversed the decree saying:—“I have carefully gone through the record, “and the plaintiff’s account is not free from suspicion. The “reasons given by the Village Munsif for giving a decree in “plaintiff’s favour do not seem to be sound. He seems to have “been led away merely by probabilities The “explanation given by plaintiff in regard to his accounts is not “satisfactory.”

The plaintiff preferred this petition.

Narayana Ayyangar and Balarama Rau for petitioner.

Mr. S. H. Bilgrami, Nizam-ud-din Sahib and Hyder Sheriff Sahib for respondent.

JUDGMENT.—The District Munsif has treated the matter as an appeal and has exceeded his jurisdiction, which, by section 73 of

* Civil Revision Petition No. 520 of 1896.

GIDDAYYA
v.
JAGANNATHA
RAU.

the Village Courts Act, 1889, is confined to the revision of village courts' proceedings on the grounds there specified, on none of which did his judgment in this case proceed. His judgment in this case is on the appreciation of evidence as if it were an appeal.

We must allow this petition and reverse the order of the District Munsif and restore the decree of the Village Munsif with costs in this and in the District Munsif's Court.

APPELLATE CIVIL.

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

SUBBARAYA RAVUTHAMINDA NAINAR

(DEFENDANT No. 1), APPELLANT,

v.

PONNUSAMI NADAR AND OTHERS (PLAINTIFFS),
RESPONDENTS.*

1897.
October 27,
28, 29,
November
1, 2, 3, 4, 16.

Transfer of Property Act—Act IV of 1882, s. 36—Mortgage decree—Interest—Contract rate—Subsequent interest—Civil Procedure Code—Act XIV of 1882, s. 209.

When a decree for sale is passed in a mortgage suit, interest at the contract rate should be decreed for the period allowed for payment by the mortgagor, and subsequent interest should be decreed at six per cent. only.

APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in Original Suit No. 33 of 1893.

This was a suit to recover Rs. 24,000, principal and Rs. 41,319, interest, due on a mortgage bond, dated the 17th of January 1881, and executed by defendant No. 1 on behalf of defendant No. 2 in favour of one Tavasumuttu Nadar, brother of plaintiff No. 1 and father of plaintiffs Nos. 2 to 4. The provisions in the mortgage bond regarding interest stipulated that the interest accruing at the rate of ten annas per cent. per mensem be paid on the 17th of January of each year; that, in default, interest be charged at twelve annas per cent. from date of default; that the principal amount be paid on the expiry of seven years; and that, in default, the same be paid with interest at one anna per cent. from date of default.

* Appeal No. 14 of 1896.

The defendants pleaded that the mortgage has been discharged. This plea was found to be false in a suit between the same parties which resulted in the appeal referred to in the first sentence of the judgment below.

The Subordinate Judge found that the amount due for interest up to the date of the suit was Rs. 38,095, and he passed a decree as follows :—

“That the defendants do pay plaintiffs in six months from to-day Rs. 62,095, and proportionate costs and interest on Rs. 24,000 from the plaint date, that is, 20th of July 1893, at twelve per cent. per annum, and that, in default of payment of the sums aforesaid, on or before the date specified, the said hypothecated property or a sufficient portion thereof be sold, &c.”

The defendant preferred this appeal.

V. Krishnasami Ayyar and Natesa Ayyar for appellant.

The Acting Advocate-General (Hon. V. Bhaskyam Ayyangar) and Pattabhirama Ayyar for respondents.

JUDGMENT.—As to the plea of discharge it is dismissed under our judgment in *Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar*(1). As to the rate of interest allowed by the Subordinate Judge his decree must be modified by directing that the twelve per cent. per annum, the contract rate, be allowed only for the six months within which payment was ordered by the decree (see our judgment in *Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar*(2) and *Surya Narain Singh v. Jogendra Narain Roy Chowdhury*(3)). Subsequent to that period, the plaintiff is entitled, in our opinion, to interest at six per cent. per annum, and it will be so decreed (*Poresh Nath Mojumdar v. Ramjodu Mojumdar*(4), and *Achalabala Bose v. Surendra Nath Dey*(5)) the ruling in *Amolak Ram v. Lachmi Narain*(6) notwithstanding.

The parties will bear their own costs.

(1) Appeal No. 48 of 1896 (unreported).

(2) Appeal No. 13 of 1896 (unreported).

(3) I.L.R., 20 Cal., 360.

(5) I.L.R., 24 Cal., 766.

(4) I.L.R., 16 Cal., 246.

(6) I.L.R., 19 All., 174.

SUBBARA
RAVUTH
MINDA
NAINA
v.
PONNUSA
NADAR

APPELLATE CIVIL.

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

1897.
November
29.

MARIMUTHU (PLAINTIFF), PETITIONER,

v.

SAMINATHA PILLAI (DEFENDANT), RESPONDENT.*

Partnership—Settlement of accounts—Promise to pay balance.

The plaintiff and defendant having carried on business in partnership, settled their accounts and struck a balance of Rs. 196, which the defendant agreed orally to pay in a month. The plaintiff now sued in a Small Cause Court for the amount not asking for an account to be taken :

Held, that the suit was maintainable.

PETITION under Provincial Small Cause Courts Act IX of 1887, section 25, praying the High Court to revise the proceedings of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in Small Cause Suit No. 1263 of 1896.

Suit for Rs. 196. The Subordinate Judge said :—

“ It is seen from the plaint that the parties were trading in partnership in cocoa-nuts from March 1894 to February 1895, and that there were accounts of the partnership trade. It is alleged that, in the beginning of March 1895, they orally settled accounts and struck a balance of Rs. 196, which defendant agreed to pay in one month. This suit is based upon that oral promise to pay within one month, and the cause of action is given as the date on which he agreed to pay which he failed. The question is whether the oral promise will amount to a new contract on which the suit can be based. The Madras High Court have held in *Amuthu v. Muthayya*(1) that such a transaction cannot amount to a new contract extinguishing the old cause of action. This suit ought to have been based upon the partnership dealings and brought for dissolution and winding up of the partnership business. The oral settlement and promise cannot form a new contract to sue upon. I, therefore, find the issue in the negative and dismiss the suit with costs.”

The plaintiff preferred this petition.

Tangarelu Chetti for petitioner.

Sundara Ayyar for respondent.

* Civil Revision Petition No. 46 of 1897.

(1) I.L.R., 16 Mad., 339.

JUDGMENT.—All we have to say is whether, on the face of the plaint, a good cause of action is disclosed. The allegation of partnership dealings and of the settlement of accounts between the partners followed by a promise on the part of one partner to pay a liquidated sum to the other amounts to a contract supported by good consideration, and the law does not require it to be in writing. The case of *Amuthu v. Muthayya*(1) does not appear to be a case of mutual dealings. The case in *Hirada Karibasappah v. Gudigi Muddappa*(2) is more in point.

We must reverse the decree and remand the suit for disposal on the merits. Costs will be provided for in the revised decree.

APPELLATE CIVIL.

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

FISCHER (DEFENDANT No. 2), PETITIONER,

v.

TWIGG AND OTHERS (PLAINTIFFS AND DEFENDANT No. 3),
RESPONDENTS.*

District Municipalities Act (Madras)—Act IV of 1884, ss. 63, 262—House-tax assessed on school buildings—Suit to recover tax payable under protest.

House-tax and water-tax was levied under District Municipalities Act (Madras), 1884, section 63, on the school buildings of the Native College, Madura (which were exclusively used for charitable purposes), and was paid by the managers of the college, who sued in the Small Cause Court to recover the amount :

Held, that the tax was illegal and the plaintiffs were entitled to recover.

PETITION under Provincial Small Cause Courts Act IX of 1887, section 25, praying the High Court to revise the proceedings of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in Small Cause Suit No. 652 of 1896.

Suit for Rs. 124 paid under protest on account of house-tax and water-tax by the plaintiffs, who were the members of the Managing Committee of the Native College, Madura, to defendant No. 1 empledged as the Municipal Council of Madura, of which defendant No. 2 was Chairman. The tax had been levied in respect of the college buildings.

(1) I.L.R., 16 Mad., 339.

(2) 6 M.H.C.R., 197.

* Civil Revision Petition No. 52 of 1897.

ISCHER
v.
TWIGG.

"Plaintiffs' case," said the Subordinate Judge, "is that the buildings are the property of Government, and have been lent to the plaintiffs free of rent for being used exclusively for educational purposes, that the Native College is not a proprietary institution managed by the plaintiffs for their own benefit, but it is purely a public one, the income derived from fees and other sources being wholly spent for the promotion and encouragement of education, that the college buildings are exclusively used for charitable purposes, and as such, are not liable to municipal taxation under section 63 (1) of the District Municipalities Act IV of 1884 (Madras)."

The Subordinate Judge passed a decree for the plaintiffs. He said, *inter alia*, "I have no doubt that the college buildings at Madura are used exclusively for charitable purposes. The payment of fees by the students and the grant given by the Government and the municipality would not destroy or take away the real purpose for which the buildings are used."

Defendant No. 2 preferred this petition.

Rangachariar for petitioner.

V. Krishnasami Ayyar for respondents.

JUDGMENT.—It must be assumed that the school buildings are buildings exclusively used for charitable purposes. That being so the buildings are exempted from the operation of the notification that may be made under section 63 of the Act. A tax upon such buildings and other similar buildings mentioned in the exception is not one which can be in legal existence, and therefore it cannot be said that the tax was collected under the Act. The case is thus distinguishable from the case relied upon by the petitioner's *vakil* (*Municipal Council, Nellore v. Rangayya* (1)). We prefer to base our judgment on the ground that an imposition, which is expressly prohibited by the Act, cannot be deemed to be made under the provisions of the Act, rather than on the ground that the case is one in which the party aggrieved is protected by the proviso to section 262.

We dismiss the petition with costs.

(1) I.L.R., 19 Mad., 10.

APPELLATE CIVIL.

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

KUPPUSAMI CHETTI (DEFENDANT No. 1), APPELLANT,

v.

PAPATHI AMMAL AND ANOTHER (PLAINTIFF AND DEFENDANT
No. 2), RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, ss. 60, 82—Partial redemption—
Contribution.*

A mortgaged two houses to B for Rs. 200. C purchased at a Court-sale A's interest in one of the houses and sold it to the plaintiff. The plaintiff sued to redeem the house and prayed that the mortgagee be ordered to convey it to her a payment of Rs. 100:

Held, that the suit should be dismissed.

APPEAL against the decree of P. Srinivasa Rau, Judge of the Madras City Civil Court, in Original Suit No. 159 of 1895.

This was a redemption suit and the facts were as follow:—

In 1873 one Ramakistna Naik, since deceased, and defendant No. 2 mortgaged two houses to one Bava Kistnappa Chetti, since deceased, and defendant No. 1, to secure the sum of Rs. 200 together with interest; and in 1874 one Tiruvengadasami Naik obtained a decree against the mortgagors in execution of which he attached and brought to sale and with leave of the Court purchased one of the houses subject to the mortgage, and in 1895 Tiruvengadasami Naik conveyed his interest therein to the plaintiff. The plaint contained, *inter alia*, the following allegations:—"By apportioning the principal sum of Rs. 200 between the two items of the mortgaged property, there is now due in respect of house premises No. 31 aforesaid by the mortgagor to the mortgagee Rs. 100, which sum the plaintiff is ready and willing to pay to the defendant, of which the defendant before filing this plaint had notice."

The prayer of the plaint was as follows:—

"That she may redeem the plaint premises, being one of the items of the mortgage referred to in the plaint.

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"That the defendant may be ordered to reconvey the said premises to her upon payment of the said sum of Rs. 100 with such costs as the Court may order to be named by the Court."

The chief issues settled were the first and the third which were as follow :—

"1. Whether the plaintiff's vendor had a right to redeem the plaint property ?

"3. If, under any circumstances, the plaintiff is entitled to redeem the property, what is the sum of money which he should pay for the redemption ?"

As to these issues the Judge said—

"As to the first issue—it is quite clear that plaintiff's vendor Tiruvengadasami Naik had a perfect right to redeem the property, for he purchased the same when sold in execution of the decree passed in Original Suit No. 794 of 1873 by the High Court against the owners of the property, viz., the second defendant and deceased Ramakistna Naik; and the sale was duly confirmed (exhibits B, C and D). And hence it follows that the plaintiff, who purchased the property from the said Tiruvengadasami Naik, is entitled to redeem the property on his own account. I find the first issue in plaintiff's favour."

"As to the third issue—this is the most practical issue; in fact this is the only real issue to be determined in the suit,—namely, what is the sum of money which the plaintiff has to pay to first defendant for redeeming the plaint house No. 31 ?

"First as to the principal amount of the mortgage debt. Admittedly the debt was Rs. 200; and for this, two houses were mortgaged, viz., the plaint house No. 31 and another house No. 39. The first defendant requires that the plaintiff should pay him the whole of this amount of Rs. 200, while the plaintiff states that, as he has purchased only one of the two houses mortgaged to first defendant's father, he is liable to contribute only one-half to the secured debt; and that this one-half is Rs. 100. This contention of the plaintiff is quite lawful, having the sanction of section 82 of the Transfer of Property Act. From the evidence of the witness examined, it appears that out of the two houses by which the first defendant's debt is secured, the house No. 39, which is not now in dispute, is more valuable (worth between Rs. 400 and Rs. 500) than the house No. 31 which the plaintiff now seeks to redeem (worth between Rs. 250 and

"Rs. 300); and yet the plaintiff offers to pay one-half of the mortgage debt, which I consider to be a very fair offer, and it is not shown how it is otherwise."

Defendant No. 1 preferred this appeal.

Ganapati Ayyar for appellant.

Ramanujachariar for respondent No. 1.

JUDGMENT.—The Judge is in error in supposing that the plaintiff having purchased a portion of the mortgaged property is at liberty to redeem that portion only without redeeming the rest. This is clear on principle, and is expressly enacted in the last clause of section 60 of the Transfer of Property Act (see also *Timmappa v. Lakshamma*(1)). Section 82 of the Transfer of Property Act on which the Judge relies does not permit the redemption of a mortgage piecemeal. It merely provides for contribution towards the mortgage debt rateably by each of several properties when they are owned by different mortgagors, or when, being all the property of one mortgagor, there are prior incumbrances on some of the properties (see also *Roghu Nath Pershad v. Harlal Sadhu*(2)).

We must therefore reverse the decree of the Lower Court and dismiss plaintiff's suit with costs throughout.

APPELLATE CIVIL.

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

MAIDEN (DEFENDANT NO. 3), APPELLANT,

v.

JANAKIRAMAYYA AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Court Fees Act—Act VII of 1870, ss. 7, 11—Mesne profits left to be determined in execution of decree—Valuation of appeal against decree.

In a suit for land with mesne profits a decree was passed for the plaintiff in which the amount of mesne profits was left to be determined in execution, the date from which they should be computed being the date of the suit. The defendant appealed against the decree on the ground that he should not have been decreed to pay either mesne profits or costs. In the valuation of the appeal

(1) I.L.R., 5 Mad., 385.

(2) I.L.R., 18 Cal., 320.

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for the purposes of the Court Fees Act, nothing was included on account of the mesne profits:

Held, that no stamp duty was payable in respect of the mesne profits subsequent to the institution of the suit.

APPEAL against the decree of T. Ramachandra Rau, Subordinate Judge of Kistna, in Original Suit No. 4 of 1896.

This was a suit for land in which the plaintiff also asks for a decree for mesne profits for the years 1892-93 to 1894-95 and subsequent mesne profits up to the date of the delivery of possession to him. The Subordinate Judge passed a decree that the third defendant deliver possession to the plaintiff of the lands in question and pay mesne profits from the year 1895-96 until delivery of possession, the amount thereof to be determined in execution. He dismissed the rest of the plaintiff's claim for mesne profits, but decreed that the third defendant should pay to the plaintiff Rs. 779-10-0 as costs of the suit.

Defendant No. 3 preferred this appeal on the ground that he should not have been made liable for either mesne profits or costs, and, in the computation of the value of the appeal for the purpose of assessing the Court-fee, he did not include any sum on account of the mesne profits left undetermined.

Etiraja Mudaliar for appellant.

Pattabhirama Ayyar and *Venkatarama Sarma* for respondent No. 1.

Sriramulu Sastri for respondent No. 2.

Sivasami Ayyar for respondent No. 3.

JUDGMENT.—Having regard to *Ramakrishna Bhikaji v. Bhimabai*(1) we must hold that no stamp duty was payable in respect of the mesne profits, subsequent to the institution of the suit, viz., for fasli 1305, which profits are comprised in the appeal.

The only contention urged with reference to the merits is that the Subordinate Judge's conclusion that the plaintiff's vendor had consented to the arrangement under which the third defendant held possession is against the weight of evidence. The sole evidence in support of the contention is that of the third defendant himself. We think the Subordinate Judge was right in declining to accept that evidence for the reasons given by him. We see no reason to interfere with the order made as to costs.

The appeal is dismissed with costs.

(1) I.L.R., 15 Bom., 416.

APPELLATE CIVIL.

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

IN APPEAL No. 66 OF 1896:—

MAHABALA BHATTA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KUNHANNA BHATTA AND OTHERS (DEFENDANTS),
RESPONDENTS.

IN APPEAL No. 42 OF 1897:—

MAHABALA BHATTA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SUBBANNA BHATTA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 31—Misjoinder—Tenants in common—Benami mortgage—Suit by some of the heirs of the real mortgagee—Evidence of benami—Limitation—Joinder of causes of action—Specific Relief Act—Act I of 1877, s. 42.

In 1880 A and B jointly advanced moneys on the security of a usufructuary mortgage which was taken in the name of B. In 1884 A alone advanced moneys on the security of usufructuary mortgages which were likewise taken in the name of B. A died leaving three sons, of whom the plaintiffs were two. The plaintiffs having become divided from their brother now brought suits in 1894 against B and the mortgagors for a declaration of their rights to the mortgages and for possession of the documents and for rent of the land which had been collected by B. It appeared that there had been no denial of the plaintiffs' rights before 1889, that no rent had been collected for several years before suit, the mortgagors who had remained in possession as lessees after the execution of the mortgages having refused to attorn to B:

Held, (1) that the suits were not barred by Specific Relief Act, section 42, for want of a prayer for possession;

(2) that the suits were not barred by limitation save as to the claim for rent;

(3) that the suits were not bad for the non-joinder of the plaintiffs' brother;

(4) that the transactions having been proved to be benami in character, the plaintiffs were entitled to a declaration of their two-thirds right under the mortgages of 1884 and a like declaration as to half of the mortgage of 1880; and

(5) that the plaintiffs were entitled to possession of the mortgage documents of 1884 and the other documents connected therewith but not the others.

APPEALS against the decrees of U. Achutan Nayar, Acting Subordinate Judge of South Canara, in Original Suits Nos. 28 and

* Appeals No. 66 of 1896 and No. 42 of 1897.

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24, 25.
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29 of 1894, in both of which the plaintiffs were two of the sons of one Ramayya Bhatta, who died leaving also a third son Subbanna Bhatta, who was not a party to the suit.

In the first case the defendants were a mortgagee and the two mortgagors of certain land. The plaint alleged that the mortgage, which was usufructuary and bore date the 25th of April 1884, was executed in the name of the first defendant as benamidar for the deceased Ramayya Bhatta, to secure repayment of Rupees 4,700, which had actually been advanced by him and not by the first defendant. It was further alleged that the mortgagors had rented the land from the mortgagee in his capacity as benamidar and that the plaintiffs were in possession by them as their tenants.

The plaint further alleged as follows :—

“After the death of plaintiffs’ father, which took place in 1887, his brother-in-law, Kambar Subbanna Bhatta, got possession from the plaintiffs of the mortgage deed and other documents relating to the mortgaged property except the lease of 25th April 1884, and a receipt in connection therewith on pretence of settling the dispute between the plaintiffs on the one hand and their brother Subbanna Bhatta, since divided by a decree of Court, on the other, regarding the division of their property, and clandestinely made over the documents to his employer, the first defendant, who since September 1889 has begun to assert his own right and to influence the second and third defendants not to pay rents to the plaintiffs.”

The cause of action was stated to have arisen at the last-mentioned date, and in bar of limitation the plaintiffs alleged in their plaint as follows :—

“Plaintiffs sued defendants Nos. 1 to 3 and others on 28th October 1889 in Original Suit No. 41 of 1889 on this Court’s file on the same cause of action, and, though this suit was fully decreed by this Court, it was dismissed on 22nd February 1894 by the High Court on the technical ground of misjoinder in Appeal Suit Nos. 62 of 1892 and 72 and 73 of 1893. Plaintiffs are entitled to the benefit of section 14 of the Limitation Act.”

The prayers of the plaint were for a declaration that the mortgage and lease deeds were obtained by the plaintiffs’ father benami in the name of the first defendant, that the first defendant be ordered to hand over to the plaintiffs those documents and all others relating to the property, and that the defendants be decreed to pay to the plaintiffs their share of arrears of rent with mesne

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profits and interest. On these averments and on the pleas raised by the defendants, the following issues were framed :—

“(1) Whether the suit is barred by limitation ?

“(2) Whether the suit is opposed to section 42 of the Specific Relief Act ?

“(3) Whether the registered usufructuary mortgage deed for Rs. 4,700, dated 25th April 1884, executed by defendants Nos. 2 and 3 as also the two leases, dated 25th April 1884 and 2nd October 1885, respectively, were really obtained by plaintiffs’ father Ramayya Bhatta benami in the name of first defendant ?

“(4) Whether the money, with which the mortgage was acquired, belonged to Ramayya Bhatta ?

“(5) Whether the plaintiffs are entitled to recover possession of the documents stated in the plaint ?

“(6) Whether the rent has been satisfied in the manner alleged by the second and third defendants ? and

“(7) Whether the plaintiffs can maintain the suit without the junction of Subbanna Bhatta as party ?”

On the first issue the Subordinate Judge held that the plaintiffs were not entitled to the deduction of time claimed ; the second issue he decided in favour of the plaintiffs ; and the third, fourth and fifth against them. The finding on the sixth issue was that defendants Nos. 2 and 3 had paid rent to defendant No. 1 as alleged by them, and in the result he passed a decree dismissing the suit against which the plaintiffs preferred Appeal No. 66 of 1896.

The second suit was brought against the same first defendant in respect of two similar mortgages taken in his name by the deceased Ramayya Bhatta on the 22nd of May 1880 and the 9th of June 1884 from defendant No. 10, who was the owner of the land and the chief defendant in this suit. The prayers in this suit were similar to those in the other. The material difference between the two suits was that the plaintiffs’ father had advanced only Rs. 1,500 of the sum secured by the first of these mortgages. Similar issues were framed in this suit, which was likewise dismissed by the Subordinate Judge, and the plaintiffs preferred Appeal No. 42 of 1897 against the decree.

The Subordinate Judge gave his reasons for finding that the misjoinder of the plaintiffs’ brother was fatal to the maintenance of the suits in his judgment in the second suit where he said :—

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"The non-joinder in the suit of plaintiffs' brother Subbanna Bhatta is said by the defendants to be fatal to the maintenance of the suit, but the plaintiffs say that he is not a necessary party having obtained a decree for partition against them. I think he is a necessary party to the suit. All that he has got by the decree in the partition suit is a declaration of his right to a share of the plaint property as against the present plaintiffs. Whether the present plaintiffs succeed or fail in this suit, he has his right to sue. If the plaintiffs had made him a party to this suit, a second suit by him might be avoided. To Original Suit No. 41 of 1889, which was dismissed by the High Court on the ground of mis-joinder, all the three brothers were plaintiffs. Then the present plaintiffs did not think that the decree for partition obtained by him did disentitle him to be joined as a co-plaintiff with them. If the decree in the partition suit has not severed their interests as regards the plaint property, which I doubt, then the non-joinder of Subbanna Bhatta is fatal to the suit (*Arunachala v. Vythialinga*(1), *Dwarka Nath Mitter v. Tara Prosunna Roy*(2), *Balkrishna Moreshwar Kunte v. The Municipality of Mahad*(3) and *Alagappa Chetti v. Vellian Chetti*(4))."

Mr. R. A. Nelson and Narayana Rau for appellants.

Pattabhirama Ayyar, Sundara Ayyar and Madhava Rau for respondents.

JUDGMENT IN APPEAL NO. 66 OF 1896.—The material allegations for the plaintiffs were, briefly, that their father Ramayya Bhatta obtained benami in the first defendant's name the usufructuary mortgage deed bearing date the 25th April 1884 for Rs. 4,700 due to him by the second and third defendants, that these defendants were, however, permitted to retain possession of the lands (mortgaged by them) as lessees under the lease granted to them at the time the mortgage was executed, that, subsequent to the plaintiffs' father's death, which took place in 1887, the first defendant, about September 1889, denied the right of the plaintiffs under the mortgage, and that he fraudulently obtained possession of the mortgage instrument and certain other documents from Kambar Subbanna Bhatta, the plaintiffs' maternal uncle, to whom the documents had been entrusted pending certain disputes between

(1) I.L.R., 6 Mad., 27.
(3) I.L.R., 10 Bom., 32.

(2) I.L.R., 17 Cal., 160.
(4) I.L.R., 18 Mad., 33.

the plaintiffs and their brother Subbanna Bhatta respecting the division of their property.

The plaintiffs asked for a declaration that the mortgage belonged to their father and prayed for the recovery of the instrument of mortgage and the other documents referred to and for their share of certain rents collected from, or payable by, the second and third defendants under the lease.

The second and third defendants admitted the title set up by the plaintiffs. But the first defendant denied that he was a mere benamidar, and averred that having paid the money himself, he was the real mortgagee. He also contended that the suit was unsustainable, since the plaintiffs' brother Subbanna Bhatta had not joined in it, and since the plaintiffs, though out of possession of the lands under mortgage, had omitted to claim possession thereof as they were bound to do under section 42 of the Specific Relief Act. The defendant further urged that the suit was barred by limitation.

The Subordinate Judge dismissed the suit having arrived at findings against the plaintiffs with reference to the questions of benami, non-joinder and limitation. But, in our opinion, the findings as to benami and non-joinder are wrong, and that as to limitation partly so. Having come to this conclusion, it will be convenient, first, to deal with the case on the merits and then to discuss the points of law raised.

The onus of showing that the transaction was benami was, no doubt, on the plaintiffs. But taking the evidence adduced in this suit and in the connected suits which were tried with it by consent of the parties, we have no doubt that the weight of evidence is decidedly in favour of the view that the case of the plaintiffs is true. The second and third defendants, as the plaintiffs' witnesses, fully support their case. No reason is suggested why these defendants should falsely espouse the plaintiffs' cause. Nor is there anything in the conduct of those defendants really detracting from their testimony. No doubt, after the plaintiffs' father's death, one year's rent was paid by the said defendants to the first defendant. That was, however, not in recognition of his title as the real mortgagee, for, as explained by them, it was not a voluntary payment.

Of the persons who attested the mortgage instrument, Narayana Kamti, who is to all appearance an independent witness, says that the document was executed for moneys belonging to the plaintiffs'

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father and that the sum of Rs. 624-8-0 recited in the document (exhibit I) as paid at the time of the execution, was paid by the plaintiffs' father. The other attestors were called on behalf of the first defendant. Koragappa, one of them, said that he remembered nothing more about the matter than that one Akkari Banta got the mortgage executed for the first defendant. The evasive replies given by him in his cross-examination show that his evidence is worthless. Thimmappa, who also stated that the first defendant was represented by Akkari Banta at the time of the execution of the document, is an equally unsatisfactory witness; and that appears to have been the opinion of the Subordinate Judge (Mr. Chandu Menon) before whom the witness gave his evidence, as the notes with reference to the witness's demeanour recorded in his deposition show. Ramayya Bhatta, another witness, whose evidence is similar to that given by Thimmappa, is likewise untrustworthy. It is clear that there is considerable ill-feeling between the witness and at least one of the plaintiffs, and that the witness was among those who had caused the plaintiffs' mother to put forward an altogether untrue claim in the course of the partition suit instituted by the plaintiffs' brother Subbanna Bhatta, but which suit terminated in a compromise whereby a division was effected among the brothers. There is no doubt that the witness (Ramayya Bhatta) was present at the execution of the mortgage, since he wrote exhibit A in this case which came into existence at the same time as the mortgage instrument. But he was then on friendly terms with the plaintiffs' father to whom he was related, and the witness's presence on the occasion and the part he took in the transaction rather indicate that the party really interested in the transaction was the plaintiffs' father and not the first defendant. It is noteworthy that Akkari Banta referred to by the defendant's witnesses was not called.

Turning now to the important question of consideration for the mortgage, the Subordinate Judge himself says that the first defendant did not pay any portion of the amount. Though, as regards the comparatively small sum recited in the instrument as paid at the execution, a feeble attempt was made to prove that the first defendant paid it, yet, as regards the payment of the remaining large sum of Rs. 4,075, the first defendant failed to adduce any evidence whatever. Now, since it is the case of both the parties that the transaction was not a sham but that there was full

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consideration for it, it is manifest that that consideration, not having come from the first defendant, must have come from some other person. That that person was the plaintiffs' father and none else is put beyond dispute by the testimony of Mahomed Beari, who, as one admittedly and most directly connected with the mortgage and the previous dealings which led to it, certainly knows the truth. According to his evidence the arrangement made about the bulk of the consideration in question was this:—At that time the second and third defendants owed Mahomed Beari a sum of Rs. 4,075; the latter owed to the plaintiffs' father over Rs. 5,000, and in consideration of the second and third defendants giving to the plaintiffs' father credit for Rs. 4,075 on account of the mortgage amount in question, Mahomed Beari gave up the claim he had against those defendants for the Rs. 4,075, the plaintiffs' father on his part giving up to that extent his claim against Mahomed Beari and executing a document for the remainder. If this were not the arrangement really made, and if, as alleged on behalf of the first defendant, the sum of Rs. 4,075 was paid by him to Kambar Subbanna Bhatta, how is it that not a scrap of evidence about it is forthcoming? and why has neither the first defendant nor Subbanna Bhatta ventured to go into the box to speak to such payment? So far as Subbanna Bhatta is concerned it is clear he would not go into the box, because he would be confronted with exhibit A in Appeal No. 42 of 1896, which completely negatives the truth of the story set up on behalf of the first defendant. We have no hesitation in saying that this exhibit is a genuine document. The two persons, whose attestations it bears, prove that it was written by Subbanna Bhatta himself throughout. That evidence is absolutely uncontradicted, and a comparison of the writing of the document with the writing of the unquestionable documents produced for comparison leaves no doubt that the exhibit in question was written by Subbanna Bhatta. We cannot, therefore, agree with the Subordinate Judge in holding that it is not genuine; and, as already observed, it disproves the defence and establishes the plaintiffs' case inasmuch as it is therein admitted in unequivocal terms that the mortgage in question was obtained benami in the name of the first defendant by the plaintiffs' father for money belonging to him. With such practically conclusive proof in favour of the plaintiffs it is scarcely necessary to refer to other less important circumstances which support our

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view and which are disclosed by some of the documents executed with reference to the transactions which preceded the mortgage in question. We would only add that the plaintiffs' case is not rendered improbable by the fact that first defendant and the plaintiffs' father were of different castes, since Subbanna Bhatta, through whom his brother-in-law, the plaintiffs' father, carried on his money dealings, was, at the execution of the mortgage and before and afterwards, the first defendant's shanbhogue or accountant, and it was not therefore unlikely that the first defendant was trusted in consequence of such connection between him and Subbanna Bhatta. As to the possession by the first defendant of the mortgage instrument and the other documents relating thereto, several witnesses on behalf of the plaintiffs prove that, shortly after the death of the latter's father owing to disputes between the brothers, those documents were handed over to Subbanna Bhatta for safe custody. He has not come forward to contradict this evidence; and he having subsequently become hostile to his nephews, it is to be inferred that he handed over the documents in question to his employer, the first defendant, and induced the latter to claim the mortgage right falsely as his own. We must, therefore, find that the first defendant was only a benamidar and that the real mortgagee was the plaintiffs' father.

We now pass to the points of law urged.

First, as to the objection of non-joinder which was strongly pressed. Now the present action is one founded on tort; and as the plaintiffs and their brother Subbanna Bhatta had become divided, their interest under the mortgage is not joint but separate being that of tenants in common. That tenants in common may, in such an action as the present, at their option either join or sever, seems to be clear law (Dicey on Parties, rule 80, paragraph 2). No doubt, according to the common law practice, when one tenant in common sued on a tort without joining other tenants in common as plaintiffs, objection on the score of non-joinder was allowed to be taken by way of a plea in abatement. If, however, such plea was not raised, he was entitled to proceed in the action. But then, if the subject matter of the claim was divisible, he could get his share and no more. Compare the opinion of the majority in *Deo d. Hellyer v. King*(1), though the dissenting Judge, Platt, B., went

(1) 6 Exch. Rep., 791 at p. 795.

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further in that case and held that a tenant in common is owner of the whole estate in common with his co-tenants, and therefore as soon as he has proved his right to the possession in common with others and that the defendant having no such right is a wrong-doer, as against such wrong-doer he, the plaintiff, is entitled to recover possession of the whole. However this may be, there is no doubt that in the case of property indivisible one co-owner alone can recover it from a person that holds unlawful possession thereof. In *Broadbent v. Ledward*(1) a member of a club, who was as such proprietor of certain pictures jointly with other members who were not made co-plaintiffs in the action, recovered the pictures from one who had no right at all. Lord Denman, C.J., observed:—"It is always unpleasant to defeat justice by adherence to technical and arbitrary rules. In suing upon contracts the rule has certainly been that all the contracting parties must be joined as co-plaintiffs, and advantage may be taken of the non-joinder without a plea in abatement; but, as no express authority has been shown by Mr. Wightman for the application of this rule to the action of detinue, we shall decide against the defendant. If any inconvenient consequence arises to the defendant from detaining the property of joint owners, it might have been avoided by giving it up to any one of them." Patteson, J., said:—"The rule as to the consequence of the non-joinder of parties as plaintiffs in actions founded upon contract is not satisfactory in principle, and ought not to be extended." Williams and Coleridge, J.J., concurred. The principle of these decisions is still applicable, and it is clear that one tenant in common can sue in tort without joining others—see *Roberts v. Holland*(2) cited for the plaintiffs.

It was contended, however, that the equity practice is different and ought to be followed in this country. It is no doubt true that the general rule in Chancery is that all persons interested should be parties, and that under the old practice it was open to a defendant to take objection on the ground of non-joinder of a tenant in common by way of demurrer (*Brookes v. Burt*(3)). But that rule is not, since the abolition of demurrers for want of parties, too inflexible to admit of qualifications. In *Wright v. Robotham*(4)

(1) 11 A. & E., 209, at pp. 212-13.

(3) 1 Beav., 106.

(2) [1893] 1 Q. B., 665.

(4) 33 Ch. D., 106.

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it was no doubt held by the Court of Appeal that one of two persons who had equal right to certain title-deeds could not recover them without the concurrence of the other. But there the defendant's possession was not unlawful, as Cotton and Lindley, L. JJ., took care to point out, implying thereby that their decision might have been different had the possession of the defendant been unlawful. Even in such a case the Court directed the deeds to be deposited in Court, the plaintiffs having liberty to inspect and make copies of them. And in *Foster v. Crabb*(1) cited in *Wright v. Robotham*(2), the decision of the Court of Common Pleas rests on the ground that the plaintiff did not show a better right than the defendant to the possession of the deed, the title to which was ambulatory between those who have an interest in and may have occasion to use it, and each is entitled to keep the deed from the other so long as he actually retains it in his custody and control but no longer. We see therefore that either at law or in equity, since the passing of the new rules of the Supreme Court whereby pleas in abatement and demurrer for want of parties were abolished, the remedy available when there is a defect of parties is, as pointed out by Jessel, M. R., in *Werderman v. Société Générale d'Electricité*(3), that provided by order XVI, rule 13, which empowers Courts to strike out or add parties so that the person who objects because of want of parties has nothing to do but to take out a summons asking that certain parties be added as necessary parties. It is necessary to observe that the above case was decided when the order corresponding to section 31 of the present Code of Civil Procedure did not contain the word "non-joinder." Notwithstanding the absence of these words the Court treated the order as comprehending cases of "non-joinder" as well as "mis-joinder." Turning now to section 31 of our Code which corresponds to order XVI, rule 13, as it stood at the time of the decision in *Werderman v. Société Générale d'Electricité*(3), and before it was amended by the addition of the word "non-joinder," we think a similar construction ought to be put on it and the section must be held to amount to a direction to the Court not to dismiss a suit on the ground of non-joinder. The reason for such a provision is obvious. The rule as to parties is for the purposes of justice and the Court has ample powers under section 32, Code of Civil Procedure, to

(1) 21 L.J., C.P., 189.

(2) 83 Ch. D., 106.

(3) 19 Ch. D., 246 at p. 251.

add parties whenever they ought to have been made parties or whenever without them the Court could not deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

In the present case what the plaintiffs are entitled to in point of law is a declaration of their title to two-thirds of the mortgage debt. Their right is separate from that of Subbanna Bhatta who is entitled to the remaining one-third though the debt is the same. In these circumstances, Subbanna Bhatta is not an indispensable party whom the Court will insist upon being brought before it, for he will not be directly affected by any decree in this suit; nor, in our opinion, is he a necessary party, that is, though not likely to be affected directly by the decree, he is yet one who, as interested in the actual controversy, should be before the Court to enable it to adjudicate fully and finally as between the parties already before it. If he is made a co-plaintiff, no doubt, future litigation in the matter can be altogether prevented. But that can only be if he consents to be a co-plaintiff, which does not appear to be the case. If, however, he be made a co-defendant, it is difficult to see how that could stop further litigation. If the plaintiffs succeeded they could get relief only in respect of their shares, and Subbanna Bhatta would be at liberty to sue in respect of his share. But if the plaintiff fail upon the question of benami, it is doubtful whether the decision would be *res judicata* between the first defendant and the co-defendant Subbanna Bhatta (see *Nabin Chandra Mazumdar v. Mukta Sundari Debi*(1); but *contra Chandu v. Kunhamed*(2)). Even were this view wrong the first defendant might have moved the Court, if Subbanna Bhatta consented to be a co-plaintiff, to add him as such, and, if he did not, to make him a defendant. The omission to adopt this course could not for a moment be held to warrant a dismissal of the suit which has been fully tried and dealt with on the merits. Even at the present stage of the case we should and would have directed Subbanna Bhatta to be made a party if that would really serve the ends of justice. But, as shown already, we do not think it necessary that he should be brought on the record. He was himself one of the witnesses in the case and nothing was elicited from him to show that he raised any question affecting in the remotest degree the right of the plaintiffs

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(1) 7 B.L.R., Appx., 38.

(2) I.L.R., 14 Mad., 324.

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to obtain the reliefs claimed by them. The contention that the suit fails on the ground of non-joinder of Subbanna Bhatta must, therefore, be overruled.

The objection under section 42 of the Specific Relief Act also fails, as the evidence leaves no doubt that the second and third defendants have for several years before the suit withheld payment of rent and refused to attorn to the first defendant who cannot thus be taken to be in possession through them.

As to limitation, the claim as to declaration is not barred, as there is no evidence to show that there was any denial of the title of the plaintiffs before September 1889. Nor has that for the documents been shown to be out of time. But the claim for the rents received by the first defendant is barred.

As to the second and third defendants, their liability for rent under the lease cannot of course be gone into in this suit.

In reversal of the decree of the Subordinate Judge, there will be a decree for the plaintiffs declaring their two-thirds right under the mortgage of the 25th April 1884 and the leases, dated 25th April 1884 and 22nd October 1885, and for possession of those documents and those mentioned in the schedule annexed to the plaint. The rest of the claim is dismissed. The first defendant will pay the plaintiffs' costs throughout. The other defendants will bear their own.

JUDGMENT IN APPEAL No. 42 OF 1897.—The real question in this case is as to what interest, if any, the plaintiffs' father possessed under the usufructuary mortgages of the 22nd May 1880 and 9th June 1884 executed to his brother-in-law K. Subbanna Bhatta, the first defendant, by Mahomed Beari, the tenth defendant. Exhibit A in the present suit which, for reasons given in our judgment in Appeal No. 66 of 1896, we find to be a genuine document, is decisive of the matter, and according to it half out of the first named mortgage belonged to plaintiffs' father and out of Rs. 1,738-4-0, the amount of the second mortgage, Rs. 313-12-0 alone belonged to K. Subbanna and the remainder belonged to the plaintiffs' father, the mortgages and the leases connected therewith being taken in the name of the former, for the benefit of the latter also. In reversal of the Lower Court's decree there will be a decree declaring that the plaintiffs are entitled to two-thirds of half of the mortgage under date the 22nd May 1880, and to two-thirds of the mortgage under date the 9th June 1884, after

deduction of the sum of Rs. 313-12-0 from the mortgage amount and the same with regard to the leases connected therewith.

The plaintiffs are not entitled to the custody of the documents in preference to the first defendant and those claiming through him and who also possess an interest under those documents.

The question of the tenth defendant's liability for rent cannot be gone into in this suit.

The first defendant will pay the plaintiffs' costs throughout. The other parties will bear their own.

APPELLATE CIVIL.

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

ARAVAMUDU AYYANGAR (PLAINTIFF AND PETITIONER),
APPELLANT,

v.

SAMIYAPPA NADAN (DEFENDANT No. 5 AND COUNTER-
PETITIONER), RESPONDENT.*

1897.
December
7, 9.
1898.
April 4.

Limitation—Order to pay money—Money paid after due date.

When an order has been made for the payment of money in a suit on a certain date and the Court was closed on that date, a payment made on the following day would be a good payment for the purposes of the order.

APPEAL against the order of B. Macleod, Acting District Judge of Tinnevely, in Appeal Suit No. 78 of 1895, reversing the decree of S. Mahadeva Sastri, Acting District Munsif of Satur, on Miscellaneous Petition No. 17 of 1895.

The petitioner was the plaintiff in Original Suit No. 669 of 1893. The facts of the case were stated by the District Judge as follows:—

“According to the terms of the decree in Original Suit No. 669 of 1893, the second instalment became payable on 6th January 1895. That day was a holiday and the Court re-opened after the Christmas holidays only on 8th January 1895. The judgment-debtor put in a memorandum asking for a chellan to enable him to deposit the money in the Taluk treasury on 8th January 1895.

* Appeal against Appellate Order No. 39 of 1897.

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KUNHANNA
BHATTA.

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ATTANGAR
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NADAN.

No chellan appears to have been granted to him on that day. Again on the 9th, the pleader for the decree-holder put in a receipt for the sum which the judgment-debtor was to have paid in Court and was ready to receive the money. The judgment-debtor did not put in his appearance that day, and the Court rejected the memorandum for chellan put in by the judgment-debtor and passed an order on the receipt put in by the decree-holder recording it, as no money was paid that day on the 10th January; the judgment-debtor again offered to deposit the money in the Taluk treasury and applied for a chellan through his pleader Subramania Pillai. He also applied by a petition on the same day asking the Court to have the money deposited on that day as having been paid on the 8th January 1895.

"The petition put in on 10th January 1895 was returned on 11th January 1895 for quoting the section of the Civil Procedure Code under which it was presented. The petition was presented again on the same day with the remark that as there was no special provision, the section had not been quoted. That same day the Court ordered that 'the money has been deposited in time, no further order is necessary' without giving any notice to the decree-holder and behind his back. The decree-holder applied on 12th January 1895 to have the aforesaid order set aside and to have the deposit, made on 10th January 1895, declared as made beyond time. Notice was given of this application for review and the judgment-debtor put in his counter-petition. The counter-petitioner states that he was all along ready to deposit the money in Court since 8th January 1895, and that as no chellan was given him, he was not able to deposit the money on 8th January 1895, that though he was all along waiting in Court, for the chellan on 9th January 1895, he was called just when he had left to the river and his petition was rejected. His payment of money on 10th January 1895 must, therefore, be deemed to have been made in time and that there are no grounds to review the order.

"The fact of payment of money only on the 10th January 1895 is admitted. It is further admitted that the Court made the order on 11th January 1895 without notice to the decree-holder. No explanation why the counter-petitioner did not insist for a chellan on 8th January 1895, or why he did not pay the money to the pleader for decree-holder who seems to have been all along ready to receive the money before the Court as appears by his

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receipt. I don't believe the Court has power to extend the time fixed by the decree. The decree makes the payment on 6th January 1895 peremptory. As the Court was closed for the Christmas holidays on 6th January 1895 then and opened only on 8th January 1895, the only course open to judgment-debtor was to have anyhow paid the money on 8th January 1895 if the Court was open. It is not said that the Court was not open on 8th January 1895. It is said that he was asked to come on 9th January 1895 for depositing the money. No deposit was made on the 8th January or on the day following. The payment on 10th January cannot, under circumstances, be taken to have been made on the re-opening day, i.e., 8th January 1895."

The District Munsif set aside the order of the 11th January 1895, but the District Judge on appeal reversed his decision holding that the defendant who appealed was not responsible for the delay and that the order referred to should be maintained.

The plaintiff preferred this appeal.

Desikachariar for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—The last day for payment into Court would admittedly have been the 6th January 1895 but for the fact that on that day the Court was closed. The first question is whether the fact that the Court was then closed entitled the fifth defendant (respondent) to pay the money on the first day thereafter that the Court was open, i.e., on the 8th January. We think he was so entitled. The case *Dabee Rawoot v. Heeramun Muhatoon*(1) cited by the respondent is a direct authority in favour of this view. The principle on which the rule depends is thus stated in *Shooshee Bhusan Rudro v. Gobind Chunder Roy*(2):—"Although the parties themselves cannot extend the time for doing an act in Court, yet 'if the delay is caused not by any act of their own, but by some 'act of the Court itself—such as the fact of the Court being 'closed—they are entitled to do the act on the first opening day.'"

We must, therefore, hold that if the money was produced in Court on the 8th January, but was not actually deposited, not from any default of the fifth defendant, but owing to an act of the Court or of its officers the requirements of the decree were satisfied and the plaintiff would not be entitled to claim the sum

(1) 8 W.R., (C.R.), 223.

(2) I.L.R., 18 Cal., 231.

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relinquished. If, on the other hand, it were not so produced, or if its non-payment into the treasury was due to any default of the fifth defendant, the requirements of the decree were not satisfied and the plaintiff is entitled to the sum relinquished.

The District Judge has not given a definite finding on the issue above stated. We must ask him to submit a finding thereon within a month from the date of the receipt of this order. Fresh evidence on both sides may, if necessary, be taken.

Seven days will be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order the District Judge submitted his finding which was to the effect that the defendant did not produce Rs. 750 in Court on the 8th of January 1895, and that there had been no default on the part of the officials in entering into a credit to him. The appeal having come on for hearing on the 4th of April 1898 his findings were accepted and the order of the District Court was reversed and that of the District Munsif restored.]

APPELLATE CIVIL.

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

MANIKKAM (PETITIONER), APPELLANT,

v.

TATAYYA AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 232—Transfer of decree—Benami transfer.

If a decree is transferred to one as benamidar for the actual purchaser, the latter is entitled to execute the decree and his right course is to apply under Civil Procedure Code, section 232.

APPEAL against the order of G. T. Mackenzie, District Judge of Godavari, in Appeal Suit No. 331 of 1895, affirming the decision of S. Pereira, District Munsif of Ellore, in Execution Petition No. 369 of 1895, in the matter of Original Suit No. 242 of 1892.

This was an application by Manda Manikkam for the execution of the decree in Original Suit No. 242 of 1892 on the file of the

* Appeal against Appellate Order No. 26 of 1897.

District Munsif of Ellore. Of the respondents to the petition the first, second, third and fourth were the defendants and judgment-debtors. As to the fifth the petition alleged that he and the applicant carried on business jointly and out of their joint funds purchased the interest of the decree-holder, the transfer being taken benami in the name of Patti Subrayadu since deceased who had no interest in the transaction. The prayer of the petition was as follows :—

“Petitioner, therefore, prays that, under, sections 232 and 248 of the Civil Procedure Code, a notice may first be issued to the original plaintiff and to the counter-petitioners and to Ponnamma, the mother of Sriramamurti, minor son of late Patti Subrayadu, that the petitioner may be taken on as the transferee-plaintiff, and that afterwards the amount may be recovered for the petitioner by sale of the movable properties belonging to the counter-petitioners situated in Ellore which will be pointed out by the petitioner or by any person on the petitioner's behalf. Subrayadu already made an application, along with which he filed copy of the decree.”

The District Munsif dismissed the application, and his decision was affirmed by the District Judge, who expressed the view that Civil Procedure Code, section 232, does not contemplate the execution of a decree at the instance of one in the position of the applicant; and that, even if the application could legally be granted, it was a matter of discretion with the Court, and under the circumstance the applicant was not entitled to the relief sought by him.

The petitioner preferred this appeal.

V. Krishnasami Ayyar and Kuppusami Ayyar for appellant.

Sivasami Ayyar and Gopalasami Ayyangar for respondents.

SUBRAMANIA AYYAR, J.—One Lakmisetti Subrayadu obtained a decree for money in Original Suit No. 242 of 1892. Shortly after, one Patti Subrayadu (deceased) alleging himself to be the transferee of the decree applied to be permitted to execute the decree and he was allowed by the Court to do so. The appellant, Manda Manikkam, alleging that he and his brother, the fifth respondent, are the real transferees and that Patti Subrayadu was but a benamidar for them, has now applied to execute the decree.

As I understand the order of the District Judge, he holds that, even if the appellant is one of the real transferees, section 232,

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Civil Procedure Code, does not admit of such transferee applying under the section, and further, supposing that an application for the execution of the decree by such transferee is entertainable under the section, the Courts should, in the exercise of their discretion, decline to grant the application.

But it is impossible to doubt that, notwithstanding the form of the transaction, it is the person beneficially entitled under the transaction, that is the transferee of the decree. The right of such transferee to apply under section 232 has been admitted. *Abdul Kureem v. Chukhun*(1), *Balkishen Das v. Bedmati Koer*(2), *Arasappan v. Pulugasari*(3), and *Sethurayar v. Shunmugam Pillai*(4).

It is true that in the present instance the alleged nominal transferee applied and was allowed to execute the decree on the footing that he was the real transferee. If, however, he was not in fact the real transferee, the proceedings taken by him in execution, though binding upon the real transferee so far as they go, could not estop the latter from claiming to conduct the further execution of the decree himself. And so far as this point is concerned, the fact that the real transferee comes forward to execute the decree after the nominal transferee has been allowed to execute it, is of no consequence. Nor does the circumstance that the alleged nominal transferee denies that he is a nominal transferee affect the right of the person claiming to be the real transferee to have the point tried. Under the law, as it now stands, it may be tried in the execution proceedings or in a separate suit according as the Court considers the one or the other the more convenient course to be adopted in the particular case. It is scarcely necessary to point out that, when there is a contest, the question whether the party claiming to be the real transferee is or is not such, is a question as to whether he is a representative of the party to the suit in whose favour the decree was given and therefore falls under the last paragraph of section 244 of the Civil Procedure Code (*Badri Narain v. Jai Kishen Das*(5), *Gour Mohan Golui v. Dino Nath Karmakar*(6)). The District Judge was therefore wrong, in my view, in holding that the appellant was not entitled to apply under section 232 of the Code. He was also wrong in considering that, even if the

(1) 5 O.L.R., 253.

(2) I.L.R., 20 Calo., 383.

(3) Appeal against Appellate Order No. 27 of 1894 (unreported).

(4) *Vide ante* p. 353.

(5) 2 Calo. Weekly Notes, p. 76.

(6) I.L.R., 16 All., 493.

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application was entertainable under the section, because the transfer was benami, the Court should, therefore, refuse to allow the real transferee to execute it. I would therefore call upon the District Judge to submit a finding upon the question whether Patti Subrayadu was the real transferee or the appellant and his brother are the real transferees. The finding will be upon the evidence on record unless the Judge is satisfied that the appellant had not sufficient opportunity of adducing evidence on the point as alleged by him. If the Judge is so satisfied fresh evidence may be received on either side.

The finding is to be submitted within one month from the date of the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

SHEPHARD, J.—We reserved judgment in the case only because some doubt was entertained as to whether the claim of the appellant could legally be dealt with on a petition. I agree with my learned colleague in holding that the appellant may apply under section 232 of the Civil Procedure Code and also in the proposed order.

[In compliance with the above order the District Judge returned his finding which was to the effect that Patti Subrayadu was the real transferee. In the result the case having come on for hearing on the 15th of July 1898 the Court delivered judgment accepting the finding and dismissing the appeal with costs.]

APPELLATE CIVIL.

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

GURUMURTI (PLAINTIFF), APPELLANT,

v.

SIVAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

*Promissory note to a minor's guardian—Minor's suit by another next friend—
Note not endorsed.*

An infant sued by his next friend to recover the balance due on a promissory note alleged to have been made and delivered on account of his estate to his mother and guardian who had not endorsed the note:

Held, that the suit was maintainable in the absence of an endorsement.

* Appeal No. 21 of 1896.

GURUMURTI
v.
SIVAYYA. APPEAL against the decree of W. G. Underwood, District Judge of Cuddapah, in Original Suit No. 5 of 1894.

The plaintiff sued by his guardian and next friend to recover from the defendant the sum of Rs. 3,792, and it was alleged in the plaint that on the 3rd July 1891 the father, since deceased, of defendant No. 1, made and delivered to Subbamma, the plaintiff's guardian, on account of the plaintiff's estate a promissory note payable on demand for Rs. 4,066 for value received, that, as the result of subsequent transactions, the maker became entitled to credit for the sum of Rs. 1,257, and that no further payment was made towards the note. The present suit was brought to recover the balance of the amount of the note together with interest. The cause of action was alleged to have arisen on the date of the note which was dated 3rd July 1891. The defendants were respectively the undivided son and brother of the maker, who, it was alleged, had made the note for the benefit of the family in his capacity as managing member. The issues which were framed in the suit raised the questions whether the debt was contracted for joint family purposes and whether it was binding on defendant No. 2. In the course of the trial it was objected on behalf of defendant No. 2, that the suit was not maintainable for the reason that Subbamma had not endorsed the note. The District Judge held this objection was well founded and was fatal to the suit, which he accordingly dismissed.

The plaintiff preferred this appeal.

Ramachandra Rau Sahib for appellant.

Venkatasubbaramayya for respondent No. 2.

JUDGMENT.—We do not clearly understand the grounds on which the District Judge has dismissed this suit. The second defendant's Vakil, in the course of the trial, raised an objection that the promissory note was not endorsed to plaintiff by Subbamma, the payee. We are unable to agree with the District Judge that the objection was a fatal one. The allegation in the plaint is that the promissory note was executed in favour of Subbamma on account of plaintiff's estate. This was not traversed in the defendant's written statements, nor was any issue framed in regard to it. Even if it had been traversed, it was open to the plaintiff to have proved the truth of the allegation, and, if he had succeeded, he would have been entitled to a decree as the real owner of the amount due under the note.

We must, therefore, allow the appeal with costs, set aside the decree of the District Judge, and remand the suit for disposal in accordance with law.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

AYYAVAYYAR (PETITIONER-DEFENDANT No. 2), APPELLANT,

v.

VIRASAMI MUDALI (COUNTER-PETITIONER-PLAINTIFF),
RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 266—Wages of private servant—
Attachment.

The wages of a private servant cannot be attached in whole or in part before they become due and a debt exists.

APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in Appeal Suit No. 92 of 1896, confirming the order of W. Gopala Chari, District Munsif of Arni, in Miscellaneous Petition No. 25 of 1896 in the matter of Original Suit No. 284 of 1883.

The decree-holder applied for and obtained an order for the attachment in execution of his decree of ten rupees a month out of the wages of defendant No. 2, who was a peon in the service of the Jaghirdar of Arni. The defendant No. 2, by his petition, now objected to the attachment, but his objections were overruled and the attachment was maintained. The District Munsif delivered judgment as follows:—

"The judgment-debtor's objections are not good. It is said "that the salary cannot be attached until it falls due, but as "observed in *Tejram Jagrupaji v. Kusaji Gangji*(1), the salary is "attached as defendant's property. It may not be a thing *in esse* "but it is a thing *in potentia*. As to the contention that defendant "is not a public servant, it does not help defendant; for, it is "only in case of salary of a public servant that a moiety is

* Appeal against Appellate Order No. 63 of 1897.
(1) 7 Bom. H.C.R. (A.C.J.), 110.

1897.
October 22,
27.

ATTAVATTAR v. VIRASAMI MUDALI. "exempted from attachment. The defendant is not a domestic servant, and clause (j) does not apply. The case cited by defendant *Syud Tuffazal Hossein Khan v. Raghunath Prasad*(1). "does not apply."

The District Munsif accordingly made an order in favour of the decree-holder and this order was affirmed on appeal by the District Judge.

Defendant No. 2 preferred this appeal.

Ponnusami Ayyangar for appellant.

Ranga Ramanujachariar for respondent.

JUDGMENT.—In this case Rs. 10 a month of the salary or wages of a peon in the Arni Jaghir have been attached in advance in execution of a decree.

The District Judge has confirmed the order of the District Munsif and this is an appeal from that decision.

We are of opinion that the decision is wrong and that, under section 266, Civil Procedure Code, no salary can be attached until it becomes due and a debt exists. There is nothing in section 266 of the Civil Procedure Code to alter the pre-existing law in this respect.

It is suggested that, inasmuch as by the proviso to section 266, the salary of public officers and of servants of a Railway Company is in part only made not liable to attachment, and the wages of labourers and domestic servants are entirely made not liable to attachment, it must be assumed that the wages of others who are not included in the proviso are liable to attachment before they have become due and are debts. This, we think, is a fallacy. There is nothing whatever in the section to indicate that the salary of public officers or of railway servants can be attached before it is due. That can only be done by virtue of the special provision in section 268. The whole meaning of the proviso to section 266 is made clear by the explanation. Read with that, the proviso (beginning at (g) and going to (m)) means that though (g) stipends and gratuities, (h) salaries of public officers and railway servants, (i) pay and allowances of persons to whom the Native Articles of War apply, (j) wages of labourers and domestic servants, (k) contingent rights and interests, (l) rights to future maintenance, (m) any allowance, &c.,—all, in fact, at some time

(1) 7 B.L.R., 186.

or another become existing debts (i.e., when payable), they are even then not liable to attachment. It nowhere says that the salary of a public officer or a railway servant is liable to attachment in advance, nor in our opinion was anything of the kind intended. The Munsif's judgment is entirely based upon a misapprehension of the decision in the case he refers to *Tejram Jagrupaji v. Kusaji Gangji*(1). That case does not decide that the whole of a peon's wages may be attached in advance, when it is what he calls a thing *in potentia*. What the case decides is that the whole of a peon's wages may be attached as it becomes due and it decides no more. We have been unable to find any case in which salary or wages have been attached in advance of their becoming due, except under section 268, Civil Procedure Code, which does not apply to this case but only to the case of the salaries of a public officer or a railway servant. The petitioner is not a public officer or a railway servant but a private peon.

We are therefore of opinion that the appeal should be allowed and the attachment set aside with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Boddam.

RAMANADAN CHETTI (PLAINTIFF), APPELLANT,

v.

NAGOODA MARACAYAR (DEFENDANT), RESPONDENT.*

Merchant Shipping Act Amendment Act—25 & 26 Vict., c. 63, s. 8—Transfer of a ship—Equitable title—Destruction after agreement for sale.

The defendant agreed to purchase a ship from the plaintiff, but the sale was not completed in the manner prescribed by the Merchant Shipping Acts. The ship was delivered to the defendant in pursuance of the agreement and subsequently foundered in port owing to accidental causes. The plaintiff sued to recover the balance of the purchase money:

Held, that the plaintiff was not entitled to recover.

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in Original Suit No. 24 of 1895.

The plaintiff sued to recover from the defendant the sum of Rs. 5,000, together with interest thereon, from the 2nd August

(1) 7 Bom. H.C.R. (A.C.J.), 110.

* Appeal No. 23 of 1897.

ATTAVATTAR v. VIRASAMI MUDALI.

1897.
October
20, 21.
November 2.

RAMANADAN
CHETTI
v.
NAGOODA
MARACAYAR.

1893 to 22nd August 1895. The sum claimed was part of the sum of Rs. 8,250 for which the defendant agreed to purchase a ship from the plaintiff under the agreement recited in the judgment of the High Court. The ship was handed over to the defendant's agent on the 2nd of August 1893 and was taken to Porto Novo where it sank, no legal transfer of the ship having been effected. The findings of the Subordinate Judge were to the effect that the sale had been left uncompleted owing to the default of the plaintiff, that the foundering of the ship was not due to any default of the defendant, that the plaintiff had not committed fraud by failing to disclose to the defendant any serious defect in the ship, that the property in the ship had not passed to the defendant when the accident occurred, and that the loss occasioned thereby should not fall on him. The further facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

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

Sankaran Nayar and Sundara Ayyar for appellants.

Mr. S. H. Bilgrami for respondent.

JUDGMENT.—The plaintiff sued the defendant for Rupees 6,233-4-0, consisting of Rs. 5,000, balance of the sale amount of a ship, and Rs. 1,233-4-0, interest thereon at 12 per cent. per annum from the 2nd August 1893, claimed as damages.

The plaintiff's case was that the defendant entered into a written agreement with him (through his agent) on the 21st July 1893 to purchase a ship belonging to the plaintiff for Rs. 8,250; that, when Rs. 3,250 of the purchase money had been paid in pursuance of the agreement, the defendant wrongfully obtained possession of the ship without the agreement being fully completed and carried it away and he claimed the balance and damages.

The facts are that on the 20th July 1893, a written agreement was signed by the defendant to the plaintiff's agent, whereby the price of the vessel was settled at Rs. 8,250 and it was agreed that the defendant having paid Rs. 701 of the purchase money should pay Rs. 2,549 more in fifteen days and the agreement continues in these words:—"which being done you shall complete and give in my favour a deed of sale of the said ship for the above-mentioned sum of Rs. 8,250, and a pass for the ship. No sooner that is done than I shall execute to you also the discount bond for

"Rs. 5,000 on the security of the said ship, &c." On the 30th July, the defendant paid the Rs. 2,549 and gave the plaintiff's agent a draft sale-deed and power to register the ship in his name, and the plaintiff's agent gave him a signed document containing an acknowledgment of the receipt of that amount and then continuing "as you have delivered to me this day the sale-deed and the power to transfer to your name having written out the same I shall forward it (the sale-deed) to my principal at Devakottah, obtain his signature thereto, and get in my name the power to transfer the pass of the ship. I shall come to Porto Novo, hand over the said sale-deed and execute in your name the pass of the said ship. At that time I shall receive the chitta in respect of the said ship from the 7th instant; you shall take the ship to Porto Novo for executing repairs." The ship was accordingly handed over to the defendant to take to Porto Novo to be repaired and he took her there, and thence to the mouth of the Coleroon which belongs to that port and where vessels of the size of the ship in question are repaired. There the ship sprang a leak and went to pieces about 26th August 1893. The sale-deed had not been executed by the plaintiff, nor was the sale registered when the vessel was destroyed and no executed sale-deed was ever tendered to the defendant.

In these circumstances, the Subordinate Judge dismissed the plaintiff's suit.

The plaintiff appeals and claims specific performance by the defendant of the agreement. He also appealed on certain questions of fact which it is unnecessary to deal with further than to say that we see no reason to think that the Subordinate Judge was wrong in his findings of fact.

The defendant contends that specific performance cannot be granted, because, *firstly*, the plaintiff did not claim it but only claimed a money payment and damages, whereas the agreement was that on the sale-deed being executed and registered by the plaintiff the defendant was to give a vatta chit for Rs. 5,000 on the risk of the ship; *secondly*, it was by the agreement a condition precedent that the plaintiff should execute and deliver to the defendant the sale-deed of the ship and register the transfer to him which was never done; and, *thirdly*, there can be no equitable ownership in a ship apart from the legal ownership, and Courts of Equity will not grant specific performance of an agreement for the sale of a ship, and he quoted in support

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of this proposition the judgment of Wood, V.C., in the *Liverpool Borough Bank v. Turner*(1), where it is laid down that, since the passing of the Merchant Shipping Act, 17 and 18 Vict., c. 104, the only ownership in a vessel that can be created either in law or in equity is when the requirements of that Act have been complied with, i.e., a sale-deed has been executed and the transfer has been registered, and in which case specific performance was refused. This case was followed by the Merchant Shipping Act Amendment Act, 25 and 26 Vict., c. 63, which by section 3 says that certain equities may be enforced and it was argued by the appellant's Vakil that the law as to the manner in which valid sales might be made was thereby altered. The case of *Ward v. Beck*(2), however, which discussed this Merchant Shipping Act Amendment Act quotes the judgment of Wood, V.C., in the above case and approves it, and it must therefore be considered as a binding authority as to the manner in which alone a valid sale of a ship can be effected.

For this reason, then, the plaintiff's suit must fail, and we also think that for the other reasons urged by the defendant, the plaintiff cannot succeed in his action. We, therefore, dismiss the appeal with costs.

APPELLATE CIVIL.

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

VIRASAMI CHETTI (PETITIONER-PURCHASER), PETITIONER,

v.

LILADHARA VYASS (COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 310A, 315—Application by a purchaser for refund.

A house was attached and sold as the property of one against whom a decree of the Small Cause Court, Madras, had been passed. The property was brought to sale, and the purchase money was paid into the Madras City Civil Court. The sale was set aside under Civil Procedure Code, section 310A. Part of the purchase money was attached in execution of subsequent decrees passed against the same defendant by the Small Cause Court and was remitted to that Court

(1) 29 L. J., Ch., 827.

(2) 32 L. J., C.P., 113.

* Civil Revision Petition No. 93 of 1897.

under the attachment. On an application by the purchaser for the refund of the purchase money by the various persons who had received portions thereof:

Held, that the City Civil Court had jurisdiction to entertain the application.

PETITION praying the High Court to revise the proceedings of P. Srinivasa Rau, Judge of the City Civil Court, Madras, on Civil Miscellaneous Petition No. 573 of 1896 in the matter of Execution Petition No. 50 of 1893.

One Virasami Naidu obtained a decree in suit No. 4528 of 1892 on the file of the Madras Court of Small Causes, in execution of which a house was attached and brought to sale and purchased by R. Virasami Chetti for Rs. 790, which was paid into Court. The judgment-debtor obtained an order setting aside the sale under Civil Procedure Code, section 310A, on payment by him into Court of the amount of the decree, i.e., Rs. 790, and the amount of Rs. 40 payable to the purchaser. In execution of subsequent decrees of the Small Cause Court against the same defendant, two sums of Rs. 39 and Rs. 89 were attached and paid over by the City Civil Court out of the sum of Rs. 790 paid in by the purchaser. The purchaser claimed to be entitled, under Civil Procedure Code, section 315, to the refund of the 790 rupees and he now applied accordingly, the several decree-holders and the judgment-debtor being made parties to the application. The Judge of the City Civil Court dismissed the application on the ground that the money had not been paid out by that Court direct, but had been sent to the Small Cause Court under attachment thereupon.

The applicant preferred this appeal.

Kumarasami Sastri and Viscanadha Sastri for petitioner.

Lakshmana Chetti for respondent.

JUDGMENT.—We think that the Judge has misunderstood the scope of section 315 of the Code of Civil Procedure. The fact that the purchase money was handed over to the Small Cause Court under an attachment issued by that Court makes no difference. The person who paid the purchase money is entitled, under section 315, to recover the same by way of execution from the person who has actually received it. The fact that the Small Cause Court was the medium through which the money reached the hands of the party proceeded against cannot affect the rights or liabilities of the parties under section 315. We must, therefore, set aside the order of the Judge and direct that the petition be restored to his file, and be disposed of according to law.

The petitioner must have his costs in both Courts.

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VYASS.

APPELLATE CIVIL.

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

RANGA CHARIAR (DEFENDANT NO. 1), APPELLANT,

v.

BALARAMASAMI CHETTI AND OTHERS (PLAINTIFFS AND
DEFENDANT NO. 2), RESPONDENTS.*

*Limitation Act—Act XV of 1877, sched. II, art. 179—Step in aid of execution—
Application for lists of properties attached.*

An application by a decree-holder for a list of the properties attached in execution of his decree is not a step in aid of execution within the meaning of the Limitation Act, schedule II, article 179.

APPEAL against the order of J. Hewetson, Acting District Judge of Chingleput, in Appeal Suit No. 523 of 1896, reversing the order of T. T. Ranga Chariar, District Munsif of Poonamallee, in Execution Petition No. 720 of 1896.

This was an application by the decree-holder in Original Suit No. 472 of 1890 on the file of the District Munsif, Poonamallee, which was passed on the 4th of May 1891. Properties of the judgment-debtor having been attached, the decree-holder now applied on the 14th of August 1896 under Civil Procedure Code, section 235, that they be brought to sale. The last application in execution was made on the 21st June 1892, but, on the 25th of January 1895, the decree-holder applied for a list of the properties attached. The District Munsif dismissed the application as being barred by limitation, but the District Judge on appeal reversed his decision and remanded the matter ruling on the authority of *Kunhi v. Seshagiri*(1), that the application on the 25th of January 1895 was a step in aid of execution, and that the application accordingly was not barred by limitation.

The judgment-debtor preferred this application.

Krishnamachariar for appellant.

Sivagnana Mudaliar for respondents.

JUDGMENT.—We think this case is clearly distinguishable from *Kunhi v. Seshagiri*(1).

* Appeal against Appellate Order No. 59 of 1897.

(1) I.L.R. 5 Mad., 141.

We cannot see how an application for a list of attached property can be said to be an application to take a step in aid of execution.

The appeal is allowed, and the District Munsif's order restored with all costs.

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v.
BALA-
RAMASAMI
CHETTI.

APPELLATE CIVIL.

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

VENKAYYA GARU (PETITIONER), APPELLANT,

v.

VENKATA NARASIMHULU (COUNTER-PETITIONER), RESPONDENT.*

*Guardians and Wards Act—Act VIII of 1890, ss. 7, 8—Testamentary
appointment of a guardian.*

A Hindu mother has no authority to appoint a guardian for her son by will; it is accordingly the duty of the Court on an application under Guardians and Wards Act, 1890, for the appointment of a guardian for the son of a Hindu widow who had purported to make such an appointment to inquire, under section 7, as to the necessity for an appointment being made and itself to appoint a fit and proper person.

APPEAL against the order of G. Campbell, District Judge of Ganjam, on Miscellaneous Petition No. 362 of 1896.

This was an application under Guardians and Wards Act, 1890, section 8, for the appointment of a guardian of one Mushnuri Ramamurti, an infant aged ten years. It appeared that one Narasimhulu, who opposed the present application, had been appointed guardian by the will of the adopted mother of the infant. The District Judge dismissed the application, seeing no sufficient reason to interfere under the above circumstances.

The applicant preferred this appeal.

Vyidianadha Ayyar and *Pattabhirama Ayyar* for appellant.

Mr. N. Subramanyam for respondent.

JUDGMENT.—Assuming that the will in this case is genuine (a question, however, which has not been tried), the appointment by it of a guardian cannot be held to be such an appointment as comes within section 7, clause 3, of the Guardians and Wards Act, for a

* Appeal against Order No. 129 of 1897.

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v.
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NARA-
SIMHULU.

Hindu mother has no authority to make such appointment by will. It was, therefore, the duty of the Court to have enquired under section 7 as to the necessity for appointing a guardian, and, if necessary, to have appointed a fit and proper person. In making such appointment he might very properly take into consideration the wishes of the mother expressed in any genuine will.

We must therefore set aside the order of the District Judge and direct him to restore the petition to his file and to dispose of it according to law. Costs will abide and follow the result.

APPELLATE CIVIL.

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

SITARAMA CHARYA (PETITIONER), APPELLANT,

v.

KESAVA CHARYA (PETITIONER), RESPONDENT.*

Lunatic—Act XXXV of 1858—Guardian for property of lunatic—Lunatic trustee of a mutt.

A guardian may be appointed under Act XXXV of 1858 to the property vested in a lunatic as the head of a mutt.

APPEAL against the order of H. G. Joseph, District Judge of South Canara, in Civil Miscellaneous Petitions Nos. 312 and 348 of 1896.

In the order appealed against the District Judge appointed a guardian to a lunatic, Vidyanidhi Tirtha Swami, the trustee of the Bhandarkeri mutt, whose disciple, Vidyanidhi Samudra Tirtha Swami, was an infant. The present appeal was preferred by the father of the infant and the brother of the lunatic, who sought to be appointed guardian of the infant and who, it was alleged, had become the sole trustee by reason of the lunacy. The respondent was the person who had been appointed guardian to the lunatic.

Pattabhirama Ayyar and Madhava Rau for appellant,

Ramachandra Rau Saheb and Narayana Rau for respondent.

JUDGMENT.—It is not alleged that any one is entitled jointly with the lunatic to the possession or control of the estate, and,

* Appeal against Order No. 126 of 1897.

therefore, the cases (*Sham Kuar v. Mohanunda Sahoy*(1), *Jhabbu Singh v. Ganga Bishan*(2), and *Virupakshappa v. Nilgangara*(3)) are not in point.

It is next contended that the Judge had no jurisdiction to appoint a guardian for the property inasmuch as it was in the nature of trust property. The person adjudged to be a lunatic is the head of a mutt. His exact position and right in regard to the property vested in him as head of the mutt have not been investigated as the point was not raised in the Court below.

Primâ facie, however, we must take it that the lunatic's right is similar to that of the heads of the mutts referred to in *Sammantha Pandara v. Sellappa Chetti*(4) and *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*(5). In this view it is quite clear that a guardian for such property may be appointed under Act XXXV of 1858. The term "estate" used in the Act is very wide, and may properly be held to include such interest as the head of the mutt has in the property. It is not necessary for us to go further and decide whether the Act would be applicable if the property were trust property, pure and simple.

On the merit we think the Judge's order is right.

We dismiss the appeal with costs.

APPELLATE CIVIL.

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

VIRABHADRAPPA CHETTI (COUNTER-PETITIONER),
APPELLANT,

v.

CHINNAMMA (PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 158—Application for succession certificate—Order for costs of adjournment against opposing party—Effect of non-compliance with such order.

A widow applied for a succession certificate to her late husband. The application was opposed by his brother who claimed to have been undivided from him.

(1) I.L.R., 19 Calc., 301.
(3) I.L.R., 19 Bom., 309.
(5) I.L.R., 10 Mad., 375.

(2) I.L.R., 17 All., 529.
(4) I.L.R., 2 Mad., 175.
* Appeal against Order No. 59 of 1897.

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CHARYA.

1897.
December 13.

VIRABHAD. RAPPA CHETTI v. CHINNAMMA. The matter came on for hearing, but was adjourned on his application, he being ordered to pay the costs. He failed to pay the costs, and the certificate was issued to the widow :

Held, that section 158 of the Civil Procedure Code was inapplicable to the case in the absence of a specific order making the payment of costs a condition precedent to the hearing of the evidence of the party in default.

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, on Miscellaneous Petition No. 600 of 1895.

This was an application under Succession Certificate Act VII of 1889, section 6, by the widow of one Basalingappa Chetti deceased, for the issue to her of a succession certificate in respect of her estate. The opposite party was a brother of the deceased who claimed to have been undivided with him at the time of his death, and he also set up an award of certain arbitrators in bar of the applicant's claim. The matter having come on for hearing, the applicant was ready to proceed, but on the application of the brother the hearing was adjourned, he being ordered to pay the costs of the adjournment. On the matter coming on again for hearing, it appeared that the order as to costs had not been complied with, and the Judge after referring to these circumstances said :—"The order has not been complied with; under section 158 of the Civil Procedure Code, the certificate is granted to the petitioner Chinnamma."

The brother preferred this appeal.

Tiagaraja Ayyar for appellant.

Raghavendra Rau for respondent.

JUDGMENT.—So far as appears from the record the District Judge seems to have dismissed the petition under section 158 of the Code of Civil Procedure on the ground that the costs which the counter-petitioner (appellant before us) had been ordered to pay had not been paid. Such costs would ordinarily be recoverable in execution, and, in the absence of a specific order making their payment a condition precedent to hearing the counter-petitioner's evidence, the counter-petitioner's failure to pay would not render section 158 applicable.

We must, therefore, set aside the order of the District Judge and direct that the petition be restored to the file and be dealt with according to law. Costs will abide and follow the result.

APPELLATE CIVIL.

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

KOMBI ACHEN AND OTHERS (PLAINTIFFS NOS. 1 AND 2 AND 4 TO 16), APPELLANTS,

1897.
December 13.

v.

PANGI ACHEN AND ANOTHER (DEFENDANT AND PLAINTIFF No. 3), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 522—Decree in accordance with an award—Appeal.

A suit having been referred to an arbitrator, he made an award and a decree was passed, in accordance with it, in favour of the defendant. On an appeal by the plaintiff it appeared that the award was *prima facie* legal and proper :

Held, that no appeal lay against the decree.

APPEAL against the decree of E. K. Krishnan, Subordinate Judge of South Malabar, in Original Suit No. 4 of 1893.

The plaintiffs and defendants were members of a Malabar edom, and the plaintiffs sued for a decree removing the defendant from management and for the appointment of fresh managers and to recover certain sums wrongly appropriated and retained by the defendant. The case was fully heard, but before judgment was delivered the parties agreed to submit the dispute to arbitration and an arbitrator was appointed. The arbitrator made his award which was in favour of the defendant. The plaintiff then applied, under Civil Procedure Code, section 521, to have the award set aside on the grounds of the arbitrator's partiality, of his refusal to examine fresh witnesses, and of his failure to give notice to the plaintiffs as to the time of hearing. A further ground, which was alleged, was that it was agreed that the arbitrator should endeavour to bring the parties into agreement but that, if he failed to do so, he should not pronounce an award against the consent of either party, but should leave the matter to be determined by the Court.

The Subordinate Judge refused to hear evidence as to the last matter which was inconsistent with the order of reference, and he

* Appeal No. 171 of 1896.

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ACHEN
v.
PANGI
ACHEN.

determined the other points raised in favour of the defendants and he accordingly passed a decree confirming the award and dismissed the suit.

The plaintiffs preferred this appeal.

Sundara Ayyar for appellants.

Ryru Nambyar for respondent No. 1.

Bhaskara Menon for respondent No. 2.

JUDGMENT.—There is no doubt in this case as to the *factum* of the award and *primâ facie* the award is legal and proper.

The Court below holding that there was no cause shown for setting aside the award passed a decree in accordance with it.

Having regard to section 522 of the Civil Procedure Code, we are clearly of opinion that no appeal lies against such a decree. We are referred to no case decided in this Court in which the contrary has been held.

The appeal is dismissed with costs.

APPELLATE CIVIL.

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

NELLAIYAPPA PILLAI (PLAINTIFF), APPELLANT,

v.

THANGAMA NACHIYAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, ss. 30, 539—Public charity—
Suit by trustee.*

The trustee of a temple sued to recover from the representatives of the trustee of a fund constituted for special purposes in connection with the temple worship, a sum of money misappropriated by him and to obtain the appointment in his place of himself or some other fit person. The plaintiff obtained leave to sue under Civil Procedure Code, section 30, but no sanction had been obtained under section 539:

Held, that the suit was maintainable.

APPEAL against the order of S. Gopala Chari, Subordinate Judge of Tinnevely, in Original Suit No. 33 of 1896, by which it was ordered that the plaint be returned to be presented in a proper Court.

* Appeal against Order No. 189 of 1897.

The plaintiff was the trustee of a temple under the management of the Devasthanam committee of the Tinnevely district and the plaint contained the following allegations. A special fund had been collected for the purpose of supplementing the Government allowance for the worship in the temple. The fund was constituted of a sum of Rs. 5,000 contributed by certain persons including one Nellaikumar Pillai, who was the trustee and manager of the fund. He appropriated part of it and died on the 1st of December 1893, leaving, as his legal representatives, the defendants who were in possession of his estate.

The plaint further alleged that the defendants had been called upon to make good the amount, but had failed to do so, and it continued as follows:—

“As there is no trustee now for the management of the said service and as no arrangements were made originally regarding the appointment of a trustee after the said Nellaikumar Pillai, the trustee for the said service has now to be appointed by this Court.

“As the plaintiff is the trustee for the temple to which the said service is due, as he is interested in the proper conducting of the service and as he is competent to look after the said service work, it is proper that he should be appointed as the trustee for the said service.

“As the plaintiff, besides being the trustee for the said Thonda Nainar temple, is as much interested in the said service as any others of Hindu religion having the same interest, he is entitled to bring a suit under section 30, Civil Procedure Code, for the collection of the amount from the defendants and for the appointment of a trustee for the said service.”

The prayer of the plaint was that the money misappropriated be paid to the plaintiff or to the trustee that might be appointed for the said service and “that this plaintiff be appointed as the trustee for conducting the said service ‘charity’ or that any other competent man be appointed as the trustee as the Court deems fit.”

Together with the plaint the plaintiff presented a petition for leave to sue under section 30, Civil Procedure Code, which was granted, service thereunder being ordered. Three preliminary issues were framed as follows:—

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NACHIYAR.

"(1) Whether the suit is not maintainable for want of sanction under section 539 of the Civil Procedure Code?

"(2) Whether the claim falls under section 539 of the Civil Procedure Code and the suit is not in consequence cognizable by this Court?

"(3) Whether plaintiff's suit is not sustainable under section 30, Civil Procedure Code?"

Of these issues the Subordinate Judge determined only the second, on which he held that the suit was not cognizable by him and he accordingly made the order now appealed against.

The plaintiff preferred this appeal.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and Ramakrishna Ayyar for appellant.

Sundara Ayyar and Srinivasa Ayyangar for respondents.

JUDGMENT.—In our opinion the Subordinate Judge has overlooked the circumstance that the plaintiff in this case was the general trustee of the temple and as such held a special position in regard to the protection of its interests. In that character it was not only his right, but his duty to see that the temple funds in the hands of special trustees were duly appropriated (Cf. *Jeyangarulavaru v. Durma Dossji*(1)), and even before the enactment in 1877 of the provision now embodied in section 539 of the Civil Procedure Code he would have been entitled to resort to the ordinary courts to enforce the obligations of the special trustees, and to obtain all appropriate relief for the protection of the interests of the temple. He would have been entitled to have sued for the removal of such trustees for malversation, and, if there was no other provision for filling up the vacancy, he could have asked the Court to appoint fresh trustees. We do not think that such right was intended to be affected by section 539 of the Civil Procedure Code. If that section were held to apply to the case of a person in the position of the present plaintiff, the rights which he had prior to the enactment would be seriously restricted, inasmuch as the exercise of his rights would be made dependent on the sanction of the Advocate-General or Collector as the case might be. It is difficult to believe that special rights of the character in question were intended to be so restricted.

(1) 4 M.H.C.R., 2.

We agree with the learned Advocate-General that the section was intended to apply to persons who, before its enactment, had, or were believed to have, no right to take proceedings for the purposes mentioned in the section, and in their case the limitation requiring previous sanction for the suit was one that was necessary to prevent an abuse of the powers conferred.

We have not thought it necessary to refer to the decisions of the High Courts in other parts of India, as they proceed on a view which has not been accepted by the Full Bench decision of this Court (*Rangasami Naickan v. Varadappa Naickan*(1)). Our view is in accordance with the principle underlying the decision in *Srinivasa Ayyangar v. Srinivasa Swami*(2), and the unreported cases therein cited.

We, therefore, set aside the order of the Subordinate Judge and direct that the plaint be received by him and that the suit be then disposed of in accordance with law.

Costs will abide and follow the result.

APPELLATE CIVIL.

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

PERIATAMBI UDAYAN (DEFENDANT NO. 1), PETITIONER,

v.

VELLAYA GOUNDAN AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 258A—Adjustment out of Court—Subsequent execution by decree-holder—Suit to recover money paid on adjustment.

It was agreed between a decree-holder and the judgment-debtors that the former should accept Rs. 200 which was paid in full satisfaction of the decree, and should certify the adjustment to the Court, and that an attachment already placed on the judgment-debtor's property should be raised. The decree-holder accepted the money, but did not carry out his part of the agreement, and more than two years later applied for execution which was ordered to issue, the judgment-debtors' objections being dismissed as out of time. The judgment-debtors now sued in a Small Cause Court to recover the money paid to satisfy the decree:

Held, that the plaintiffs were entitled to recover.

(1) I.L.R., 17 Mad., 462.

(2) I.L.R., 16 Mad., 81.

* Civil Revision Petition No. 126 of 1897.

1897.
December 16.

PERIATAMBI
UDAYAN
v.
VELLAYA
GOUNDAN.

PETITION under Provincial Small Cause Courts Act IX of 1887, section 25, praying the High Court to revise the proceedings of K. Ramachandra Ayyar, Acting Subordinate Judge of Salem.

The plaintiffs sued to recover from the defendants the sum of Rs. 200 claimed to be due on the following circumstances:—

In Original Suit No. 401 of 1890 on the file of the District Munsif's Court, Salem, the present defendant No. 1 obtained a decree against the present plaintiffs Nos. 1 and 2 and defendants Nos. 3 and 4. In execution, movable property belonging to the judgment-debtors were attached on the 26th of October 1893. Negotiation then began between the decree-holder and the judgment-debtors, and the former agreed to receive Rs. 200 in full discharge of the decree, provided payment was made in one month. Accordingly in November the present plaintiffs paid Rs. 200 through the monigar, who was defendant No. 2 in the suit and now stated to be in collusion with the decree-holder, to the decree-holder who gave a receipt to defendant No. 2 and promised to have satisfaction of the decree entered up in Court, and to have the attachment raised. The decree-holder in violation of the agreement applied for execution in July 1896. The plaintiffs in various petitions raised objections to the execution, but they were dismissed as being out of time. They accordingly sued as above to recover the money. The Subordinate Judge passed a decree for the plaintiffs.

Defendant No. 1 preferred this petition.

Seshagiri Ayyar for petitioner.

Sadagopachariar for respondents.

JUDGMENT.—The finding is that the money was paid in full discharge of the judgment-debt, the first defendant undertaking to enter up satisfaction. No satisfaction was entered up and no application to compel the first defendant to fulfil his undertaking was made by plaintiff within sixty days of the payment. It was, therefore, not competent to the executing Court to determine whether the payment had been made or not. The only course open to the plaintiff was that which he followed, viz., to bring a suit for the amount. The fact that no application was made by the plaintiff within sixty days distinguishes the present case from *Guruvayya v. Vudayappa*(1). As the Courts there held that it was open to the plaintiff to seek relief in execution, it must be taken

(1) I.L.R., 18 Mad., 26.

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GOUNDAN.

that the application was made within sixty days, though the report does not expressly state this. In the case of *Rama Ayyan v. Sreenivasa Pattar*(1), the person relying on the adjustment was not entitled to make any application under section 258, Civil Procedure Code, within sixty days from the date of the adjustment, as against the person who denied the payment, inasmuch as the latter was not then an assignee. That decision cannot be taken to justify an enquiry into an alleged adjustment after the expiry of sixty days from the time when a party relying on the adjustment had become entitled to apply for the adjustment to be recorded. We must, therefore, dismiss the petition with costs.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

ACHUTAN NAYAR (DEFENDANT No. 30), APPELLANT,

v.

NARASIMHAM PATTAR (PLAINTIFF No. 2), RESPONDENT.*

Malabar Compensation for Tenants' Improvements Act (Madras)—Act I of 1887—Timber trees.

In a suit to redeem a kanom of land on which timber has grown, the jenmi is not entitled to be credited with half the value of the timber.

SECOND APPEAL against the decree of A. Venkataramana Poi, Subordinate Judge of South Malabar, in Appeal Suit No. 93 of 1894, confirming the decree of V. Rama Sastri, District Munsif of Temelprom, in Original Suit No. 27 of 1891.

Suit to redeem a kanom. The main question related to the amount of compensation payable by the plaintiff in respect of timber trees. The District Munsif said as to this point:—"The last item of improvements to be considered forms the trees. The fruit-bearing trees are few, but there are many teak and other trees of valuable timber. The question how far the tenants are to be considered as the makers of this class of improvement is not free from difficulty. The demise of 1017

(1) I.L.R., 19 Mad., 230.

* Second Appeal No. 1603 of 1895.

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NAYAR
v.
NARASIMHAM
PATTER.

"(1841-42) recites 'the karimpana and other trees standing on 'these paddy lands and parambas' as part of the property demised, and indicates them to be the jenmi's property. It is probable that the kanom of 1,000 fanams under the earlier demise of 986 (1810-11) was raised to 800 paras and 3,031 fanams in 1017 (1841-42) partly for compensation for some of the improvements, but there is no evidence on this point. Whatever might be the cause of showing a larger kanom in the demise of 1017 (1841-42), the safest rule to adopt would be to accept as jenmi's property whatever is included in the demise as his, unless and until the contrary be established by clear and unmistakable evidence. If the earlier demise be silent as to the trees, it would not necessarily follow against the express recital in exhibit IX that the trees must have been the tenant's property. . . . In examining the several items of trees in the third Commissioner's accounts I find, however, only a few of them 60 years and above, all the rest being below 60 years apparently grown subsequent to the year 1017 (1841-42). Those of 60 years and above may be presumed to be the jenmi's property for which no compensation is needed. . . . I adopt the latter valuation. But as ruled by the High Court in *Govinda Menon v. Damodaran Nambudripad*(1) in the case of timber trees, one half of their value is to be deducted in favour of the jenmi." The District Munsif awarded accordingly as compensation only Rs. 747-10-9 being half the value of the trees; and the Subordinate Judge upheld this award.

Defendant No. 30 preferred this second appeal.

Ryru Nambiar for appellant.

Sundara Ayyar for respondent.

JUDGMENT.—The value of such of the thirtieth defendant's improvements as consisted of timber trees, &c., was found to be Rs. 1,505-8-6. The Munsif disallowed about half of this amount as the landlord's share, on the authority of an unreported decision of this Court (*Govinda Menon v. Damodaran Nambudripad*(1)). We do not find in that decision any such authority as is supposed, nor is there anything in the Malabar Compensation for Tenants' Improvements Act I of 1887 authorizing the distribution of any share of any improvement to the landlord. The point that the one

(1) Second Appeal No. 184 of 1889 (unreported).

ACHUTAN
NAYAR
v.
NARASIMHAM
PATTER.

half deduction that had been made in the total amount above referred to was wrong was taken in the appeal grounds to the Lower Appellate Court, but the objection was overruled by the Subordinate Judge without his noticing the true ground on which it was made. We are of opinion that the disallowance of half the amount found due for the improvements proceeded on an erroneous view of the law, and that there is nothing to justify it. We must, therefore, far, allow this appeal as to direct that the sum of Rs. 757-13-9 allowed by the Lower Courts be added to the amount decreed the thirtieth defendant for kanom and improvements. We are not prepared to rule that the data on which the value of the reclamation improvements was calculated were wrong in principle, and we dismiss this ground of appeal. The parties will bear their own costs in this and the Lower Appellate Court. Time for redemption extended for three months from this date.

APPELLATE CIVIL.

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

VENKATAGIRI RAJAH (PLAINTIFF)

v.

RAMASAMI (DEFENDANT).*

1897.
October 15.

Rent Recovery Act (Madras)—Act VIII of 1865, s. 14—Suit for rent—Limitation.

When a tenant has executed a muchalka specifying the dates on which the various instalments of rent are payable, the period of limitation for a suit by the landlord for the rent is to be computed from such dates.

Case stated under Civil Procedure Code, section 617, by T. Sami Ayyar, District Munsif of Ongole, in Small Cause Suit No. 243 of 1897.

The case was stated as follows:—

"In Small Cause Suit No. 243 of 1897 on this Court's file, Rajah of Venkatagiri has instituted a suit against one of his tenants for recovery of rent amounting to Rs. 7-13-8, being the years with interest due for fasli 1303 which commenced from July 1893 and ended with the 30th June 1894. The suit is

* Referred Case No. 18 of 1897.

VENKATAGIRI
RAJAH
v.
RAMASAMI.

based on a muchalka in writing, executed by the defendant on the 31st March 1894, which stipulates for payment according to three kistbandies, the last of which fell on the 30th January preceding. The plaint was presented on the 30th June 1897.

"Defendant raises the contention that the suit is barred by limitation, as it has been instituted more than three years from the date of the prescribed kistbandies and more than three years from the date of the muchalka. It is argued for the plaintiff that, under the special rule of limitation provided by section 2 of Act VIII of 1865, he had a right to claim rent until the last day of the fasli and that in consequence he was entitled to take that as the starting point for limitation. In support of this argument, plaintiff's pleader quoted *Appayasami v. Subba*(1). But in the later decision (*Sobhanadri Appa Rau v. Chalamanna*(2)), it has been distinctly held that the ruling in *Appayasami v. Subba*(1) only applies to the special proceedings authorized by section 2 of the Rent Recovery Act, and that it does not apply to a suit for recovery of rent. It is also laid down therein that the rule of limitation applicable to a suit of this kind is what has been provided for by article 110 of the second schedule to the Limitation Act. According to this article the period of limitation for such suits is three years calculated from the time when the arrears fell due. The question now is when did the arrears become due. Was it on the dates specified in the kistbandies, or was it on the date of the muchalka, or was it on the last day of the fasli year? There are no reported cases so far as I have been able to ascertain in which this question was expressly raised and decided. The only case which affords any clue for a decision of the question is *Sobhanadri Appa Rau v. Chalamanna*(2) above quoted. There the question as to the period from which time commenced to run alternated between the date of the kistbandies and that on which the landlord acquired the status to sue. Under section 7 of the Rent Recovery Act, the right to sue accrues on the exchange of pattas and muchalkas. If these had been exchanged without any hitch before the dates specified as kistbandies, it seems to me that the latter would furnish the starting point for limitation. If the exchange took place after date fixed for the kistbandies either by agreement or by the

(1) I.L.R., 13 Mad., 463.

(2) I.L.R., 17 Mad., 225.

force of a decree obtained under section 10, as it was in *Sobhanadri Appa Rau v. Chalamanna*(1) then according to the dictum laid down thereby, time will begin to run from the date when the exchange has taken place. In this case the giving of a muchalka by the tenant was a voluntary act and it took place on the 31st March 1894. Though the kistbandies should in the natural course be held as fixing the dates when the arrears become payable, when the exchange of pattas and muchalkas takes place on a later date, it seems to follow from the decision referred to, that the date of the muchalka must be taken as the period from which limitation should be reckoned. The contract evidenced by the muchalka would further operate as an acknowledgment of the liability for rent provided by the kistbandies, and the date of the acknowledgment would, under section 19 of the Limitation Act, furnish a fresh starting point for limitation. On the whole, my opinion on the question submitted for decision is that time begins to run from the date of the muchalka. The only reason for my entertaining a doubt on the point is because the landlord has a right to tender patta until the last day of the fasli year and if he had done so, he would have been entitled to sue for the rent within three years of that date."

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and *Desikachariar* for plaintiff.

The defendant was not represented.

JUDGMENT.—According to the contract evidenced by the muchalka in the case before us the rent was payable in three instalments, and each instalment which remained unpaid on the date it ought to have been paid became at once an arrear (see section 14 of the Rent Recovery Act). Time began therefore to run from the dates specified in the kistbandi, that is, the dates on which the instalments fell due and not from either of the other dates mentioned in the reference.

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

VENKATAGIRI
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APPELLATE CIVIL.

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

SRINIVASA AYYANGAR (DEFENDANT NO. 6), APPELLANT,

v.

AYYATHORAI PILLAI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 244, 310A—Right of a mortgagee to the benefit of s. 310A—Appeal against order adverse to mortgagee.

A mortgagee being a party to a suit objected that the mortgage premises had been attached and sold in execution of the decree and applied to have the sale set aside on payment being made by him under Civil Procedure Code, section 310A. The purchaser was the decree-holder. The application having been refused by the Courts of First Instance and First Appeal the applicant appealed to the High Court:

Held, that the appeal was maintainable and the appellant was entitled to the relief sought.

APPEAL against the order of F. H. Hamnett, Acting District Judge of Tanjore, on Appeal against Order No. 33 of 1896, affirming the order of T. Ramasami Ayyar, District Munsif of Tirutturaippundi, on Miscellaneous Petition No. 393 of 1896 in Original Suit No. 157 of 1890.

This was an application by the sixth defendant that a sale of land held in execution of the decree in the above suit be set aside under Civil Procedure Code, section 310A, on payment being made by him under the decree. The applicant was a mortgagee of the land in question. The District Munsif refused the application and his decision was upheld on appeal by the District Judge.

The applicant preferred this appeal.

Gopalasami Ayyangar for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—We cannot accept the respondent's contention that no appeal lies in this case. The respondent before us, who is the purchaser, is the decree-holder. The question is one which arises in execution between him and the appellant before us who is also a party to the suit. The order therefore must be treated

* Appeal against Appellate Order No. 41 of 1897.

as one falling under section 244, Code of Civil Procedure, and therefore appealable.

It is next objected that the appellant before us being only a mortgagee is not entitled to the benefit of section 310A, Code of Civil Procedure. On the analogy of the decision in *Rakhal Chunder Bose v. Dwarka Nath Misser*(1) we think that the appellant is an "owner of the immovable property" within the meaning of section 310A, and as his mortgage was subject to the right of the respondent under the mortgage decree in execution of which the sale took place, he would be affected by the sale, and should therefore be held entitled to ask for cancellation of the sale on making the payments prescribed by that section, (*Cf. Asmutunnessa Begum v. Ashruff Ali*(2)). We must therefore set aside the orders of the Lower Courts and direct the petition to be restored to the file of the District Munsif, and the appellant must be allowed to pay into Court the sum payable under section 310A within a time to be fixed by the District Munsif, and of which reasonable notice is to be given to both parties. If the payment is made within the time fixed, the sale should be set aside. In default the petition will stand dismissed with costs throughout.

SRINIVASA
AYYANGAR
v.
AYYATHORAI
PILLAI.

APPELLATE CIVIL.

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

SAMI PILLAI (PETITIONER), APPELLANT,

v.

KRISHNASAMI CHETTI AND OTHERS (COUNTER-PETITIONERS),
RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 244, 311, 588—Execution proceedings at instance of attaching creditor—Party to a suit—Right of appeal—Irregular sale.

A attached a decree which B, his judgment-debtor, had obtained against C, and in execution thereof he brought to sale land belonging to C. After the publication of the proclamation of sale, one of the advertised lots was sub-divided

1897.
December 9.

(1) I.L.R., 13 Calc., 346.

(2) I.L.R., 15 Calc., 488 at pp. 491, 492.

* Appeal against Order No. 63 of 1897.

SAMI PILLAI into various lots for the purposes of the sale. B applied to have the sale set aside, and his application was refused:

U.
KRISHNASAMI
CHETTI.

Held, that B had a right of appeal under Civil Procedure Code, section 311, and not under section 244, but that the sub-division of the lots was no irregularity and the appellant was not entitled to the relief sought by him.

APPEAL against the order of L. C. Miller, Acting District Judge of Trichinopoly, in Miscellaneous Petitions Nos. 511 and 511A of 1896.

This was an application under Civil Procedure Code, section 244, to have set aside a sale that was held in execution of the decree in Original Suit No. 5 of 1888. The execution had proceeded at the instance of certain persons who, in execution of a decree against the applicant, had attached the decree obtained by him in the above suit. A like application was made by the same applicant under section 311. He objected to the mode in which the attachment had taken place, and also to the circumstance that one of the lots which was advertised for sale was subsequently divided into five lots for the purpose of the sale.

The District Judge dismissed both the applications and the applicant preferred this appeal.

Desikachariar for appellant.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar), V. Krishnasami Ayyar, Ranga Ramanujachariar and R. A. Krishnasami Ayyar for respondents.

JUDGMENT.—We must hold that the appellant is not entitled to appeal under section 244, Civil Procedure Code. No doubt the respondents Nos. 1 to 3 as attaching creditors in Original Suit No. 21 of 1894, became entitled to execute the decree in Original Suit No. 5 of 1888, but the sale took place in execution of the latter decree, and so far as Original Suit No. 5 of 1888 is concerned these respondents cannot be held to be parties to the suit, so as to entitle the appellant to treat any question arising between him and them as one under section 244. We, however, think that he is entitled to appeal under section 311.

The right of the said respondents to execute as attaching creditors of the decree in Original Suit No. 5 of 1888 is a special right created by section 273, Civil Procedure Code; but they do not thereby become transferees of the decree as was contended on their behalf before us. The holder of the decree in Original Suit No. 5 of 1888 remains decree-holder notwithstanding the

attachment of his rights and as such he was entitled to apply under section 311 and to appeal against the order passed under that section.

Turning now to the merits the only irregularity that was pressed before us as vitiating the sale was that lot No. 1 of the property was sold in five sub-lots. Having regard to the facts stated by the Judge in his order and to the other circumstances of the case, we do not think that this was an irregularity at all, but was a prudent step in the interest of all concerned.

The result is that we dismiss the appeal with costs.

APPELLATE CIVIL.

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

SUBRAMANIA PILLAI (DEFENDANT No. 1), PETITIONER,

1897.
December 10.

v.

SUBRAMANIA AYYAR (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code—Act XIV of 1882, ss. 78, 80, 82—Substituted service—
Duty of process-server.*

More temporary absence of a person to be served does not justify the process-server in affixing the summons to a door. It is the duty of the process-server to take pains to find out the person to be served in order that, if possible, personal service may be effected.

PETITION under Provincial Small Cause Courts Act IX of 1887, section 25, praying the High Court to revise the proceedings of S. Gopala Chariar, Subordinate Judge of Tinnevely, in Small Cause Suit No. 1427 of 1896.

A decree had been passed in favour of the plaintiff, the defendants having been declared *ex parte*. The defendants then made an application under Civil Procedure Code, section 108, and Provincial Small Cause Courts Act, 1887, section 17, praying that the decree be set aside and that the suit be tried on the ground that they had not been served with the summons.

The allegations contained in the plaint were as follows:—

“It is learnt that a decree has been passed in the said suit, declaring the defendants *ex parte*.”

* Civil Revision Petition No. 102 of 1897.

SUBRAMANIA
PILLAI
v.
SUBRAMANIA
AYYAR.

"The defendants have not to pay the plaintiff in the said suit any amount in any matter.

"It is learnt that the summonses have been returned falsely, stating that the defendants Nos. 1, 2 and 3 were not present at their residence and that they (summonses) were affixed in their houses.

"No summonses were served on the defendants in the said suit; neither were they affixed. The defendants are unaware of the subject-matter of the said plaint.

"Of the said defendants, defendants Nos. 1 and 3 have been permanently residing in Pottanur and second defendant in Puthaneri.

"I therefore pray that the Court may be pleased to cancel the decree passed in the said suit declaring the defendants *ex parte*, hear the contentions of these defendants and pass a fresh decree."

The return of the serving officer was as follows:—

"On making inquiries about the guardian herein mentioned on 24th instant, the females of the said person's house and the neighbours said that he left for Tinnevely two days ago and that there were no heirs (male members), and, therefore, at the place the copies of the notice issued for the minors Nos. 1, 2 and 3 have been affixed to the front door of the said guardian's house. I solemnly declare that, in respect of the said particulars, I have obtained athatchi (statements) from the big landholders of the said village."

The Subordinate Judge refused to set aside the decree. He referred to *Nobodeep Chunder Shaha v. Sonaram Dass*(1) and said:—
"In the circumstances I must find that first defendant had not proved the truth of his case and that he had or must have had knowledge of the suit.

"As regards the second defendant, defendants' witnesses Nos. 1 to 3 seek to make out that he permanently resides in Puthaneri 6 miles off. But he is an undivided son of first defendant, and I find, on evidence of plaintiff's witness No. 2, that he used to reside in both places and that there was constant communication between second defendant and the other members of his family. Section 78 provides that, in the absence of a defendant, his summons may be served on any adult male member of the family

(1) I.L.R., 4 Calc., 592.

"residing with him, and such a person first defendant undoubtedly was. If first defendant is to be deemed to have been duly served, then such service is enough to bind second defendant also."

SUBRAMANIA
PILLAI
v.
SUBRAMANIA
AYYAR.

Defendant No. 1 preferred this petition.

Ramasubba Ayyar for petitioner.

Seshagiri Ayyar for respondent.

JUDGMENT.—We do not think that the service in this case was proper. Mere temporary absence of the person to be served does not justify the process-server affixing the summons to the door (*Bhomshetti v. Umabai*(1)). It is the duty of the peon to take some pains to find out the person to be served, so that, if possible, personal service may be effected.

We must set aside the decree and direct that the Subordinate Judge do restore the suit to his file and dispose of it according to law. Costs will abide and follow the result.

APPELLATE CIVIL.

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

RAMAKISSOOR DOSSJI (DEFENDANT No. 3), APPELLANT,

1896.
January 17.

v.

SRIRANGA CHARLU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 2, 588—Religious Endowments Act—Act XX of 1863, s. 18—Order for payment of plaintiffs' costs out of the funds of the institution—Appeal on behalf of the institution.

A suit having been instituted under Religious Endowments Act, 1863, section 14, *bonâ fide* in the interests of a Hindu temple, the plaintiffs desired to withdraw the suit with liberty to sue again and an order was made permitting them to do so and directing that the costs be paid from the funds of the institution:

Held, that no appeal lay against the order as to costs.

APPEAL against the order of E. J. Sewell, District Judge of North Arcot, on Miscellaneous Petition No. 349 of 1896.

The order appealed against was an order permitting the withdrawal of Original Suit No. 3 of 1892 and gave liberty to the

(1) I.L.R., 21 Bom., 223.

* Appeal against Order No. 158 of 1897.

RAMAKRISHNAN
DOSSJI
v.
SRIBANGA
CHARLU.

plaintiff to file a fresh suit and directed that the plaintiffs' costs be paid out of the funds of the Tirumalai and Tirupati devasthanams, of which the first defendant had been, and the second defendant at the time of the suit was, the mahant. The suit was one brought under Religious Endowments Act XX of 1863, section 14, and the Judge considered that it had been brought *bond fide* in the interests of the devasthanams. The order relating to costs was made under section 18 of that Act. The third defendant, who had been brought on to the record pending the suit on the death of the second, applied against the order so far as it related to costs.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar), Sadagopachariar and Gopalasami Ayyangar for appellant.

Sundara Ayyar for respondents.

JUDGMENT.—The order of the District Judge as to costs is not a "decree" within the definition of that word in section 2, Civil Procedure Code, nor is the order one of those enumerated in section 588, Civil Procedure Code, as subject to appeal. No appeal therefore lies (*Jogodindro Nath v. Sarut Sunduri Debi*(1)).

We dismiss the petition with costs.

APPELLATE CIVIL.

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

REFERENCE UNDER STAMP ACT, s. 46.*

Stamp Act—Act I of 1879, s. 3 (9), (19)—Settlement—Gift—Conveyance.

An instrument whereby a life interest in land is created with remainder to the settlor and his heirs is a settlement within the meaning of the Stamp Act.

A transfer of land, in pursuance of a compromise of a widow's suit for maintenance, is a conveyance and must be stamped accordingly.

CASE stated under Stamp Act, 1879, section 46, by N. S. Brodie, Acting Secretary to the Board of Revenue.

The case was stated as follows:—

"Copies of two documents presented for registration in the Godavari district, together with their English translations, are herewith forwarded. Of these one has been treated as a gift and

is engrossed on a stamp of Rs. 8. It purports to have been executed by two persons in favour of their sister making over to her, for her enjoyment for life without any power of alienation, 4 acres and 67 cents of inam land valued at Rs. 800. All Government dues on the land are to be paid by her, and at her death the land is to revert to the executants or their heirs.

"The second document was executed by one Mahipala Subbayya in favour of Mahipala Atchamma, widow of Mahipala Sami, whereby the executant, in pursuance of a razinama filed in a suit for maintenance brought by the widow, makes over to her a piece of land measuring 2 acres and valued at Rs. 300 in satisfaction of her claim for maintenance with power to alienate, by way of gift or sale and subject only to the condition that no further claim for maintenance is put forward. This document has also been stamped as a gift with a stamp of the value of Rs. 3.

"The Inspector-General considers that the first of these documents should be regarded as a deed of settlement according to the ruling of the Madras High Court in *Reference under Stamp Act, s. 46(1)*. He points out, however, that in this case the property was settled on only one person and the chief requisite of a settlement as pointed out in the judgment of the same Court in *Reference under Stamp Act, s. 46(2)*, namely, the creation of separate interests in favour of several persons, is absent. The Board agrees with the Inspector-General in considering that the judgments in the two referred cases cited in this paragraph conflict with each other and is unable to decide whether the document should be regarded as a deed of gift or settlement.

"The same difficulty is experienced in dealing with the second document. According to the definition given in the Transfer of Property Act, there should be no consideration for a gift. In the case of this document the property was given away in satisfaction of a legal claim for maintenance, and it does not appear therefore to be a gift, nor is it a settlement under the ruling of the High Court in *Reference under Stamp Act, s. 46(2)*, as it does not create separate interests in favour of several persons.

"The question is one of considerable importance from the point of view of the revenue involved, as the stamp duty on a deed of settlement is half that on a deed of gift, and the Board

REFERENCE
UNDER STAMP
ACT, s. 46.

(1) I.L.R., 18 Calc., 322.

* Referred Case No. 20 of 1897.

(1) Referred Case No. 5 of 1896 (unreported). (2) I.L.R., 7 Mad., 349.

REFERENCE
UNDER STAMP
ACT s. 46.

requests that a definite ruling may be obtained so as to enable registering officers to distinguish in future between gifts and settlements."

The documents in question were respectively as follows :—

Document No. 417 of 1897.—"Document executed on 9th April 1897 by Nadakuditi Venkatasivudu and Purushottam, sons of Chinna Ramachandrudu, Brahmins and inamdars of Sahapuram in favour of Ayyagari Mangamma, wife of Venkataraju, Brahmin, inamdar of Sahapuram. As you are our sister we have given you for enjoyment for life without power of alienation mirasi inam land valued Rs. 800 measuring acres 4-67 and bearing Survey No. 129B (2a. 1c.), No. 176 (0a. 71c.), and No. 178 (1a. 95c.) situated in Sahapuram, Cocanada sub-district. You may lease out the land and enjoy the profits derived therefrom from this date. You should yourself pay all Government dues every year. After your death the land should go either to us or to our heirs. . . . stamp Rupees eight."

Document No. 1364 of 1897.—"This deed made on 23rd April 1897 between Mahipala Subbayya, son of Sathiyya, Telaga, and raiyat of Arikarevulla of the one part and Mahipala Atchamma, widow of Sami deceased, Telaga of Arikarevulla living by maintenance of the other part: Whereas the said Mahipala Atchamma sued for maintenance in a Court of law, and as both parties agreed to a razinama at the intercession of mediators and presented a razinama (in the Court, now in pursuance of the said razinama the said Mahipala Subbayya gives to the said Mahipala Atchamma a piece of land without trees therein measuring 2 acres worth Rs. 300 out of jirayati wet land bearing Survey No. 48 and measuring 3 acres 8 cents, situated in Chodavaram in Ramachandrapur sub-district and belonging to said Mahipala Subbayya, and the said Mahipala Atchamma is at liberty to enjoy the said land with power of alienation either of sale or gift without further disputes on the part of Mahipala Subbayya and his heirs and the said Mahipala Subbayya agrees to register the land in the name of the said Mahipala Atchamma in the revenue accounts."

Counsel were not instructed.

JUDGMENT.—The first case is clearly distinguishable from that decided in 1884 (*Reference under Stamp Act, s. 46(1)*), for there

(1) I.L.R., 7 Mad. 349.

there was an absolute and unqualified disposition of property by way of gift. Here there was a provision merely for the life of the donee with reversion to the settlor and his heirs. We think this document (No. 417 of 1897) is a settlement within the meaning of the Stamp Act.

The other document No. 1364 of 1897 is certainly neither a settlement nor a gift. There was consideration other than that of marriage. We think it must be treated as a conveyance and stamped accordingly.

APPELLATE CIVIL.

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

SIVA RAU AND OTHERS (DEFENDANTS NOS. 2, 4 AND 6), APPELLANTS,

1898.
March 31.

v.

VITLA BHATTA (PLAINTIFF), RESPONDENT.*

Hindu law—Bequest to daughters—Construction of will.

A Hindu testator died leaving three daughters. By his will he gave certain property in equal shares to his younger daughters and their descendants and disposed of the rest for the benefit of his elder daughter S and her son R as follows :—
"All the remaining rent should be collected by S and her son R; they shall, when necessary, let the land to other tenants and have it cultivated, and R shall pay the assessment and subject to the directions of his mother shall enjoy the land and shall not in any way alienate the property." R predeceased S :

Held, that the testator's daughter took a life estate with remainder to her son, and that on her death the property passed to the heirs of the son.

SECOND APPEAL against the decree of H. G. Joseph, District Judge of South Canara, in Appeal Suit No. 186 of 1896, affirming the decree of U. Achutan Nayar, Subordinate Judge of South Canara, in Original Suit No. 24 of 1895.

The plaintiff sued as the reversioner of Saraswati Amma deceased, to recover possession of certain immovable property in the possession of defendant No. 1, who was the widow of Saraswati Amma's son who had predeceased his mother. The plaintiff was

* Second Appeal No. 211 of 1897.

SIVA RAU
v.
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BHATTA.

the son of the brother of Saraswati Amma's husband. Defendants Nos. 2 to 8 were the sisters and nephews of Saraswati Amma. The property in question formed part of the estate of one Karakal Rangappayya who died without male issue leaving him surviving Saraswati Amma, Rukmini Amma, the mother of defendants Nos. 2 to 6, and defendant No. 7, his daughters. The portion of Rangappayya's will, the construction of which was in question in the suit, was in the following terms:—

"My wife having died, and as I have grown old having attained seventy years of age, I am to live with my daughter Saraswati and her son Rama Bhatta, and have my welfare looked after by them; as after my demise my daughter's son, the said Rama Bhatta, is alone liable to perform my obsequies and the vaidika and other ceremonies that ought to be performed yearly on account of me and my wife The movables are to be used and enjoyed by my eldest daughter Saraswati and her son, the said Rama Bhatta, and neither my daughters Rukmini and Mukamba nor their children have any right to them.

"In the immovable property the rent of the land chitta No. 38 called Karakal Rankappa assessed at Rs. 24-1-7 situated in Mudu village, Bantval Magne, is 50 muras of rice, 190 coconuts and Rs. 3 in cash excluding Rs. 4 set apart for ceremonies to deities. From this at the rate of 2 muras of rice should be paid annually to purohit Bantval Vasudeva Bhatta, and all the remaining rent should be collected by the said Saraswati and her son Rama Bhatta; they shall, when necessary, let the land to other tenants and have it cultivated, and Rama Bhatta shall pay the Government assessment and subject to the directions of his mother, shall enjoy the land and shall not in any way alienate the right to the property."

The rest of the testator's property was given in equal shares to Rukmini Amma and defendant No. 7 and their descendants.

The Subordinate Judge held that Saraswati Amma and her son Rama Bhatta took an absolute joint estate, and that on the death of the latter Saraswati Amma became the sole owner, and that as she was married in one of the approved forms of marriage the plaintiff was her heir and he passed a decree accordingly. The District Judge affirmed his decree.

Defendants Nos. 2, 4 and 6 preferred this second appeal.

Mr. C. Krishnan and Ranga Rau for appellants.

K. Narayana Rau and H. Narayana Rau for respondent.

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JUDGMENT.—One thing appears to be clear as to the intention of the testator and that is that the property should be divided and enjoyed in three shares by his three daughters and their respective descendants. It would be inconsistent with this intention to hold that each daughter was to take an ordinary daughter's estate, for in the event of any daughter dying leaving other daughters, the property would go to those other daughters instead of to the deceased daughter's descendants. Nor is the contention that each daughter was to take an absolute estate in accordance with the above intention or with certain express provisions in the will. In the first place in the case of the daughter and son before us the two are coupled together as both taking under the will, and no power of alienation is given to the daughter, while it is expressly prohibited to the son. Though this prohibition may not be valid as against the son, it is a clear indication that no absolute estate was intended to be given to the daughter. It being clear, however, that both the daughter and the son had an interest, it is necessary to determine what was the nature of the interest of each. We have already shown that the mother's estate could not have been absolute. It seems to us that it was a life estate that was granted to her with remainder to her son. The provision that the son was to act under her orders with reference to the management of the property shows that his interest was subordinate to hers and was therefore not a joint interest. The view taken by PARKER, J., in *Shanteramma v. Sadasiva Rau*(1) that the two took as joint tenants cannot be maintained, for it was based on the decision in *Vyadinada v. Nagammal*(2), which has since been overruled by the Privy Council (*Jogeswar Narain Deo v. Ram Chandra Dutt*(3)) and they were clearly not tenants in common as already pointed out. The fact being as we find that the daughter Saraswati took only a life estate and not an absolute one, it follows that the plaintiffs, who claim as the heirs of Saraswati, must fail. In our view the persons entitled to the property are the heirs of Rama Bhatta her son, who has left a widow surviving. We must therefore allow the appeal, and as against the appellants who are the

(1) Appeal against Appellate Order No. 16 of 1889 (unreported).

(2) I.L.R., 11 Mad., 258.

(3) I.L.R., 23 Calc., 670; s.c. L.R., 23 I.A., 37.

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defendants Nos. 2, 4 and 6, we reverse the decrees of the Lower Courts and direct that the suit be dismissed. In the circumstances we make no order as to costs.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Moore.

QUEEN-EMPRESS

v.

TIRUVENGADA MUDALI.*

*Local Boards Act (Madras)—Act V of 1884, s. 43—Public servant—
Sanitary Inspector.*

A Sanitary Inspector appointed by the local board is a public servant within the meaning of Local Boards Act, Madras, 1884, section 43.

CASE submitted, for orders of the High Court, under Criminal Procedure Code, section 438, by J. K. Batten, Acting District Magistrate of North Arcot, in Calendar Cases Nos. 245 and 246 on the file of the Second-class Magistrate of Arni.

The Sanitary Inspector of Arni having been obstructed in the discharge of his duties prosecuted the person who obstructed him under Indian Penal Code, section 188. The Sub-Magistrate held that the Sanitary Inspector was not a public servant and acquitted the accused. The Sub-Magistrate gave his reasons for his opinion as follows:—

“The question is whether the Sanitary Inspector of any union or panchayat is a public servant or not, for the purpose of Indian Penal Code. I consider that he is not, and the Deputy Magistrate is of opinion that he is.

“The reasons for my considering him not to be a public servant are that he is not entrusted with the duty of collection of any tax, toll or fee as required by section 43 of Local Boards Act and section 21, clause 10, of the Indian Penal Code.

“Section 43 of Local Boards Act runs as follows:—

* Criminal Revision Cases Nos. 119 and 120 of 1898.

“Every member or servant of a Local Board, or of a panchayat, every contractor or agent, to whom the collection of any tax, &c., is entrusted, &c., shall be deemed to be a public servant, &c.”

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“In the above I beg respectfully to call your attention to the punctuation in the section. If the construction put in by the Deputy Collector is right, I think there is no necessity for the comma after the word ‘agent.’

“Clause 10, section 21, of the Indian Penal Code, says that every officer whose duty it is, &c., to levy any rate or tax for any secular common purpose of any village, &c., is a public servant.

“If my interpretation of section 43 of Local Boards Act is not correct, I beg to submit that this clause cannot be read in consonance with that section and seems to me to be meaningless.”

The District Magistrate in making the reference said:—“The Sub-Magistrate contends that a Sanitary Inspector of a union, who is undoubtedly the servant of a panchayat, is not a public servant. In section 43 of Madras Act V of 1884, the words ‘to whom . . . is entrusted’ do not appear to refer to ‘every member or servant of a local board or of a panchayat,’ but only to ‘every contractor or agent.’ Every member or servant of a panchayat should, it would appear, be deemed a public servant within the meaning of the Indian Penal Code, irrespective of his duties.”

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

The accused was not represented.

JUDGMENT.—We consider that the words “to whom the collection, &c., is entrusted” govern only the words “contractor or agent” immediately preceding them. The introduction of the distributive word “every” before “contractor or agent” shows that the intention of the legislature was to separate or distinguish these persons from the previous class of persons, viz., members and servants of the board.

We, therefore, hold that the Sanitary Inspector appointed by the local board is a public servant within the meaning of section 43 of the Local Boards Act V of 1884.

The orders of acquittal are accordingly set aside, and the Magistrate will replace the cases on his file and dispose of them on the merits.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard (Officiating Chief Justice).

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v.

RAMALINGAM.*

1898.
July 15,
25, 29.

Reformatory Schools Act—Act VIII of 1897, s. 8—Reformatory Schools Act—Act V of 1876, s. 22—Period of detention in reformatory—Rules under Act of 1876.

Held, by SHEPHARD, OFFG. C.J., affirming the judgment of MOORE, J. (DAVIES J., diss.), that the rules made by Government under Act V of 1876 must be deemed to have been made under Act VIII of 1897; and that Magistrates acting under Act VIII of 1897 must order the detention of a juvenile offender until he attains the age of eighteen.

PETITION under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the proceedings of S. M. V. Woosman Sahib, Deputy Magistrate of Salem, in Calendar Case No. 70 of 1897.

The petitions were preferred on behalf of the Crown by the Public Prosecutor.

The grounds of the petition were as follows:—

“(1) The Deputy Magistrate was wrong in limiting the detention of the accused in the reformatory school to three years.

“(2) Under the terms of the notification, dated 30th June 1887, No. 1076, framed by the Governor-General in Council under section 22 of Act V of 1876, which rule by virtue of sub-section (ii) of section 2 of Act VIII of 1897 is still in force, the boy should have been sent to a reformatory for a period of five years unless he shall sooner attain the age of 18 years.

“(3) The Deputy Magistrate having fixed the boy's age at 14 years, the period of detention should have been for at least four years, *i.e.*, until he attains the age of 18 years.”

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

The accused was not represented.

These cases first came on for hearing before DAVIES and MOORE, JJ., who delivered the following judgments:—

MOORE, J.—These are applications made to us by the Government Pleader to revise the orders of certain Magistrates passed under section 8, Act VIII of 1897. In the case dealt with in Criminal Revision Case No. 124, the Deputy Magistrate of Salem

* Criminal Revision Cases Nos. 124, 138 and 141 of 1898.

has sent a boy of 14 years of age to the Chingleput reformatory for three years. In Criminal Revision Case No. 138, the District Magistrate of Tanjore finds that a boy is 13 years of age and directs that he be detained for four years and six months, and in the case brought to notice in Criminal Revision Case No. 141 he has passed a similar order.

These orders have been passed since the introduction of Act VIII of 1897 and are legal under the wording of section 8 of that Act if that section stood alone. The Government Pleader, however, draws attention to a notification of the Government of India, No. 1076, under date the 30th June 1887, promulgated under section 22, Act V of 1876, and urges that, under the terms of this notification, the Magistrates were bound to order the detention of these juveniles till they attained the age of 18. The question that arises for decision is, therefore, as to whether this notification can be held to be still in force.

Rules under section 22 of Act V of 1876 are directed to be made by the Governor-General in Council, while under section 8, clause 3 of the present Act, the duty of framing such rules is entrusted to the local Governments. The Government of Madras, in an order (G.O., No. 934, Judicial, of the 2nd July 1897), which has been brought to our notice by the Government Pleader, has observed that the operation of the rules framed by the Government of India under section 22 of the former Act has been “saved” by sub-section 2 of section 2 of the present Act and has decided that it is not necessary to frame new rules. •

Section 2, Act VIII of 1897, repeals Act V of 1876, but goes on to provide that all rules made under the old Act shall, as far as may be, be deemed to have been made under the present Act, and the question therefore for decision is as to whether the rule relied on by the Government Pleader can be held to be still in force. This question must, in my opinion, be decided in the affirmative. The words, *as far as may be*, in section 2 of the Act of 1897 must, I consider, be interpreted as meaning “in so far as the rules are not inconsistent with the provisions of the new Act.” Under section 7 of the old Act a juvenile could be sent to a reformatory for a period of not less than two years, and not more than seven years. Under section 8 of the present Act the limits prescribed are not less than three or more than seven years. The rule, therefore, passed under the old Act that a boy over ten should

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be confined for a period of not less than five years with the proviso that he must not be detained after the age of 18, is not inconsistent with the provisions of the present Act, and such being the case we are, I consider, bound to follow it.

For the foregoing reasons I would revise these sentences as follows:—

In Criminal Revision Case No. 124 the order should be that the boy be detained for four years from the date of the Magistrate's order unless he shall sooner attain the age of 18, and in the other two cases the sentences should be that the boys be detained for five years from the dates of the Magistrate's order with a similar proviso.

DAVIES, J.—The facts are fully set forth in my learned colleague's order. There can be no doubt that the Legislature intended, owing probably to the varying conditions of the several provinces of the Empire, that the rules "for regulating the periods" for which youthful offenders should be sent to "the reformatory schools" according to their ages or other considerations "should, in future, be made by the Local Government [see clause (3) of section 8 of Act VIII of 1897] instead of by the Governor-General in Council as heretofore under section 22 of the old Act (V of 1876).

It seems to me that the saving clause in section 2 of the present Act could never have been meant to frustrate that intention and to absolve the Local Government from undertaking the statutory duty cast upon it. The word "as far as may be" do not, I think, go as far as that. It is understood that the Local Government has made no rules under the provision quoted. The orders in revision cannot, therefore, be contrary thereto, and as they are not opposed to anything in section 8 itself, there is, in my opinion, no ground for our interference, and I would dismiss the petitions.

Owing, however, to the difference of opinion between Mr. Justice Moore and myself, the matter should be referred to a third Judge.

These cases then came on for hearing under Criminal Procedure Code, section 429, before the Officiating Chief Justice who delivered the following judgment:—

JUDGMENT.—There seems to me to be no doubt that the rules though passed under the old Act, must be deemed to have been passed under the existing Act. The orders must be amended so as to make the detention last till the offender in each case has attained the age of eighteen.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard (Officiating Chief Justice), Mr. Justice Davies, and Mr. Justice Moore.

IN LETTERS PATENT APPEAL No. 6 of 1897:—

THEIVU PANDITHAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SECRETARY OF STATE FOR INDIA (DEFENDANT No. 1),

RESPONDENT.

IN LETTERS PATENT APPEAL No. 7 of 1897:—

THEIVU PANDITHAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

CHINNAKANNU PILLAI AND OTHERS (DEFENDANTS Nos. 2 to 5, 10, 12 to 17, 19 to 21, AND REPRESENTATIVES OF DEFENDANT No. 8), RESPONDENTS.*

Trees pattadar—Right to land on which trees stand.

Held, per DAVIES and MOORE, JJ., affirming the judgment of BENSON, J. (SUBRAMANIA AYYAR, J., diss.), that persons holding a patta for palmyra trees in Tinnevely are not, ipso facto, entitled to an ordinary raiyatwari patta for the land on which the trees stand.

Per SUBRAMANIA AYYAR, J.—Land on which a man plants a palmyra tope is in his exclusive occupancy and possession as a raiyat of Government, subject to his liability to pay any assessment or assessments which the Government may from time to time be entitled to impose and subject also to all other lawful incidents attaching to a holding of that description.

The rights of a tree-pattadar and the nature of the revenue levied on such pattadars considered.

SECOND APPEALS (Nos. 158 and 159 of 1895) against the decree of S. Gopala Chariar, Subordinate Judge of Tinnevely, in Appeal Suits Nos. 264 and 289 of 1892, reversing the decree of T. Sadasiva Ayyar, District Munsif of Srivaikuntam, in Original Suit No. 233 of 1891.

The plaintiffs brought this suit against the Secretary of State and twenty persons, the residents of Senthamangalam village. They sought a declaration that they were entitled to receive a patta for acre 1.77, being part of a larger area described in the plaint as

* Letters Patent Appeals Nos. 6 and 7 of 1897.

1897.
April 1, 5.
September 7.
1898.
July 20, 21.
August 10.

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bearing Survey No. 587D. Of this area 43 decimals, on which a group of 33 palmyras stood, were described in the plaint as belonging to defendant No. 15. As to the rest of the land and the palmyra trees thereon, the plaintiffs claimed that their family had been in possession of a part from time immemorial and of the rest from 1856 when their father purchased it from one Picha Pillai who had had long possession. They also said that they had similarly been in enjoyment of "Valan villai land letter C, and the palmyras. Although a patta has been granted only for the palmyras standing on acres 2.39, made up of acres 1.85, the property mentioned in the particulars annexed hereto and 54 decimals bearing letter C not included in the said particulars, belonging to the plaintiffs' ancestors as above stated, yet the plaintiffs' ancestors and the plaintiffs have, according to the practice of this district and the revenue rules issued from time to time, been enjoying the land as owners, in several modes, such as penning cattle and putting straw ricks, &c., without assessment or patta for the land. Instead of the patta being issued as it ought to have been done to the plaintiffs' ancestors at the time of the settlement for the lands, on which the above-mentioned palmyras belonging to plaintiffs' ancestors stood, those fields and some others were taken together, the fields of No. 587 were marked C and D and taken (entered or measured) as immemorial waste, the letter B, situate between the said two, entered as habitation poramboke and the remainder entered as letter A, immemorial waste, and the matter disposed of by them (the settlement officers). Nevertheless, the plaintiffs' ancestors, who were not aware of that fact, continued to enjoy the lands. Sivoyjama assessment was fixed for C letter land in favour of plaintiffs' elder brother and subsequently in Fasli 85 patta was granted (to him) and, after his death, the patta continues to be issued in the names of plaintiffs."

The plaint proceeded to allege that in 1881 the plaintiffs' brother had put in a darkhast, with a view of obtaining a patta for the rest of the land to which they claimed title as above and on which their palmyras stood, that the application was opposed by some of the residents of the village on the ground that the land was required for a threshing floor, "when the plaintiffs, learning the circumstances, presented a petition on the 12th October 1888, in which, among other reasons, they stated that, as the building of

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"the plaintiffs' house stood on No. 590 and some portion of No. 587 letter D, acres 1.85, on which plaintiffs' palmyras stand and left after excluding the northern extremity of 43 cents from the acres 2.28 of letter D, should be given only to plaintiffs and that the said land was being enjoyed from time out of memory and up to that date by plaintiffs' ancestors and plaintiffs. Thereupon the Tahsildar inspected the locality, gave only the 8 cents of land containing the portion of the plaintiffs' house out of the said D letter land to the plaintiffs, and charged the rest of the land as threshing ground poramboke on the 14th October 1889. On (our) preferring an appeal against it to the Revenue Board on the 1st of January 1890, they stated that they could not interfere. The above-mentioned land letter D has been enjoyed by plaintiffs' ancestors, and, subsequently, by plaintiffs, from time out of memory. It was never used as a threshing ground As the plaintiffs' ancestors have been enjoying the plaint land for a long time of over twelve years, by heaping straw, penning cattle, &c., and erecting a compound, the determination thereof as threshing ground poramboke by the Revenue authorities will not be legally valid. (Paragraph 11.) Even if there were no clear evidence about the enjoyment of the land under the palmyras, the legal presumption is that the said land belongs to the palmyra pattadar and that he alone enjoys it. The fact of plaintiffs' brother having applied by darkhast for a grant of patta in plaintiffs' name, could not cause any diminution of the interest possessed by the plaintiffs in the said land. Even assuming for the sake of argument that the disputed land under the palmyras do not belong to the plaintiffs, the Revenue authorities have no right to determine the said land as threshing ground poramboke in accordance with the request made unnecessarily and out of enmity by the opposite party without granting it to plaintiffs. As the second and the subsequent number of defendants have presented a petition to the Revenue department contending that the disputed land must be for common benefit, they have also been made parties herein. . . . I, therefore, pray that the Court may be pleased to declare the plaintiffs' right to get the patta granted in their names for the undermentioned property and to pass a decree cancelling the order passed in reference to it, awarding such further or other reliefs as the Court may deem fit, and directing the defendants to pay plaintiffs' costs."

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The written statement of the Secretary of State was as follows:—

"1. The plaint land being classed as assessed waste before and after the settlement, and now as threshing floor poramboke, is the property of Government. The plaintiffs never held patta for it. Nor can the alleged purchase of a portion of the land from Picha Pillai, even if true, bind the Government.

"2. Plaintiffs' allegation in paragraph 2 of the plaint that they enjoyed a portion of the plaint land for over sixty years is not true. They admit in paragraph 5 that their (plaintiffs') brother applied in 1881 for the plaint lands under the darkhast rules—an admission that the land was then Government waste. The plaintiffs encroached upon the land only subsequently to 1886.

"3. No such legal presumption can be formed as stated in paragraph 11 of the plaint.

"4. Under these circumstances the plaintiffs have no claim to the plaint land. The first defendant, therefore, prays that the suit be dismissed with costs."

The other defendants pleaded that the land was village samudayam and had long been used by the villagers "as threshing floor and path" and that the plaintiffs had no exclusive right thereto.

The following issues were framed by the District Munsif who decided them both in favour of the plaintiffs, viz.:—

"(1) Is the plaintiffs' alleged right to, and enjoyment of, the disputed land true and valid as against defendants?

"(2) Have defendants other than first defendant any right of easement to the land as poramboke threshing floor?"

The District Munsif accordingly passed a decree for the plaintiffs.

Separate appeals were preferred against this decree on behalf of the Secretary of State for India and the other defendants respectively, and the Subordinate Judge remitted the following issue to the District Munsif for a finding:—

"Whether in this district the pattadar of palmyra trees is, *ipso facto*, the pattadar of the land underneath such trees and whether by assessing and issuing pattas for such trees, the proprietary right of the Government in such land ceases and terminates and the pattadar becomes the owner of the land?"

The District Munsif's findings on this issue were as follow:—

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"The evidence, as a whole, shows that the holder of patta palmyras on unassessed waste or of scattered trees on assessed waste has no right as such to the land itself, unless, of course, he has had open and adverse enjoyment of the land against the Government for more than sixty years; or unless the land in natham poramboke garden of not more extensive character than is allowed; or is terai land planted with palmyras about which there can be no doubt from the defendants' own document No. XL that the tree pattadar is also the pattadar of the land underneath. . . . On the evidence I find that the pattadar of trees on assessed waste, whose holding could be enclosed and treated in blocks or groups has, *ipso facto*, all the rights of a pattadar of the area underneath the trees, subject to Government's right to derive an additional revenue whenever he cultivated the land with punja crops and to issue to him a consolidated patta for land and trees with a higher assessment, as indicated in Government proceedings of 1872, and that he has not merely a right of way to the trees. I might add that in this case, if the Government is held to possess the right to transfer the land to poramboke and allow the villagers to hold threshing floors and place their hay stocks on the whole land, even the acknowledged right of the tree pattadars to a right of way and to manure the foot of his trees will be seriously interfered with."

The Subordinate Judge, on appeal, held that the plaintiffs had proved no title to the land in dispute and that the evidence did not establish any exclusive possession in the plaintiffs with an intention to appropriate the land as their own, earlier than ten years before suit, and that the holders of neighbouring lands inclusive of the plaintiffs had used the site in question as a common threshing floor from a time anterior to 1881 and he said:—"Plaintiffs have not shown that the trees were planted by them. If the trees were granted, then they must show that the land also was granted, which they have not. They must at least show that the favourable rules as regards terai lands existed at the time of the grant of the trees and applied to their case, and this too has not been shown. Nor could there have been a grant of trees with tax in substitution of the land-tax." He accordingly overruled the plaintiff's contention that a tree pattadar had a right to the land as against the Government and dismissed the suit.

Exhibit No. XXXIX which is referred to in the following judgments were certain proceedings of Government beginning

with an extract from the Minutes of Consultation, dated the 31st of May 1855, and ending with the Government Order, dated 23rd August 1872, from which the following passages are extracted:—

“There are four classes of tree-tax payers for whose cases provision has to be made:—(1) Raiyats paying for trees on their own holdings; (2) palmyra climbers holding Government pattas for trees in the holdings of others; (3) palmyra climbers holding Government pattas for trees in culturable waste lands; and (4) palmyra climbers holding Government pattas for trees in unculturable sites.

“For the first class Mr. Puckle, the Collector of Tinnevely, proposes to fix the tax for thirty years (corresponding with the duration of the revised settlement of the Government demand on the land now being carried out in the district) at the present amount of the tree-tax in each case *plus* a trifling addition for seedlings coming on, and rejecting fractions of annas.

“The Government are not prepared to say that the Collector’s proposals in these two cases may not be the best that can be made; but it is evident that the principle laid down by him is not maintained, and that the settlement is an arbitrary one.

“For the second class, or holders of pattas for trees on land in the occupation of others, Mr. Puckle would adopt the same plan of fixing the existing assessment with an addition for seedlings, as the Government demand for thirty years.

“The third class, or holders of pattas for trees on Government culturable waste, includes those interested in the great palmyra forest, which comprises sixty-eight villages. In these cases he proposes to define, as far as possible, the area occupied by trees in a single holding; to assess a low rate on the land itself suitable to its specially inferior character; to determine the tree-tax as provided for classes (1) and (2); and to settle the aggregate as the Government demand on the holder for thirty years.

“Where the interests of the several tree patta-holders of this class are much involved, and also for the fourth class or holders of patta for trees on Government unculturable waste or reserved tracts, as tank banks, roadsides, building sites, &c., Mr. Puckle proposes to fix the present demand for a term of ten years, being the period of growth of the seedling to a mature tree.

“The Board, after mature consideration, recommend to Government to adopt Mr. Puckle’s proposals, and the Governor in Council resolves to sanction them.”

In the year after the date of this Government Order, a suit was instituted by certain tree-pattadars in Tinnevely against the Head Assistant Collector of Tinnevely and others. The judgment in the appeal to the District Court which resulted in the plaintiff’s favour was filed in the present suit as exhibit L, and it contained the following passages:—

“It appears that certain of the defendants having been turned out of their houses, when the land on which their houses had stood had been taken up for the railway, were granted by the Head Assistant Collector (first defendant) fresh house-sites upon a piece of land on which were growing certain palmyras. Under the orders or sanction of the Head Assistant Collector, certain of these palmyras were cut down to make way for the houses.

“The plaintiffs objected to the trees which they claimed being cut down, and on their objection being disregarded, they filed this suit against the Head Assistant Collector and the house-builders. The prayer of their plaint is for an order restraining the defendants from interfering with the land, and directing the removal of the huts, and further to recover the value of the trees cut, this last claim having been subsequently added to the plaint.

“The Head Assistant Collector (first defendant) contended that the land was not the plaintiffs’ property, but Government waste land, and that the plaintiffs had a right by their pattas only to the palmyra trees and not to the land—that the plaintiffs’ right to the trees was only to be used so long as the Government did not require the use of the land, and that as it now was required for building sites, the cutting down of the trees was lawful and that as the Government tax upon such trees had been deducted from the plaintiffs’ patta, they had all the relief to which they were entitled. It is further urged that the plaintiffs have no right whatever to the land, since in Fasli 1270, an opportunity was offered to the raiyats to register such waste lands as they had any claim to, and the plaintiffs had then preferred no claim to the land in question nor had a patta been ever issued for it.

“The Subordinate Judge recorded two issues:—

“(1) Whether the plaint land and trees are plaintiffs’ own, or the Government waste?

“(2) Whether the damages claimed in respect of the trees cut down are correct?

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"Upon the first issue he found that though the land had never been taxed, the palmyras thereon had been taxed and that there was proof of the enjoyment of these trees by the plaintiffs and their ancestors for a long number of years and consequently he decided that the right to both land and trees was the plaintiffs' and that the first defendant was wrong in entering upon the land, and cutting the trees.

"Upon the second issue he found the proof of the amount of damages vague; and hence he awarded none.

"The relief granted by the Subordinate Judge was that the defendants be restricted from interfering with the trees and lands in dispute, and that they do remove the huts or houses constructed or in course of construction over this land.

"From these considerations it is manifest that the plaintiffs holding a patta for these palmyras were, *ipso facto*, entitled to be considered pattadars of the land, and that, if their land was necessarily required for public purposes, the Revenue authorities had full power to acquire it under a definite law; and hence that the first defendant had no right arbitrarily to enter into the land, divert it to other purposes, and cut down the plaintiffs' trees."

Sundara Ayyar for appellants in Second Appeal No. 158 of 1895.

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

Sundara Ayyar, *Seshachariar* and *Srinivasa Ayyangar* for appellants in Second Appeal No. 159 of 1895.

Mr. N. Subramanyam and *Ramakrishna Ayyar* for respondents.

SUBRAMANIA AYYAR, J.—The question raised in these cases is one of considerable importance to a large class of persons who plant and grow, as they are permitted to do by the rules of the Government applicable to the Tinnevely district, palmyra trees on assessed Government sandy tracts, which abound in some parts of the district and which, though scarcely suited for any other kind of cultivation, are well adapted for the growth of the palmyra palm. The question is when a person grows on a piece of assessed Government land such trees in sufficient numbers and fairly closely over the land, so as to form, in the language of the people accepted by the Revenue authorities themselves, a 'tope' (paragraphs 3 and 9, Extract M.C., 31st May 1855, No. 655, and paragraph 7, extract

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from the Proceedings of the Board of Revenue, 6th May 1858, No. 1617, in exhibit XXXIX), what right does the planter acquire in that piece of land by so planting therein? It is not the case of either party that, when one is allowed to grow such a tope, any express agreement is entered into between the Government and the planter with reference to the rights of the latter in the soil. The solution of the question depends upon implications arising from a few unquestionable facts connected with this kind of plantations, coupled with the conduct of the parties concerned.

To understand the matter easily, let us confine our attention, first, to so much of the land as is visibly covered by each tree in the tope. Now, by the very fact of the man being allowed to grow the trees, has not the site of each tree been virtually granted to him for plantation purposes? What the proper answer to this question should be would become at once apparent by putting a further question, viz., suppose some of those trees or all of them are blown away or they otherwise cease to exist; would not the planter thereof or his assign be at liberty to plant other trees on the sites of the extinct ones, and go on thus planting as long as he is inclined so to act? It would be absurd to reply to this latter question in the negative, and an affirmative reply involves the conclusion that the sites of the trees which have disappeared had from the very first become vested for such plantation purposes in the planter of the dead trees. Otherwise how could he have had a right to replace them by other trees? Such being the necessary conclusion with reference to the ground visibly covered by the trees, is the case different with reference to the interspaces between the trees forming the tope? Now, of course, though on the surface of the land, the space covered by each full-grown palmyra tree does not generally exceed a few feet in circumference, yet it is scarcely necessary to add, the soil really required for the due growth of the tree is much more. Moreover, in order to promote the growth of the trees and to make them productive, it is usual for the planter of such a tope occasionally to plough up the soil lying between the trees, and in doing so, to take advantage of the ploughing to raise on the land crops of gram or other dry grain. These acts on the part of planters of topes are, of course, among the most common acts indicative of possession and of an assertion of right to land. Nay, there is one more piece of evidence in the case which is perhaps even clearer on the point: viz., the almost invariable

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practice on the part of planters of these topos of enclosing the lands forming the sites of the topos including, of course, the spaces between the trees. It is scarcely necessary to say that the obvious object of forming such enclosures is to assert an exclusive right to the land. While such are the principal facts concerning plantations of the description in question and the conduct of planters of topos, what has been the conduct of the Government, the other party concerned? If the contention, stated in the written statement and persisted in that, notwithstanding the existence of a palmyra tope on a piece of assessed Government land, the land is virtually unoccupied property at the disposal of Government, were well founded, one would expect Government would have taken care to have it unequivocally intimated to planters of topos that they were labouring under a serious and a very unfortunate mistake in thinking (as in the absence of such intimation they were entitled to do) that the land on which they were expending labour and money in growing the trees was in no way vested in those persons. Nobody ever thought of doing so and even the very significant practice of enclosing was not forbidden. The explanation for the course thus pursued by the Government is manifest. The Government was naturally desirous that its waste lands should be occupied and used for the purpose for which they were best fitted, viz., the growth of palmyra trees, and to have told intending planters that any land taken up by them, though covered with trees grown by them, was still at the disposal of the Government, would surely have completely frustrated the beneficial end the Government had in view and practically stopped all further plantations of this description. It is not, therefore, surprising that the Government did not stir in the matter even though the precise question, now under consideration, was broadly raised and distinctly decided more than twenty years ago against the Government in Original Suit No. 53 of 1873 by the Subordinate Court of Tinnevely, and the decision was upheld on appeal by the District Court, and became final (exhibits K and L). In these circumstances, as will be seen from the observations made in the case of *Lord Advocate v. Lord Blantyre*(1) by Lord Blackburn at pages 791 and 792 and by Lord Hatherley at pages 797 and 798, the various acts mentioned above of exercise of right on the part of planters

(1) L.R., 4 A.C., 770.

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of topos must be taken to be most cogent evidence against the view that the sites of such topos are unoccupied Government property, and they strongly support the contention that such sites are entirely held by the planters of topos under the Government, subject, no doubt, to all the legal incidents attaching to holdings of that kind.

The principal arguments urged in favour of the Government have now to be noticed. The main argument was based on the allegation that holders of palmyra topos in Tinnevely pay no revenue to the Government for the occupation of the land on which the topos stand. This allegation, however, is destitute of any real foundation. To show that that is so it is necessary to advert to the system of taxation in force in Tinnevely and to that prevailing in the other parts of the Presidency in respect of palmyra plantations, as well as to the reason for the existence of two such different systems in the Presidency.

The system in force in Tinnevely is to collect so much per tree after it has attained a certain growth; while in almost all the other districts, Government demand is fixed solely with reference to the extent of land on which the topos stand. How and why palmyra plantations in Tinnevely came thus to be exceptionally treated is shortly this:—Up to 1853 the system throughout the Presidency, not only in respect of palmyra plantations but also in respect of plantations of many other descriptions of valuable fruit trees, was what still prevails in Tinnevely in the case of palmyra plantations. But that mode of assessing Government revenue operated so harshly on the holders of topos that large number of persons relinquished their topos to the Government and people generally refrained from planting taxable trees anew. In 1853, the Government therefore ordered the abolition of so oppressive a system of assessing revenue and directed the substitution of the system of charging on the extent of land planted with trees of various kinds including palmyra trees, assessments charged being according to 'taram' rates, i.e., rates fixed for various descriptions of soils with reference to their capacity to produce grains. This order of the Government was at once carried out in Tinnevely as well as in other districts. But about three years later the Collector of Tinnevely submitted to the Government a representation on the subject. He pointed out that the sandy tracts in the district, on which palmyra trees were grown so plentifully, not being well suited for the cultivation of any of the important species of grains usually grown

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in the country, the rates of assessment fixed in the case of these tracts were extremely low, while the tax fixed for palmyra trees growing thereon amounted annually to a large sum which was collected with ease, that consequently in giving effect to the Government Order of 1853, a considerable amount of revenue thus derived had been given up and that such sacrifice of revenue was altogether uncalled for inasmuch as experience had shown that, so far as this particular district was concerned, the system of taxing each tree had not in any way discouraged the industry in question.

This representation induced the Government to order the re-introduction in the district of the old form of taxation in so far as palmyra trees alone were concerned. This was done accordingly. The reason, therefore, for the existence in Tinnevely of what since 1858 has been an exceptional mode of taxing plantations of palmyra trees, is the peculiar fitness of the soil there for such cultivation and which fitness enables the inhabitants of the locality to grow such trees with profit to themselves in spite of their having to pay a tax upon each tree. How, then, can it be said that a person that grows palmyra trees on assessed Government land in Tinnevely does not pay for the occupation of the land? If his payment per tree is not for the use and occupation of the land forming the site of the tope, what does he make such payment for? There can be no doubt, therefore, that the payment in question is made solely for the use and occupation of the land, though in this particular instance the amount of revenue is arrived at in a mode different from that adopted with reference to similar plantations elsewhere.

In thus holding the allegation that planters of palmyra trees in Tinnevely do not pay revenue for the occupation of lands on which such trees are grown to be unfounded—a circumstance on which much stress was laid on behalf of the respondents has not been overlooked. That circumstance is that, if on a piece of land on which a palmyra tope stands any grain also is grown by the planter, separate assessment under the head of Sivaya Jama or extra revenue is collected by the Government for the additional cultivation. The imposition of separate assessment for such additional cultivation is, however, perfectly consistent with the view that the payment per palmyra tree is equally for the use and occupation of the land. For when any grain is grown in addition to trees of that kind, the Government treats the land as used for two distinct purposes for which the State is justified in claiming

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separate payments (see paragraph 6 of the Board's Proceedings, dated the 20th March 1871, No. 1206, embodied in the Government Proceedings of the 23rd August 1872, exhibit XXXIX). It is evident, therefore, that the fact that lands on which palmyra trees are grown receive in Tinnevely an exceptional treatment at the hands of the Government in the matter of revenue assessments, is due to the special policy pursued by the Government in the matter as already explained and not to any established notion, as was suggested on behalf of the respondents, that planters of topes containing such trees are not occupants of the sites of the topes.

The next argument urged on behalf of the respondents was rested on the nature and description of some of the entries in certain revenue accounts, and in pattas periodically issued to raiyats which latter are but extracts from one of those accounts. It is true that in those documents planters of topes are not referred to in terms as occupants of the lands containing the topes. But the reason is plain. The primary object in view in preparing these accounts is the recording of such information as is necessary for the ascertainment and collection of the revenue due to the Government by the raiyats. Now, as the amount of the liability of the raiyats who own palmyras in the district in respect of Government revenue depends, as already stated, solely on the number and age of the trees irrespective of the extent of land on which they stand, particulars connected with the former matter alone are entered in the accounts without any reference being made to the latter matter. As to the suggestion based on the character of the entries in pattas, it is scarcely necessary to say that the legal relation between the planter and the Government is not created by the grant of any specific patta, but comes into existence from his occupation which takes place long before what is known as a tree-patta, is first issued, and which could be given only when the trees are about ten years old and fit to be assessed for revenue. Nor is it necessary to point out that the so-called land pattas, but show that in cases in which such are issued, Government revenue is calculated upon the extent of the land occupied, while tree pattas show that the revenue charged for the occupation is reckoned with reference to the number of trees on the land, and consequently this distinction between the two classes of pattas has no real bearing upon the question of the nature of the right acquired by the occupation.

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Another argument on behalf of the respondents was based upon the fact that instances were to be found in which palmyra trees standing on a piece of land were entered in the revenue accounts in the name of one man, while the land itself was entered in the name of another. But such entries were explained by Mr. Puckle, a former Collector of the district, in a report submitted by him to the Revenue Board in 1871, during the progress of the present Revenue Settlement of the district, thus:—"The origin of the anomaly of a double patta is twofold; in some cases lands already partly planted with trees have been granted by the Collector on patta without due inquiry or priority of option being accorded to the tree owners to take up the land on which the trees stood, and in others the landholders themselves have voluntarily resigned a percentage usually from one-third to one-half of the trees on their lands to certain palmyra climbers on condition that the latter attended to the entire stock of trees on the land, and they have further permitted these climbers to get tree pattas made out in their names for the percentage of trees thus resigned" (exhibit XXXIX). Entries arising from such exceptional causes or from the others referred to in the judgments of the Lower Courts and which are similar to the second of the causes mentioned by Mr. Puckle cannot affect the validity of the conclusion already arrived at as to the nature of the interests possessed by those who plant palmyra topes on Government assessed lands.

Before leaving this point it is perhaps not superfluous to remark that it would be easy to avoid confounding the case of tree pattadars, who have become such under arrangements like those referred to by Mr. Puckle entered into with the owners of the land containing the trees, with the case of persons allowed to plant and grow topes on Government land, if one would but distinctly bear in mind the vital distinction which exists between the two cases. Now, in the former the right transferred is obviously to only specific standing trees. The grantee thereof would no doubt be entitled to enjoy them while they exist, and for that purpose to exercise over the land other rights necessary for the due enjoyment of the trees. Subject to this, the land continues to belong to the grantor of the trees. If the grantee of the trees cuts and removes them, he has no right to grow others in lieu of those cut. In short, he can no longer enter upon the land, the planter's right to which has (by the trees which had been granted away ceasing to

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exist) become freed from the limitation imposed upon it by the transfer of the trees. Now, turning to the second case, the transfer there is not of a right to standing trees but of a right to use the land without limit of time for bringing into existence new trees and this right, as has been shown before, can be nothing else but a transfer of the land itself for plantation purposes.

A further argument urged on behalf of the respondents was in effect as follows:—Suppose on a piece of Government land measuring, say, an acre or two, a man grows on one spot therein a few palmyra trees. He is treated by the Revenue authorities as the owner of scattered trees only, and as it is conceded for the appellants that such a person does not thereby become the occupant of the whole piece of land, the planter of a tope should likewise be held not to be an occupant of the entire site of his tope. But this argument is unsound. That there is a real difference between the two cases is too plain to require lengthened discussion. In the former case it would be manifestly unreasonable to imply that by planting a few isolated trees on one little spot on the land, the planter intends to and does occupy the whole plot, capable of growing many more trees; but in the latter case the only fair and just conclusion, for reasons already stated in the early part of this judgment, is that planters of topes do possess the entire sites of the topes. Whether in a particular instance the planter holds but scattered trees without possession of the whole plot of land on some small portion of which they stand, or whether he is the planter of a tope and an occupant of the whole of the site thereof, cannot certainly be difficult to determine. It is only necessary to add that in dealing with such a question it would be well to bear in mind the following observations of Bramwell, B., made with reference to what would amount to *de facto* possession in circumstances not altogether dissimilar to what are just under consideration. The learned Baron said:—"If there were an inclosed field and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common" (*Coverdale v. Charlton*(1)).

(1) L.R., 4 Q.B.D., 104 at p. 118.

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The only other argument requiring notice was that there was no distinction between the case of trees planted on poramboke and that of trees planted on assessed land. This clearly confounds well-known differences which exist with reference to the two cases. Now, the very object of classifying land as poramboke is to take it out of the category of cultivable land so as to prevent the cultivation thereof without express permission. That is why penal assessment is imposed if trees are planted on such land. That is also why the trees so planted are taken to vest entirely in the Government. But it is otherwise with reference to assessed land. For as stated in the opening part of this judgment the Revenue rules allow any one without obtaining previous permission to plant upon such assessed land and recognise the planter's right to trees grown therein. No doubt if such trees die, the property is shared equally by the Government and the planter. That however is because the Government, as the owner of the melvaram right and the planter as the owner of the kudivaram right are co-owners. (See *Venkatanarasimha Naidu v. Dandamudi Kotayya*(1).) Nor is this inconsistent with the rule which enables the Government to mulct a planter in a fixed sum if he improperly cuts the trees, for he thereby violates one of the implied terms of the holding and thus unquestionably commits waste.

Before concluding, however, it is necessary to say a few words with reference to a view of the case which I have hitherto refrained from considering. The view in question is that when under the rules of the district a man plants palmyra trees on a given piece of land so as to form a tope, he does so subject to the Government being at liberty to allow another man to occupy and use the same land for purposes not detrimental to the rights of the palmyra planter. This view, no doubt, is not absolutely inconceivable. But it is difficult to believe that any of the parties concerned could have intended such a state of things to be for a moment possible. First, as to the palmyra planters I do not at all believe that they thought that any body else could hold possession of the land simultaneously with them. Secondly, as appears from its own orders filed as exhibits here, the Government was strongly and consistently opposed to the anomalous practice of issuing a patta for the trees standing on a plot of ground to one individual and a

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patta for the plot itself to another. These same orders show that local officials were repeatedly told that it was extremely desirable by some arrangement or other to put an end to the objectionable state of things that came into existence in certain villages owing to the causes explained by Mr. Puckle in the passage already quoted. Moreover, it being admitted that the planter has the right to plant again if the existing trees die, is he to plant fresh trees on the sites on which the dead trees stood or on the land occupied by the land pattadar? In the former case it would be a costly and troublesome process to dig up and remove the roots of the dead trees which penetrate several feet under ground. Even if the roots are removed, fresh plants would not, for obvious reasons, grow so well on the spots on which the old trees stood as they would on spots not so used up. And the lands of the description in question not being so well fitted for any other kind of cultivation the Government itself would be a loser. If, on the other hand, the planter were to plant the new trees in the land occupied by the land pattadar, nothing but confusion and inconvenience to all the parties concerned would result. Take for example a not improbable illustration. After a man has planted on a plot of ground the maximum number of palmyra trees that could, consistently with the requirements of good husbandry, be planted therein, a land patta for the ground is given to another man. This land pattadar uses the spaces between the palmyra trees for growing casuarina trees and does such acts as are necessary thereto. Suppose now, the palmyra trees for some reason or other die and the palmyra planter wishes to plant again. Though he may plant on the old sites, yet he would naturally avoid using such sites. If in such circumstances he wants to plant on the portion utilised by the land pattadar, is the former to be at liberty to insist upon the latter cutting down the casuarina trees? If the palmyra planter is entitled so to insist would not that be seriously injurious to the planter of the casuarina trees and would he have taken up the land had he been aware that such would be his position? If, on the other hand, the palmyra planter is not entitled to insist as stated above, what becomes of the hypothesis that, by the introduction of the land pattadar, it was not intended to affect the rights of the palmyra planter?

Now passing from the hypothetical case to the actual case before us, let us see what the effect of the Revenue officer's order

(1) I.L.R., 20 Mad., 299.

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which the appellants pray may be declared invalid would be. If it were upheld, would not the position of the appellants be worse than if only a land patta had, as supposed in the above illustration, been issued? The order in question directs that the land be classified as poramboke for a threshing floor. And since, as stated before, trees on poramboke vest in Government, is the order complained of to be treated as depriving the appellants of their right to the existing trees? Is that why in the Secretary of State's written statement the appellants' right to the land is denied *in toto* and the land is claimed as absolutely belonging to Government? Suppose next that the appellants' title to the existing trees is not affected by the order in question, could the appellants consistently with the classification directed by that order to be carried out and the rules relating to the cultivation of poramboke, plant in future any trees on such spots of the land as are or become hereafter available for such planting? Now as all cultivation on poramboke of any kind is strictly prohibited by the rules just referred to and as for the infringements thereof the Revenue authorities assert that they have power to impose penal assessments to any extent they please, must not the appellants refrain from growing any more trees? If on behalf of the Government it be conceded that the order does not touch either of the abovementioned rights of the appellants, what is the use of the order declaring the land to be poramboke? Even if it were taken that the appellants' right to hold the existing trees as well as the right to plant fresh ones is not prejudiced by the above order, would not the appellants be clearly subjected to material inconvenience in the enjoyment of their rights inasmuch as during the whole time the threshing operations are carried on, in order to prevent the numerous persons that resort to the land for those operations from improperly interfering with the trees and particularly the produce thereof, the appellants would be obliged to take special measures and precautions? If the order in question were right, it will be easy to suggest many other purposes for which the Revenue officials could allow such lands to be used and which though not necessarily injurious to the trees will be highly inconvenient to the planters in the cultivation and enjoyment of their trees. It is, however, unnecessary to pursue this further as a very slight consideration ought to convince one that to constitute two persons with different interests, holders of the same land—however sound such a holding may seem in theory—would

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not and could not but result in practice in friction and dispute between the two holders. And I confess I cannot persuade myself that any body of reasonable men would have intended so highly questionable a form of holding. Certainly not the Government that has repeatedly protested against and prohibited the extension of the preposterous practice of granting the tree-patta to one man and the land-patta to another. There can be no stronger confirmation of the correctness of the above conclusion than that the extraordinary view of the holding under consideration is not only not set up in the Secretary of State's written statement, but is quite inconsistent with the plea therein raised which, as already stated, is that the land is Government property and that the appellants have no right whatever thereto.

For all the above reasons I would hold that the conclusion of the District Munsif is right, that the Subordinate Judge was in error in reversing the Munsif's decree, and that the proper view is that land on which a man plants a palmyra tope is in his exclusive occupancy and possession as a raiyat of Government subject of course to his liability to pay any assessment or assessments which the Government may from time to time be entitled to impose and subject, also to all other lawful incidents attaching to a holding of this description.

I would consequently allow the appeals, reverse the decrees of the Subordinate Judge and restore the decree of the District Munsif with costs in the Lower Appellate Court and in this Court.

BENSON, J.—In these cases the plaintiffs hold a patta for certain palmyra trees in Survey No. 587D in a certain village in Tinnevely. They sued for a declaration that they were *ipso facto* entitled to an ordinary raiyatwari patta for the land on which the trees stood. The first defendant is the Secretary of State for India in Council. The other defendants are certain villagers who allege that the land is used by them as a common threshing ground.

The District Munsif decided in favour of the plaintiffs, but, on appeal, the Subordinate Judge reversed the decree and dismissed the suit.

Against this dismissal the plaintiffs urge this second appeal.

In my opinion the decree of the Subordinate Judge is right.

In Tinnevely, as in other East Coast Districts, land is classified in the Revenue accounts as—

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(1) *Nanjah* (i.e.) occupied irrigated land ; (2) *Punjah* (i.e.) occupied unirrigated land ; (3) *Anathi* (i.e.) unoccupied waste land that is cultivable and assessed ; (4) *Poramboke* (i.e.) unoccupied waste that is not cultivable or assessed.

For nanjah and punjah Government grants pattas to the occupiers and claims nothing more than the right to assess and levy a suitable revenue. In anathi, Government claims the proprietary right. It is called assessed waste, because it is land which at the time of settlement (which in Tinnevely took place in 1874) the Revenue officers thought was suitable for cultivation and might be granted on patta in accordance with the rules for the grant of waste lands, and subject to the assessment which they then fixed as appropriate.

The poramboke is land required for village site, threshing floors, roads, banks of tanks, channels, &c. This is land which the Revenue officers at the settlement considered was required for these public purposes, and which should not, therefore, at any time, be granted on patta, and on which it was for this reason useless to fix any assessment.

This classification of land existed long before the settlement, but the registers and assessments were then systematically revised and correct areas, as ascertained by survey, were entered and all private claims against Government were, as far as possible, enquired into and settled.

It is to be observed that in all the East Coast Districts from very early times, Government was in the habit of granting pattas for fruit trees including palmyras growing on both anathi and poramboke. The patta might be for a single tree or for any number, and the trees might form a definite group or be scattered about anywhere in the waste. In a field with a dozen trees there might be a different pattadar for each tree or they might be all held by a single pattadar. Admittedly the pattadar had the exclusive right to the produce of the trees, but, as we shall see hereafter, he was not allowed to cut them down, and if they fell from natural causes, the Government took half the sale-proceeds if the tree was on anathi and the whole if it was on poramboke. It is conceded that in the Tinnevely district the Government ordinarily has the proprietary title in wholly unoccupied waste land.

The land now claimed by the plaintiffs had always been classed as Government waste land (anathi) and no patta for it had ever

been issued, but the plaintiffs held a patta for certain palmyra trees on it and the plaintiffs' contention is that these trees form a definite group and that they are, for this reason, the owners of the land and entitled to demand an ordinary patta for it (i.e.) what we may for brevity call a land-patta as opposed to a tree-patta.

Plaintiffs never having had a patta for the land the *onus* rests on them to show that they are entitled to demand a patta.

The Government contends that the tree-patta evidences no right to the land, save such as is necessary to enable the tree-pattadar to enjoy the produce of the trees in his patta, and that subject thereto the proprietary right in the land remains with the Government and may be alienated by Government to whomsoever it pleases. This is the case as it now stands before us for decision, but originally it was very different. No distinction was then made between the alleged rights of tree-pattadars whose trees formed defined groups, and of those whose trees were scattered. The question first agitated before the District Munsif was largely as to the right of Government to charge an assessment on the land in addition to the tree-tax. The points which the District Munsif set before himself for determination were:—

(a) Whether, in the Tinnevely district, the Revenue authorities can, while getting assessment on trees standing on assessed waste, charge assessment for the land also separately, and treat the assessment on the trees as having nothing to do with the assessment on the land, especially when the assessment obtained by taxing the trees is greater than the assessment on the land ?

(b) Whether the pattadar who has got trees on unassessed waste and who pays a larger assessment for his trees than what is fixed for the land is also *ipso facto* entitled to the ownership of the said land, or can the Revenue authorities treat the land as at their absolute disposal subject only to a right-of-way in the pattadar through the land to his trees ?

The District Munsif at first decided both these questions in favour of the plaintiffs, and gave them the declaration sued for.

The Subordinate Judge, on appeal, considered that the issues had not been correctly framed and that this led to a dearth of evidence as to the custom of the district without which it was impossible to arrive at a correct decision. He, therefore, remitted the following issue for a finding:—“Whether in this district the pattadar of

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"palmyra trees is *ipso facto*, the pattadar of the land underneath such trees and whether, by assessing and issuing pattas for such trees, the proprietary right of the Government in such land ceases and determines and the pattadar becomes the owner of the land."

It will be observed that, in this issue also there is no reference to groups of trees, nor is there any suggestion that a distinction is to be drawn between them and scattered trees. In the evidence of the many additional witnesses on both sides who were examined on this issue, I find only one, and he, a wholly unimportant witness, who draws any distinction between the two cases. The witnesses were not even questioned with a view to elicit the existence of any such distinction. I think that this fact is of great importance, because it shows that no such distinction was present to the minds of the parties, their pleaders or witnesses, and that, in fact, no such distinction really exists. Yet it is on this distinction alone that the plaintiffs now rely, and ask us to give a decree in their favour. They do not now contend that they have any right to demand a patta for land on which scattered trees stand. They limit the claim to land in which the trees form a defined group. The distinction appears to have first suggested itself to the District Munsif when writing his finding on the issue remitted to him. He then drew a distinction between palmyra trees standing (1) on unassessed waste land, (2) in a scattered manner on assessed waste, and (3) in a definite group on assessed waste, and came to the conclusion that the holder of a tree-patta in the two former cases had, as such, no right to the land itself; but that in the third case he had such right, that is to say, that he had the same right as an ordinary land-pattadar. The idea of the distinction, though unknown to the parties, has evidently been suggested by certain proposals made by Government in 1855 and afterwards in 1872 by Mr. Puckle at the settlement, with a view to encourage the more extensive planting of trees (see the file of papers marked exhibit XXXIX). It was then proposed that, where trees in unoccupied lands formed a defined group or tope and were held on patta by one pattadar, the land should be assessed and a patta issued for the land, including the trees, tree-pattas being continued only in the case of single or scattered trees. The experiment was tried in 1855 but, at the end of three years, it was abandoned, and the former system reverted to, pending the regular settlement which took place in 1874. No patta was issued for the plaint land in 1855 or at the settlement;

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whether this was because the trees were regarded as only scattered trees, or whether it was because the land was used as a common threshing floor, or for some other reason, does not appear. In 1881, however, the plaintiffs' brother, who was then the manager of the family, made a darkhast or application (exhibit III) for "the grant of the land to him for cultivation" on the ground that he was the pattadar for the palmyra trees on it; and was the adjacent landholder, and offered to pay the usual land-tax in addition to the tree-tax which he was then paying. Enquiry was made by the Revenue officials, and the application was refused on the ground that the land was used as a common threshing floor by the villagers. This application does not, of course, estop the plaintiffs from setting up their present claim to ownership, but it is certainly a strong piece of evidence that their claim is an unfounded one, and that at that time the plaintiffs' predecessor in interest understood and admitted that his holding of a patta for the trees gave him no legal right to demand a land-patta, though it might give him a preferential claim in the eyes of Government if others applied for the same land. With regard to exhibit XXXIX which contains a mass of correspondence between Government and the Board of Revenue and the Collector of Tinnevely in 1855—58 and 1872, the important thing to note is that all through it a distinction is drawn between the trees on patta land (nanjah and punjah) and those on unoccupied waste lands, and all through there is not a single expression to indicate that these various authorities, who had special knowledge of the subject and were anxious to make rules for the benefit of the tree-pattadars, regarded the tree-pattadars in unoccupied waste as persons entitled as of right to the land beneath the trees, nor is there a single expression to show that they regarded Government as having when it issued tree-pattas given up anything more than the right to take the produce of the trees. Indeed, the right of Government as in some cases the real owner of the trees themselves, and in other cases as a kind of co-owner is constantly referred to.

Thus "in some districts large topes of palmyras, and sometimes of other kinds on totally unoccupied and waste and jungle lands, are rented out This is seen particularly in Tinnevely."—Extract of Minutes of Consultation No. 655, dated 31st May 1855. This renting out of

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the topes was in some places annual and implies that they were Government property. It was to get rid of the necessity for renting them out that Government was then anxious. Again, the Board of Revenue in its Proceedings, No. 1617, of the 6th May 1858, paragraph 12, referring to the proposals of Government, say that the taluks where palmyras abound are not yet in a fit state for receiving the orders of Government "for forming groups of "trees on unoccupied ground into topes and giving them away to "parties who agree to pay the land-tax." Again, Mr. Puckle in his letter to the Board printed in Proceedings of Madras Government Revenue Department, dated 23rd August 1872, says that any general application of the Government Order of 1858 "would have "given away without reason millions of valuable trees." Further on he refers to "the impossibility of enforcing the right of Government to a share in the value of every tree cut down." Lastly, in paragraph 8 of Board's Proceedings, No. 3364, of the 9th August 1871, it is stated that Rs. 15,000 were derived from the felling of such trees each year.

It is important to notice this because it has been assumed by the appellants' vakil that the holder of a tree-patta must necessarily have planted the trees himself. It is notorious that palmyras and other fruit trees, such as tamarinds and mangoes, often spring up spontaneously on waste land. Defendant's twelfth witness mentions the spontaneous growth of palmyras in his enjoyment. It would seem then that the assumption that scattered trees, or even topes held under tree-pattas, must have been grown by the pattadar or his ancestors, is erroneous. In the present case the evidence does not show whether the trees, were originally grown by the plaintiffs' predecessors, or were spontaneous. The earliest patta (exhibit H1) shows that in 1825 the plaintiffs' father had a patta for ten palmyras only. The number had increased in 1841 (exhibit H2) and again in 1874 (exhibit H3) and is now 87. Probably the plaintiff planted the additional trees (though there is no evidence of this), but the trees only, not the land, are mentioned in these pattas of 1841 and 1874. The patta of 1874 contains an exact statement of the acreage and assessment of all the plaintiffs' lands, but with regard to the palmyras, no land is mentioned. The sum of Rs. 14-11-0 is merely entered at the foot of the patta as the miscellaneous tax payable for palmyras and the land on which they grow is not named or referred to in any way.

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Moreover, there was formerly another person who had a tree-patta in the area now in question and his interest was acquired by the plaintiffs. There was, of course, nothing in the way of an assignment by Government of any area in which the plaintiffs were to plant trees or of any agreement, express or implied, with the local Revenue officials that the plaintiffs should be allowed to plant trees in any particular area. All that we find is that the plaintiffs originally had a patta for ten trees and that the number gradually increased partly by purchase of another tree-pattadar's interest and partly by the growth of fresh trees, and that the number of such trees is now 87.

Let us now see what is the evidence as to the rights which are locally understood to belong to the tree-pattadar as such. The District Munsif did not attach much weight to the oral evidence on either side, with the exception of that given by Mr. Krishnayyar (sixth defence witness), the Tahsildar of Tenkarai, where the lands are situated. Both the Lower Courts regarded him as a thoroughly competent and trustworthy witness. As sub-division Sheristadar for eight years and afterwards as a Tahsildar for twelve years, he had special knowledge of the subject. This is what he says as to the general custom of the district:—"The mere tree-pattadar is not "entitled to the land underneath the trees as of right. He is only "given a perpetual right to get patta for the land underneath the "trees when such land has been assessed waste. The Government is "not bound to issue patta to the tree-pattadar for the land underneath the trees. According to the usage prevailing in this district, "Government has a right to collect tax on palmyra trees and a "separate tax on the land underneath the trees. The land is assessed "separately from the palmyra trees on it and both taxes are recovered "from the respective pattadars, if the pattadars are separate individuals and from the same individual if he has got patta for the "land as well as the trees. If assessed waste underneath the patta "trees is brought into cultivation, the land assessment is charged to "the cultivator. If the land underneath is poramboke land, prohibitory assessment is levied from the person cultivating it. The "assessment charged to the cultivator of assessed waste underneath "trees is called sivayajama assessment. The land belongs to Government, though covered with patta trees. The land is given "on patta. There is no substitution in Tinnevely district of the "palmyra tree-tax for the land-tax and both are collected except in

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"the special cases of terai land. Even in the cases of terai land, "there is no substitution of the tree-tax, but favourable rates are "charged against both trees and land."

Nothing could be plainer than this evidence and it is altogether against the plaintiffs' contentions. The only sentence that seems to support the plaintiffs is the second sentence where the witness says:—"He (the tree-pattadar) is only given a perpetual right to "get patta for the land underneath the trees when such land has "been assessed waste." This sentence must be understood in connection with the rest of the evidence in which he repeatedly states that Government is not bound to give a patta for the land. What he means is that under the rules framed by Government for the disposal of applications for grant of waste land on patta (darkhast rules) preference is given to the holder of a patta for trees on the land. This is made clear in his cross-examination where he says:—"The tree pattadar has a preferential right under darkhast rules to "get patta for the anathi land underneath the trees." In other words, the tree-pattadar has a right as against other applicants, not as against Government itself.

It has, however, been held and the decision is clearly correct, that these darkhast rules do not convey any rights enforceable against Government in the Civil Courts (*Fakir Muhammad v. Tirumala Chariar*(1). Again, in the case of *Subbaraya v. The Sub-Collector of Chingleput*(2), TURNER, C.J., referring to the question whether the plaintiff could claim to enforce an alleged preferential right under the darkhast rules said:—"A Civil Court cannot, "however, compel the Revenue authorities to make settlement with "a particular person. In that matter the discretion of the Revenue "authorities is uncontrolled."

It is necessary to bear these rulings constantly in mind, for both in the District Munsif's judgment and in the evidence of the witnesses there is a recurring confusion between rights enforceable by law against Government and so-called rights or rather preferences which Government, by its rules and practice, secures to the tree-pattadar against third persons, where both are candidates for something which Government has to give.

Indeed, the District Munsif in paragraphs 24 to 27 of his "finding" takes the Revenue authorities roundly to task for not

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having "carried out speedily in an earnest spirit" what he considers was the policy of Government for the settlement of the district. Such remarks in any case would be out of place in the judgment of a District Munsif, but they are especially so in the present case where the Government is itself the defendant, and supports the action of the local Revenue authorities as being in accordance with its policy and orders.

To return, however, from this digression. The witness having stated the general rules in the language above quoted, proceeded to illustrate by six examples the kind of rights which Government had over assessed waste lands in which tree-pattas were held by private persons. The illustrations were as follows:—

"(1) For the last eight years, the Forest Department have "been enclosing as Forest Reserve Government assessed waste "lands on which palmyra trees belonging to raiyats and in the "patta of raiyats are standing, merely allowing the tree-pattadars "access to the trees;

"(2) In Korkai village an embankment was constructed on "Government assessed waste on which palmyra trees of raiyats "stood and no compensation was given to the tree owners for the "lands;

"(3) Pattas have been granted by me to other than the "owners of the trees for the assessed waste underneath in several "cases—but the owners of the trees did not want the land in these "cases;

"(4) In one or two cases where the trees were held by the "three or four persons under tree-pattas and each of them applied "for the whole land underneath the trees, I have rejected the "applications of all, but one, of the tree pattadars and granted "the entire land to the said one pattadar whom I preferred. I "disposed of these applications under the darkhast rules;

"(5) When patta trees are felled or fall down one-half the "sale-proceeds is taken by Government and half is given to the "pattadar;

"(6) The tree-pattadar cannot fell the trees without permission of Government, and, if he does so, thirty years' assessment is levied from him."

And in cross-examination he added:—"If one pattadar has "ten trees and another two trees, and the whole land underneath "the twelve trees is applied for separately by each, the land is

(1) I.L.R., 1 Mad., 205.

(2) I.L.R., 6 Mad., 303 at p. 309.

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"granted to both jointly or to either of them at the discretion of the Revenue Officer according to convenience and circumstances."

Not the slightest attempt was made to break down this evidence in cross-examination; nor strangely enough was there any attempt to call counter evidence of an independent character as to the custom or practice of the district.

The District Munsif attaches importance to the witness's statement that he was not aware of any cases in which land underneath trees held on tree-patta had been granted to any one other than the tree-pattadar when the tree-pattadar was willing to take up the land on patta, but this only shows how faithfully the Revenue authorities gave effect to the standing orders that the tree-pattadar was to have the preference in case of contest. The witness, however, says that in some cases where the tree-pattadar did not want the land patta, he had given the land patta to a stranger. Moreover Mr. Puckle (exhibit XXXIX) in reporting to the Board of Revenue on the origin of the anomaly by which pattas for the trees and the land were often held by different persons, states as the first and principal reason the fact that the Collector had granted the land pattas without due inquiry or priority of option being accorded to the tree owners. The fact that these grants of land pattas were so generally acquiesced in by the holders of pattas for trees on the land, shows that the growing of the trees, and the cultivation of crops on the land were in the opinion of the parties concerned separate rights which might be granted separately by Government, though Government preferred to grant both rights to the same person. As, however, Government by its rules gave the tree-pattadar a preferential claim to a land patta, if he desired it, it is not surprising that there are but few cases in which Government did actually grant a land patta to a third party contrary to the will of the tree pattadar. Exhibit XXIX, however, evidences a case of that kind and in exhibit XXVII Government refused to grant a land patta to the tree pattadar who applied for it, and in many cases the Tahsildar exercised a discretion between rival applicants. A very few such instances are sufficient to show that Government retained the power to refuse a patta, though ordinarily willing to grant it. The only witness on the plaintiffs' side who gives general evidence as to the custom is their first witness who is the monigar of the village, and he distinctly says:—"Government have right to grant the waste

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"land on which patta trees stand (excepting the sites occupied by the trunks of the trees) for cultivation to others." This was his evidence in cross-examination and no attempt was made in re-examination to explain away or minimize the force of so complete an admission of the Government case.

The witness was in no sense a hostile witness to plaintiffs. On the contrary he gave evidence stoutly in their favour in regard to the point he was called to prove, viz., that the land was not a common threshing floor. There was practically no evidence adduced by the plaintiffs to contradict the evidence of this, their own witness, who, as an elderly man and monigar of the village, must know well the respective rights of Government and the tree pattadars as understood in his village. The Tahsildar of the taluk, who has had twenty years' experience in the posts where he could best gain a general or comprehensive knowledge of such rights as they are understood not merely in the village but in the wider area of the district, and whose evidence is on all hands admitted to be trustworthy, is equally distinct in favour of the Government case. As already observed no question was asked of either witness to suggest that any distinction existed between the rights of holders of pattas for scattered trees and groups of trees. The standing orders of the Board of Revenue make no such distinction and no such distinction was made in the pleadings or issues even when the case was remanded.

The District Munsif found that the Government contention was true and correct so far as scattered trees were concerned, and there is no contention before us that the District Munsif was wrong in that finding. The evidence whether oral or documentary does not set up, much less does it establish, any distinction in regard to trees in a defined group. It follows, in my opinion, that no distinction can properly be drawn and that the plaintiffs' case fails just as much in regard to groups of trees as it does in regard to scattered trees.

In the course of the argument, I asked the appellants' Vakil at what stage in the course of planting up an area of land would the holder of a patta for scattered trees on it become, *ipso facto*, entitled to a land patta. He could only suggest that it was as soon as the tax on the trees equalled the land-tax, but this (though at first adopted by the District Munsif) is a criterion which has nothing at all to support it. The two taxes are, as the District

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Munsif eventually admitted, cumulative. The tax for cultivation of the land is levied in addition to the tax for the trees and without any reference to the amount of the tree-tax. If a pattadar of scattered trees has not a right to a patta for the land on which each tree grows, it is impossible to see how or at what stage as he increases the number of trees he acquires the rights of a land pattadar. No doubt as Government issues a patta for each new tree it increases the interest of the tree pattadar in the land, and diminishes the interest which remains in itself, but the interest of each party remains throughout of the same kind. The *quantum* of interest varies, but its quality does not vary. If, however, the District Munsif's distinction is to be maintained, we must hold that at some point of time the admitted limited interest of the holder of a patta for scattered trees develops *per saltum* into the wholly different kind of interest which a land pattadar possesses. Thus, in the present case the plaintiffs had originally a patta for only ten trees. These would clearly have been regarded as scattered trees and would, according to the finding of the District Munsif and the admissions of the plaintiffs before us, carry with it no right to a land patta. The trees gradually increased in number and now it is claimed that the plaintiffs have acquired the wholly different kind of interest in the land which a land pattadar admittedly has. This seems to me an illogical conclusion and one which we cannot reasonably admit.

The District Munsif freely admitted that the plaintiffs had failed to prove the custom alleged by them or its acceptance by Government, but he held somewhat inconsistently, as it seems to me, that there was a long continued course of dealings and conduct on both sides from which an implied contract, as between landlord and tenant, might be inferred. The Subordinate Judge has carefully analysed the evidence on which the District Munsif relied and has found it to be altogether insufficient, and I have no hesitation in agreeing with the Subordinate Judge. I need not go through all the evidence, but I notice a few leading points. The District Munsif first relies on the fact that in several cases the holders of tree pattas have purported to sell the land under the trees as well as their rights in the trees. Some of these documents the Subordinate Judge has found to be not genuine, some he has found to have been executed collusively in order to get up evidence, some profess to sell the trees only, some profess to sell Government

poramboke land, in which it is admitted the vendors can have no right; and in all cases the transactions were behind the back of Government and were never accepted by Government officers as giving any title to the lands. It is impossible to hold that Government is bound by these transactions or that they indicate any general consciousness on the part of the community that the legal right to the land vested in the vendors. As well might it be argued that the prevalence of theft in a community was good evidence of a consciousness on the part of the community that there was no such thing as a legal right to private property. Again, the District Munsif finds that the practice prevails of enclosing groups of trees with low mud walls and thinks that this implies an assertion of exclusive ownership. As regards this, the Subordinate Judge observes that the evidence shows that the object of the mud walls was to define the limits of the groups held by the various tree pattadars. They were also useful for confining the goats whose manure is used for the trees, to the particular trees or groups of trees which belong to the owner of the goats. The erection of such walls is an act which does no injury to Government, and is, therefore, ordinarily not objected to by Government, but this cannot, I think, be taken to derogate from the rights of Government when it has occasion to assert them. In the case of the plaint land the evidence is that such enclosing as took place was of very recent date and was of a very temporary character. The District Munsif also relies on the fact that the tree pattadar without special permission of the Revenue authorities plants fresh trees on the land, and in due time gets a tree patta for them. This, at first sight, would seem to be a strong argument, but it loses its force when we see that a pattadar of scattered trees does precisely the same thing, and, in fact, a man without a tree patta at all may do it. Nay more, the plaintiffs' own twelfth witness says that this is done even in poramboke land. He says:—"Raiyats plant palmyras even on poramboke land without Government permission and enjoy the same. The kanakkan will enter in accounts, and then tax will be levied." For such land a patta cannot be given, and no suggestion is made that by such planting the planter does, or can, acquire a right to the land. He plants the trees with the full knowledge that he has not right to the land, but in the hope that Government will raise no objection. If the planting does no harm to the bund or channel, Government will

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ordinarily, on the trees coming to maturity, give a patta for them to the planter; but this surely cannot be taken as evidence that the Government thereby admits the planter's right to the land. The patta is issued subject to locally well-known limitations. The pattadar is allowed to take the produce, but he has not even the ownership of the tree, still less, of the land. If the tree is felled or falls down, it belongs to Government. In the same way, when a holder of a tree patta plants fresh trees on Government assessed waste, he does so subject to locally well-known incidents as stated by the Tahsildar and the plaintiffs' own witness, the Village Munsif. Government will ordinarily give him a patta for the trees, but even then the trees do not belong wholly to him. If they are felled without leave, he has to pay assessment on them for thirty years. If they fall down Government gets half their sale-proceeds and the evidence shows that Government remains the owner of the land.

I have dwelt on this matter in order to show that the rights of the parties are not to be judged by *a priori* principles, or what may seem to be *a priori* principles, of natural justice, but rather by the known existing conditions which govern the relations of the parties and by the inferences which may reasonably be drawn from such known conditions with regard to other matters regarding which evidence is uncertain.

The District Munsif has, I think, been too much influenced by regard for these *a priori* principles, or, as he puts it, by "a broad view of the facts and evidence" and by what he considers to be "for the real and permanent benefit of both parties." He has also, I think, attached undue importance to Mr. Carr's judgment in Appeal Suit No. 456 of 1874 (exhibit L) and to the fact that no appeal against it was made by Government. The Collector and the Board of Revenue, however, at once declared that the decision was incorrect, but no evidence as to the custom of the district had been given and the case was therefore thought to be an unsuitable one on which to obtain a final decision by the High Court (see exhibit XI.). The decision itself was based almost entirely on Dalyell's note on S.O. No. 5 of the Revenue Board. The note, not the order itself, is to the effect that in Tinnevely the tree tax is "substituted for the land assessment instead of "being an addition to it." Such a note expressed merely the opinion of the editor, and, in the absence of special knowledge on

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his part, can carry but little weight with it. The statement is, in fact, incorrect, as is clear not only from the protest of Mr. Comyn, the Collector, who had special knowledge (exhibit XL), but, what is more important, from the evidence already quoted of Mr. Krishnayyar in the present case, and from a mass of other evidence which shows that the land tax is levied in addition to the tree tax when the land under the trees is cultivated, except in the terai tract, where it may, perhaps, be correct to say that the tree tax is substituted for the land tax. The land in the present case, however, is admittedly not in the terai tract, and is not subject to the same incidents. Mr. Dalyell's note seems to have been a generalization from what he understood to be the case in the terai tract. The fact that thirty years' assessment is charged if patta trees are cut without permission is a clear indication that the tree tax is not substituted for the land tax. The two taxes are for two distinct uses of the land. The one use does not materially interfere with the other use.

If trees are planted on the land, Government charges so much for each tree for such use of the land, and, if crops are also grown on the land, it charges a separate sum on the crop so grown.

If the two uses are made by the same person, Government charges him the two taxes: if by different persons, the Government charges each according to the use made by him. Thus the permission to plant trees implied by the grant of a tree patta does not include the right to the use of the land for every purpose, and until such right has been assigned it remains in Government and can be alienated by it, provided the doing so does not derogate from the customary right of the tree-pattadar in regard to the enjoyment of the trees. Mr. Carr's decision therefore seems to me of very little importance, since it was based on an incorrect assumption and without evidence as to the custom of the district in respect of tree pattas. The only importance of the case lies in the fact that it shows that a claim similar to the present claim was made in the courts some twenty years ago, but it is remarkable that this appears to be the only case in which such a claim has ever been made in any district though the system of tree pattas has been in existence from the earliest times in two-thirds of the districts of the Presidency. If such a claim as the plaintiffs now make was well founded, I should have expected that it would have been established by some judicial decision other than that of

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Mr. Carr above referred to. The District Munsif, however, seems to think that the tree pattadar's right to "physical possession" of the land is established by the ruling of the Full Bench of this Court (*Reference under section 39 of Madras Forest Act(1)*). That was a reference under the Forest Act, and the question was whether the holder of a tree patta was a "known occupier of land" within the meaning of the Forest Act so as to entitle him to notice under section 6, when the Government proposed to reserve as forest the land on which the trees in the patta stood. The Full Bench observed that the Collector of Salem, Mr. McWatters who made the reference, was "of opinion that a tree patta gives the pattadar at any rate an interest as occupier in the site on which the tree stands," and added:—"It appears to us that the view of the Collector is correct" . . . the tree pattadar "has an interest during the continuance of his patta in the tree itself, and in all that is necessary for the growth of the tree including the soil in which it grows. Such interest though far inferior to the interest of the owner or lessee of the soil, is still an interest in the land." Now the interest of an ordinary land pattadar in the land in his patta is admittedly much greater than that of a mere lessee, yet the Full Bench held that the tree pattadar's interest in the soil was "far inferior" to that of a lessee. It follows that it is still more inferior to that of a land pattadar. Moreover, the Full Bench seems to have considered that the tree pattadar's interest lasted only "during the continuance of his patta" and extended only to the sites on which the trees stood (not to the inter-spaces between trees) and so far only as was necessary for the growth of the trees. It has never been contended that the growing of crops under palmyra trees is injurious to the trees. It is rather beneficial by reason of the opening up and manuring of the soil which accompanies it. The words "during the continuance of the patta" are of importance as showing that there was no grant of a permanent right of occupancy even of the sites of the trees. If all the trees were to die or be swept away by a storm, I take it that the interest of the tree pattadar would, *ipso facto*, cease, and the land would be again absolutely at the disposal of Government. It seems to me that the observations of the Full Bench, far from supporting the

(1) I.L.R., 12 Mad., 203 at p. 207.

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plaintiffs' claim, lead very distinctly to the conclusion that their claim is in excess of their real interest in the land. I think that those observations correctly indicate the limits of the tree pattadar's interest in the soil, and, if this is so, the plaintiffs' claim to demand a land-patta for the land must be dismissed. The mistake made by the District Munsif and by the appellants' vakil seems to be in the assumption that land on which patta trees stand must either be absolutely at the disposal of Government, or absolutely the property of the tree-pattadar. The evidence in the present case and the observations of the Full Bench show that neither of these extreme views is correct. Each party has certain rights in the land. As the number of the trees in the patta increases the *quantum* of the planter's rights increases, and the *quantum* of the Government rights which remains is diminished *pro tanto*, but the quality of the rights belonging to each party remains unaltered. If the Government has the right (as it admittedly has) to grant the spaces between scattered trees for cultivation, it has equally the right to grant for cultivation the spaces between trees forming a group, but in each case the grantee of the right to cultivate must exercise his right without infringing the pre-existing right of the tree-pattadar to enjoy the trees in the customary manner. Whether any particular act is an infringement of the right is a matter for judicial determination. It is argued that such a joint interest is, in practice, inconvenient. No doubt that is so like all joint interests, and it is in consequence of this inconvenience that Government has from time to time been anxious to give land-pattas to the holders of tree-pattas, but the existence of the inconvenience is no proof of the non-existence of the joint interest, and I can find nothing in the revenue history and practice of the district, in the evidence adduced in the case, or in the nature of things, to show that the Government is bound to grant a land-patta for land on which a group of trees is held on tree-patta.

Some expressions in the District Munsif's judgment would seem to show that he regarded the action of the Revenue authorities in refusing a land-patta in the present case as an act of oppression. There is no foundation for this idea. The patta was refused solely because the Revenue authorities, after due enquiry, came to the conclusion that the land had long been used by the villagers in common as a threshing floor. The same conclusion

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has been arrived at by the Subordinate Judge on the evidence recorded in the case. He finds that the plaintiffs' attempt to take exclusive possession began in 1885, but that the villagers had been using it as a "public common threshing floor from a time anterior to 1881." This is a finding of fact which we must accept in second appeal and it shows that the refusal was no high handed departure from the ordinary rule which Government has made for the disposal of applications for land on which patta trees stand, but was strictly in accordance with those rules and was in the interest of the villagers generally against an attempted encroachment on their rights. I may add that the plaintiffs were granted a patta for a portion of the land on which they had (without permission) built a house with yard, &c. The patta was refused for the remainder only, but no interference with the customary enjoyment of the trees was attempted. It seems to me, therefore, that whether we look to the facts of the particular case, as found by the Subordinate Judge, or deal with the rights of the tree-pattadars in the abstract, the plaintiffs have failed to make out any case for interference on their behalf.

I would, therefore, confirm the decrees of the Subordinate Judge and dismiss the second appeals with costs.

[The judgment of Mr. Justice Benson prevailing under section 575 of the Civil Procedure Code, the second appeals were dismissed with costs.]

The plaintiffs then appealed under Letters Patent, section 15; and the appeals came on for hearing before the Officiating Chief Justice and DAVIES and MOORE, JJ.

The parties were represented as before, and the arguments adduced for the appellants and respondents were those employed in the judgments of SUBRAMANIA AYYAR, J., and BENSON, J., respectively.

SHEPHARD, OFFG. C.J. in his judgment referred to the findings of the Subordinate Judge on the facts of the case and pointed out that the plaintiffs had failed to prove the case set up by them, and he said:—For this reason I concur in the dismissal of the second appeal, but I must not be taken to agree with the opinions expressed by my learned colleagues with regard to the rights of a tree-pattadar and the nature of the revenue levied upon such pattadars. It is admitted that plaintiffs and other persons holding tree-patta have some rights in the soil. What those rights are,

whether in the nature of a profit *a prendre* or of such nature as to entitle the pattadar to exclusive possession, must be determined upon some other occasion. In this case owing to the way in which the suit was framed and defended, the opportunity has been lost for deciding the question.

DAVIES, J.—Being in Second Appeal we must take the facts as found by the Lower Appellate Court. Those facts are that in the Tinnevely district the Government grant a patta for palmyra trees exclusive of the land on which the trees grow and that, for the land, either a separate patta is granted—sometimes to the pattadar of the trees and sometimes to another person—or the land is allotted to the villagers for communal purposes as in this case for a threshing floor, or it is not allotted at all, but kept at the disposal of the Government. The plaintiffs' claim is that they, as holders of the patta for the trees, are, *ipso facto*, entitled to the land as well. Their claim as originally laid was a claim to the whole of the unoccupied survey field in which their trees stood, although the major portion of the field was not covered by their trees. But now their claim has been narrowed down to the land immediately underneath their 87 trees which, it is said, form a 'group.' It is only by virtue of the trees forming a group that the plaintiffs lay claim to the land below, for it is conceded that the patta for a single palmyra tree or for two or three scattered trees growing in, say, an acre field, gives no right to the land. The number of trees and the degree of their relative proximity, which are necessary to constitute a group, have nowhere been defined, and this very indefiniteness is itself an indication of the shadowy nature of the plaintiffs' claim.

The one right which the plaintiffs admittedly have in connection with their right of enjoyment of the trees is the right of access to them for taking their produce and for manuring and watering them when occasion requires. A right to plant fresh trees and a right of enclosing the land on which the trees stand for its exclusive enjoyment, which rights the plaintiffs also set up, they have failed to establish. Now, if the right of access to, and enjoyment of, one tree does not give a right to the land underneath it, which is admitted, a mere difference in the number of trees can make no difference in the character of the right. The plaintiffs' claim, however, seems really to be based on two other grounds. The first is that the tree-tax which they pay is a

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substitution for the land-tax. There is found to be no authority for this proposition so far as the Tinnevely district is concerned, while the history of the matter as set forth in the official correspondence filed as evidence in this case shows the exact contrary to be the case. The Collector Mr. Puckle's proposal was to consolidate the two taxes, the land-tax and the tree-tax, into one which is unmistakable proof that they were different items of revenue and not the same.

The second ground for the plaintiffs' claim would appear to be the assertion of an abstract right founded on some principle of natural justice that the owner of the trees should necessarily be the owner of the land on which they grow. But this principle is not observed in the Tinnevely district where the actual condition of affairs often is for one person to be the owner of the land and another person to be the owner of the trees. The numerous cases that have been put in evidence prove this fact beyond a doubt. It is not contended that, in such cases, the owner of the trees could claim to be the owner of the land as against its private owner, and if the claim could not be supported against the private owner, how can it be supported against the Government? The plaintiffs have, in my opinion, entirely failed to prove the right which they assert.

What their right is has, I consider, been laid down in the Full Bench ruling of this Court (*Reference under section 39 of Madras Forest Act(1)*). They have "an interest during the continuance of their patta in the tree itself and in all that is necessary for the growth of the tree including the soil in which it grows." This interest exists so long as the tree exists, and together with this limited and constricted right in the soil they have an easement right-of-way to the tree over the adjoining land for the purposes mentioned before. I think the exhaustive judgment of Mr. Justice Benson, which is appealed against, is entirely right and I would confirm it and dismiss the appeal with costs.

MOORE, J.—These are appeals under the Letters Patent against the decision of Mr. Justice Benson in Second Appeals Nos. 158 and 159 of 1895.

The plaintiffs (appellants) have, for many years, held a tree-patta for a number of palmyras growing on Survey Field No. 587D in the Senthamangalam village, Tenkarai taluk, Tinnevely

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district. It is admitted that a patta for the lands has never been given to the appellants, and it is shown that a few years ago the land on which these palmyra trees stood, was, under the orders of the Board of Revenue, converted into poramboke with the intention that it should be used by the villagers as a threshing floor. In their plaint the appellants pray that the Court may declare their right to get a patta for the land claimed by them and that the order transferring that land to poramboke may be cancelled.

That the Revenue authorities are not bound under the rules authorised by the Board of Revenue to grant a patta for land on which trees are standing to the holder of the tree-patta is perfectly clear. In clause 2 of Standing Order No. 5 (printed at page 8 of the latest edition of the Board's Standing Orders), it is laid down that the issue of a tree-patta and the payment of the tree-tax entered therein conveys to the pattadar only the usufruct of the trees. The following rule is also laid down:—"In all cases where such usufruct only is conveyed it should be noted on the patta that the pattadar has no right to cut down the trees and a condition should be inserted in all pattas granted in future that they are liable to be cancelled when the land is granted on patta." The pleader for the appellants, on this order having been brought to his notice, urges that it applies to scattered trees and Government topes only and not to the trees held by the appellants. It is argued that the trees for which the appellants hold a tree-patta are not scattered trees, but a group or groups of trees and it is contended that while scattered trees may continue to be held on a tree-patta, yet when such trees by additions made to their number are formed into a group or groups of trees, the tree-patta for such group is converted into a land-patta by some obscure and unexplained process. It also appears to be maintained that, on the supposition that it is not found that the conversion of scattered trees into a group, *ipso facto*, converts a tree-patta into a land-patta, yet that it should be held that the Revenue authorities are bound to grant a land-patta for the land on which a group of trees is formed, in lieu of the tree-patta previously held. I cannot find anything that can be called evidence in support of these somewhat curious contentions. It does not appear that the Revenue authorities draw any distinction in this matter between scattered trees and groups of trees, and it is not easy to see how they could do so. Do two trees standing not far apart form a group? If not, how many trees are required before the group

(1) I.L.R., 12 Mad., 203 at p. 210.

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can be held to have been formed? Such questions are not easy to answer. No doubt the tendency when the trees become crowded on a piece of land will be for the tree-patta to be converted into a land-patta, and it will be remembered that clause 6 of the Standing Order already referred to provides that, whenever an application is made for waste land containing trees which are held on tree-patta, the holder of the trees is to be offered the first choice of taking the land at taram assessment and he would no doubt avail himself of this power of choice where there are a number of trees in his patta and where consequently the amount of the tax approaches the figure of the land assessment.

It further appears to be contended that even if it be held that the rules laid down in the Standing Orders of the Board to which I have referred do apply to the case of palmyra trees held on tree-pattas as in the present case, yet that such rules must be held to be *ultra vires*, illegal and contrary to the declared intentions of Government. Such, as I understand them, are among the contentions advanced on behalf of the appellants—contentions which it must be admitted are by no means as clear as could be desired. In accepting these and similar contentions, the District Munsifs seem to have especially relied on a decision of Mr. Carr as District Judge of Tinnevely passed in 1875 (exhibit L), an opinion expressed by Mr. McWatters, the Collector of Salem, in a case referred by him to the High Court to be found in the decision in *Reference under section 39 of Madras Forest Act*(1) and a marginal note to No. 129 of the Standing Orders of the Board in Mr. Dalyell's edition of those orders. Mr. Carr's decision is, of course, not binding on this Court, although that officer's lengthened service in the Tinnevely district entitles his opinion to be treated with deference. It should, however, be remembered that the then Collector, Mr. Comyn, in a letter addressed by him to the Board criticises in most adverse terms this judgment of the District Judge and that the Board also was of opinion that his decision, that the holder of a patta for trees was, *ipso facto*, to be considered the pattadar of the land, was erroneous, although it was not considered advisable for reasons given in their Proceedings No. 935 of the 15th April 1875 to appeal to the High Court. No importance can, it is clear, be attached to the expression of opinion by the Collector of Salem already mentioned.

(1) I.L.R., 12 Mad., 203.

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The following is the note in Mr. Dalyell's edition of the Board's Standing Orders above alluded to. The first paragraph of Standing Order No. 129 runs as follows:—"When the regular assessment of the land is paid no extra tax will be levied on trees of any kind which now exist or may hereafter be planted." And to this order the following marginal note is added:—"Note:—The spirit of this rule is not contravened by the levy of a tree-tax in Malabar, Tinnevely, Tanjore and in the wet taluks of Trichinopoly, for this tax is there substituted for the land assessment instead of being an addition to it." The Subordinate Judge was of opinion that one reason why no great importance should be attached to this note was that it was no part of the substantive order, but only the view of the compiler (paragraph 29 of his judgment). No weight can, in my opinion, be attached to this argument, for the statement that in Malabar, Tinnevely and Tanjore a tree-tax is substituted for the land assessment is to be found in clause 2 of Standing Order No. 5 of the last edition of the Standing Orders of the Board. It does not appear to me, however, that the wording of this Standing Order and note affects the question now under consideration. What is there laid down is that when the regular land assessment is paid no extra tree-tax will be levied and it is added that the spirit of this rule is not contravened by the fact that in certain districts land assessment is calculated not with reference to the quality and character of the land as is usually done, but on the trees growing on it. The plaintiffs, however, in the present case, have been charged not land assessment, but tree-tax and have been granted not a land-patta but only a tree-patta. The general principle laid down in the old Standing Order is that separate pattas should not be granted for trees and for the land on which they stand; but there are, as is well-known in practice, many exceptions to this rule. In order No. 5 in the latest edition of the Standing Orders, some of the means by which this anomaly can be done away with are set forth; but, however great that anomaly may seem to be, there can be no doubt that for years past there have been numberless cases in Tinnevely and elsewhere where separate pattas have been granted for the trees and the land.

The only reported decision of the High Court that has been alluded to as bearing on this question is *Reference under section 39*

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of *Madras Forest Act*(1). The point there at issue was as to whether a holder of a tree-patta was a known occupier of land within the meaning of section 46 of the *Madras Forest Act*. It was held that he was a known occupier on the ground that he had, during the continuation of his patta, an interest in the tree itself and in all that was necessary for the growth of the tree including the soil on which it was growing. "Such interest," it is remarked, "though far inferior to the interest of the owner or 'lessee of the soil, is still an interest in land.'" It is, of course, true that the holder of a tree-patta has an interest in the soil on which his tree grows, but it cannot for a moment be held that it therefore follows that he is entitled to demand a patta for the land as a matter of right.

Exhibits XXXIX and XL are sufficient to show that for many years, and indeed as far as can be seen ever since the commencement of the current century, tree-pattas have been granted in the Tinnevely district with respect to palmyras, which give the holders no rights over the soil on which the trees are growing except in so far as is necessary for their usufruct of the trees. It is also shown that in many cases a patta for the trees is granted to one man, and a patta for the land on which they grow to another. The origin of this custom is, of course, the undisputed fact that, in parts of this district, there is land, miles in extent, on which nothing but palmyras is, or can be grown, and that, as these trees are often situated at great distances from one another and scattered over a large extent of sandy waste land, it would not pay any one to hold them if he were to be obliged to pay the taram assessment on the land on which they stand. The manner in which the anomaly of double pattas is to be gradually extinguished is set forth in Standing Order No. 5 to which I have so often referred. So long as the land remains as assessed or unassessed waste with respect to which no patta other than a tree-patta has been issued, it is still land at the disposal of Government for which it can give or refuse a land-patta as may be thought advisable.

A good deal has been said at the hearing of this appeal as to the right of the appellants to the trees growing on the land for which they claim a land-patta and of the injustice which they will

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suffer if they are deprived of those trees. All that it is necessary to say as to this is that there can be no question as to the right of the appellants to the usufruct of the trees without let or hindrance, but that there is nothing to show that any one has the slightest intention of interfering with their rights in this respect. That the plaintiffs (appellants) in their plaint do not allege that there has been any such interference or state that they apprehend such is sufficient to show that no weight need be attached to the appeal *ad misericordiam* now made on their behalf. They do not ask for a declaration of their right to the usufruct of the trees, because that right has never been denied. It cannot reasonably be doubted that, without any interference with the rights of the appellants with respect to their trees, the villagers can make use of a sufficient portion of No. 587D as a threshing floor. As pointed out by Mr. Justice Benson at the close of his judgment, the Subordinate Judge has found as a matter of fact that the reason why the revenue authorities refused to grant a land-patta for the land was that it had been used in common by the villagers for years as a threshing floor. If there had not been some such ground for refusal, it is only reasonable to assume that the land-patta would have been granted, the land assessment for the whole area being, of course, greater than the tree-tax on the by no means considerable number of trees on it.

On the ground that the appellants cannot claim as a right in a Civil Court to be granted a land-patta merely on the ground that they hold a tree-patta for some trees growing on the land, I would dismiss both these appeals with costs.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard (Officiating Chief Justice), Mr. Justice Davies and Mr. Justice Moore.

1897.
August 26.
September 1.
1898.
July 20,
22.

ARUNACHALAM OHETTI AND ANOTHER (PLAINTIFFS) APPELLANTS,

v.

AYYAVAYYAN AND ANOTHER (DEFENDANTS NOS. 2 AND 3),
RESPONDENTS.*

*Transfer of Property Act—Act IV of 1882, s. 68—Usufructuary mortgage—
Possession not given—Suit for sale.*

A usufructuary mortgagee to whom the mortgagor fails to deliver or to secure possession of the property mortgaged is not entitled to claim in a suit for the money an order for the sale of such property.

So held by the Full Bench in a case where the mortgage contained no covenant to pay.

SECOND APPEAL against the decree of W. Dumergue, District Judge of Madura, in Appeal Suit No. 618 of 1895, reversing the decree of J. Solomon Gnaniyar Nadar, District Munsif of Manamadurai, in Original Suit No. 14 of 1895.

The plaint recited a mortgage, dated 10th February 1887 and executed by defendant No. 1 in favour of Ramachandra Ayyan, which contained the following passage:—

“As I have received the sum of Rs. 400 being the total of these two items as particularized above, you shall possess and enjoy under mortgage the aforesaid house-site, and the pannai, varam, and nunja, punja and samudayam lands attached to the said $\frac{2}{3}$ pangu, for a period of seven years from this year, and further until the amount is paid. Should any objections arise in enjoying the same, I shall myself have such objections settled. You shall yourself pay the poruppu and quit-rent, and road cess, due for the said pangu. I shall, at the time when the amount of the said mortgage is to be paid, pay the sum of Rupees four hundred mentioned in this mortgage deed in the month of Audi after the termination of Auni (season), and shall get back this document.”

The plaint proceeded as follows:—

“The said Ramachandra Ayyan, and after his death, his son Vembayyan, cultivated and enjoyed the mortgage lands for six

years; and (the latter) has released $\frac{1}{3}$ pangu in favour of the svandar out of the said mortgage pangu $\frac{2}{3}$, after receiving a sum of Rs. 50. The said Vembayyan has, by a registered deed, dated 16th August 1893, transferred to plaintiff for Rs. 350 his full right under the mortgage in respect of the lands and the samudayams, &c., attached to the same, and of the $\frac{1}{3}$ of the house, all of which form the remaining $\frac{1}{3}$ pangu.

“As, at the time of the said transfer, the kudivaram of Arumai-perumal Thiruthal which was a pannai attached to the said $\frac{1}{3}$ pangu had been sub-mortgaged by the said Vembayyan for Rs. 14-8-0 to Palla Karuppan of Soodiyoor village, he (Vembayyan) allowed that sum to remain with his consent that the sum be paid for it and the land be redeemed, and received only the remaining sum of Rs. 335-8-0.

“Under the said right, the plaintiff is entitled to enjoy the produce with the samudayam attached to the $\frac{1}{3}$ pangu for a period of seven years. While so, the defendants who are the svandars got possession of the mortgage lands and house without allowing the plaintiffs to enjoy the same, and have themselves paid the said sub-mortgage amount of Rs. 14-8-0 and redeemed the land, and they themselves are forcibly enjoying them. They have also written a letter to the plaintiffs stating matters not acceptable. Their said act is unlawful.

“As now the plaintiffs do not want to enjoy the said mortgage property, and as the period stipulated for the enjoyment of the mortgage has elapsed, this suit is brought for obtaining a decree binding the first defendant's undivided sons. Defendants Nos. 2 and 3 to pay the mortgage amount together with the loss (of profit) for Fasli 1303.”

The plaintiffs prayed for a decree for sale and for a personal decree against the defendants. The District Munsif passed a decree for sale in the usual form, and a personal decree against the defendants. This decree was reversed on appeal by the District Judge on the ground that the suit was not maintainable. He did not determine the first issue which was framed as follows:—
“Whether the plaint bond was void for want of consideration?”

The plaintiffs preferred this second appeal.

Desikachariar for appellants.

Ayya Ayyar for respondents.

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This second appeal and the memorandum of objections first came on for hearing before SUBRAMANIA AYYAR and BODDAM, JJ., and their Lordships delivered judgment as follows :—

JUDGMENT.—The Lower Appellate Court was right in holding that the instrument sued upon, which purports to be a usufructuary mortgage, contains no covenant to pay. Nevertheless as possession of the land comprised in the instrument was not given to the alleged mortgagees, this suit for the recovery of the money said to be due would lie under section 68 of the Transfer of Property Act, if the instrument sued on represents a real transaction and is not a mere collusive document as alleged by the defendants and if the claim is not time-barred.

As to the first point the Lower Appellate Court recorded no finding. As to the latter point, that depends upon the further question whether in a case like this a decree for the sale of land could be properly given.

Before entering into the question of limitation it appears to us advisable that there should be a finding upon the question whether there was a real mortgage or whether the plaint mentioned instrument was a mere sham document. The District Judge should submit a finding upon the above question on the evidence on record.

The finding is to be returned within thirty days from the receipt of this order, and seven days will be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order the District Judge submitted his finding which was to the effect that the instrument sued on was a real mortgage and did not represent a sham transaction.]

This second appeal then coming on for hearing before the same Divisional Bench after the receipt of the above finding, the Court made the following order of reference to the Full Bench :—

ORDER OF REFERENCE TO THE FULL BENCH.—The instrument sued upon being found to be not a mere sham transaction, but a real mortgage, it is necessary to decide the question of limitation. The suit is barred if the plaintiff cannot ask for a decree for sale, but is not barred, if he can. Is he then entitled to claim such relief? According to *Samayya v. Nagalingam*(1) he cannot claim the relief. But a decision to the contrary was arrived in *Linga Reddi v. Sama Rau*(2). Of these views it is difficult to agree with the one

(1) I.L.R., 15 Mad., 174.

(2) I.L.R., 17 Mad., 469 at pp. 471, 472.

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adopted in the former ruling. For that view of the law would sometimes lead to a practically absurd result as where a man grants a usufructuary mortgage of the only item of property he owns, but omits to deliver or fails to secure possession of the property to the mortgagee. In such a case if the mortgagee sues and obtains a decree for the money, it would in reality be useless. For under section 99 of the Transfer of Property Act he cannot cause the property to be sold without getting a decree for sale, and such decree he cannot get according to the view referred to. This very anomalous result could not have been intended by the Legislature. No doubt section 67 of the Transfer of Property Act lays down that a usufructuary mortgagee as such cannot institute a suit for sale. That section, however, evidently contemplates the case of a usufructuary mortgagee in possession and enjoyment of the property mortgaged. It is true that section 68, which refers to the case of a mortgagee who has been denied such possession and enjoyment, whilst giving a right to sue for the money says nothing about his title to an order for sale. That cannot however be held to prohibit by implication such an order being given in his case. The object of the section is to point out in what cases a mortgagee can sue for the mortgage money and not to lay down whether in so suing he can ask for the sale of the mortgaged property. This is manifest from clause (a) of the section since it cannot be argued that in the case referred to therein, viz., where there is a covenant to pay, no order for sale can be claimed because no reference to such an order is to be found in the section. The reason why a usufructuary mortgagee cannot ordinarily sue for the mortgage money of course is that the parties to such a transaction intend that the money ought not to be claimed so long as the mortgagee is in possession of his security. When however that consideration fails through the fault of the mortgagor, it is but just that the mortgagee should have the right to claim not only the money but also as accessory thereto an order for the realization of the money by means of that which undoubtedly was originally intended to secure its payment, though that intention was to be carried out in a different way, i.e., by giving possession of the security. It is impossible to see what claim the mortgagor who is in default can have upon the consideration of the Court, so as to warrant it in declining to grant to the mortgagee, the party wronged, what in certain circumstances would be the only effective remedy, viz., an order for sale.

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The following question is, therefore, referred for the decision of a Full Bench :—

Is a usufructuary mortgagee, to whom the mortgagor fails to deliver or to secure possession of the property mortgaged, entitled to claim in a suit for the money, an order for the sale of such property?

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

Desikachariar for appellants.—It is submitted that the question referred should be answered in the affirmative. [DAVIES, J.—Why did you not sue for possession? Such a suit would not be barred.] The plaintiff elected the other remedy. See section 67 of the Transfer of Property Act. The section presupposes the continuance of the charge under the mortgage. [SHEPARD, J.—You want to sell. Where does the Act give a usufructuary mortgagee the right to sue for sale?] It is the ordinary remedy of a chargeholder, and under section 58 (d) without possession the mortgage is not usufructuary. If the mortgagor does not give possession the mortgage is not a usufructuary mortgage—but of course the mortgage lien subsists. See *Samayya v. Nagalingam*(1). In any view the plaintiff's position is not less than that of a chargeholder. [SHEPARD J.—Your security was right to possession. You have abandoned that.] I have not abandoned the security, but I do not want to be in possession. [DAVIES, J.—You want now a remedy which you could not exercise, if you had taken possession.] I have the option, if I was in possession I could not sell by reason of section 67. [DAVIES, J.—Is it not a usufructuary mortgage under the circumstances?] Possession is necessary for that. [DAVIES, J.—What sort of mortgage is it?] It is a mortgage conferring a lien: however it is classified it is not usufructuary within the definition till possession is given. [DAVIES, J.—What kind of mortgagee are you? you must be simple or usufructuary.] Some mortgages do not come under any of the recognised classes and must be regarded as anomalous; under certain circumstances the plaintiff could not enforce the right of sale, but under the present circumstances he can, see *Linga Reddi v. Sama Rau*(2). When there is a covenant to pay, he could bring property to sale. [SHEPARD, J.—You want to be in the same position as if you had

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an express covenant.] In the case of a usufructuary mortgage with a covenant to pay the mortgagee is in the same position as simple mortgagee. My contention is that as possession was not given to me I am entitled to sue in the same way as if I was a simple mortgagee—See *Umda v. Umrao Begam*(1). *Venkatasami v. Subramanya*(2) and *Chathu v. Kunjan*(3) only apply to cases where possession has been given. I submit the security is not taken away. As long as security remains, there is right to sell, but it is only taken away when the usufructuary mortgagee is in possession.

Ayya Ayyar for respondents: referred to *Hira Lal v. Ghasitu*(4).

Desikachariar in reply: In *Hira Lal v. Ghasitu*(4), the mortgagees were in possession constructively through their tenants.

JUDGMENT.—Assuming that the facts of the case are such as to raise any question under section 68 of the Transfer of Property Act, we are of opinion that the plaintiff is not entitled to institute a suit for sale.

The contention really is that at the option of the mortgagee or in the cases mentioned in section 68, a usufructuary mortgagee is entitled to have his mortgage treated as a simple mortgage. The right to sue for sale is not provided for by the contract between the parties and is not to be found in section 68 without doing violence to the language of the section. In the case of *Linga Reddi v. Sama Rau*(5) the point now raised does not seem to have been decided. There is no hardship in the matter, for the remedy is to sue for possession of the property for which he has bargained. We answer the question in the negative.

[The second appeal coming on again for final hearing after the expression of the above opinion of the Full Bench, it was dismissed with costs.]

(1) I.L.R., 11 All., 367.
(3) I.L.R., 12 Mad., 109.
(5) I.L.R., 17 Mad., 469.

(2) I.L.R., 11 Mad., 88.
(4) I.L.R., 16 All., 318.

(1) I.L.R., 15 Mad., 174, at p. 177.

(2) I.L.R., 17 Mad., 460, at p. 471.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard (Officiating Chief Justice),
Mr. Justice Davies and Mr. Justice Moore.

MANICKA GRAMANI AND ANOTHER (PLAINTIFFS
Nos. 2 AND 3), APPELLANTS,

v.

RAMACHANDRA AYYAR (DEFENDANT), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, s. 10—Order of ejectment—Suit to
set aside such order.

Held (DAVIES, J., *dis.*) that a tenant who has been ejected in pursuance of an
order under Rent Recovery Act (Madras), section 10, cannot maintain a suit to
question the legality of that order.

SECOND APPEALS against the decrees of S. Russell, District Judge
of Chingleput, in Appeal Suits Nos. 355 to 369 of 1896, reversing
the decrees of T. A. Krishnasami Ayyar, District Munsif of
Chingleput, in Original Suits Nos. 82 to 85, and 134 to 144 of
1895, respectively.

The defendant in each of these suits was a shrotriendar and
the plaintiffs were tenants on the estate against whom orders of
ejectment had been made under Rent Recovery Act, section 10.
The suits were brought to have these orders set aside.

The decrees of the District Munsif which were in favour of the
plaintiffs were reversed on appeal by the District Judge who held
that the suits were not maintainable.

The plaintiffs preferred these second appeals.

The second appeals having come on for disposal before
COLLINS, C.J., and SHEPHARD, J., their Lordships made the follow-
ing order of reference to the Full Bench:—

ORDER OF REFERENCE TO THE FULL BENCH.—The question is
one of some importance and difficulty. There are, on the one
hand, cases to the effect that an order under section 10 of the
Rent Recovery Act is not appealable. On the other hand, there
is the decision in *Ragava v. Rajagopal*(1) to the effect that a suit
will not lie.

We refer to the Full Bench the following question, viz.:—

* Second Appeals Nos. 748 to 762 of 1897.

(1) I.L.R., 9 Mad., 89.

Whether the plaintiff who has been ejected in pursuance of an
order passed under section 10 can maintain a suit to question the
legality of that order.

These second appeals then came on for hearing before the Full
Bench constituted as above.

Mr. C. Krishnan for appellants.—The order to eject was made
under section 10 of the Rent Recovery Act. The District Munsif
held the ejectment order to be illegal holding that there was no
default, but the District Judge ruled on the authority of *Ragava v.*
Rajagopal(1) that the suit would not lie. It is submitted that this
ruling is erroneous. See also *Rama v. Tirtasami*(2), *Ramayyar v.*
Vedachalla(3), *Gangaraju v. Kondireddiswami*(4) and *Rangayya*
Appa Rau v. Ratnam(5). It is well established that there is no
appeal, clearly therefore a suit lies. Compare also sections 69 to 73
and section 76. If the Civil Courts cannot enquire into the order
there is no remedy at all. Ejectment orders were first granted
under the Regulation of 1832. [SHEPHARD, J.—We need not go
behind this Act.]

Sundara Ayyar for respondent.—Power of ejectment is ex-
pressly conferred by this Act, and is to be regulated by the special
tribunal provided and there is an appeal under section 69 against an
order of ejectment under section 10. See *Ragava v. Rajagopal*(1).
The right to eject a tenant for failure to accept a patta was never
given to a Civil Court. [MOORE, J.—Here the District Judge
finds there has been an irregular order. You say there is no
remedy?] I say so here—the order of ejectment is a judgment
under section 73, and compare sections 12, 41, 70, 71 and 72 which
show how the judgments are to be executed including judgments
for ejectment under section 10, as well as for reinstatement under
section 12. [DAVIES, J.—It would seem that the collector is the
agent merely, but the ejector is the landlord.] The collector acts
judicially; see what he has to do under section 10, paragraph 2.
[DAVIES, J.—In adjudicating on the patta, not in issuing the
subsequent order. How do you get over section 12 which says
the ejector is the landlord?] [SHEPHARD, J.—See *Rama v.*
Tirtasami(2).] That case is distinguishable. I cannot go to the
collector first and fail and then go to the Civil Court. Section 44

(1) I.L.R., 9 Mad., 89.

(2) I.L.R., 7 Mad., 61.

(3) I.L.R., 14 Mad., 441.

(4) I.L.R., 17 Mad., 106.

(5) I.L.R., 20 Mad., 392.

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provides for a suit by a tenant to challenge an ejectment not under section 10, but under section 41.] [SHEPARD, J.—It assumes the common law right to sue rather than gives it.] It permits of the suit. If no appeal is provided for expressly there is no appeal intended. Where a suit to set aside any of the orders is intended, it is given expressly—*vide* section 32. Compare section 44. Then read sections 73 and 76. [SHEPARD, J.—See section 58.] That section means a suit does not lie. It excludes the powers of the Civil Court in all cases which are not expressly provided for, *e.g.*, by sections 78 and 87. Section 7 has also to be considered. The case of *Gangaraju v. Kondireddiswami*(1) is distinguishable, for the plaintiff sued there as owner denying the tenancy and it is doubtful whether Revenue Courts can decide whether a man is a tenant. The Judges seem to say they do not depend on the decision in *Ragava v. Rajagopal*(2). I rely on *Ragava v. Rajagopal*(2) so far as the Judges there hold that there was no suit possible; but it may be that some of the observations cannot be upheld. The learned Judges who decided *Gangaraju v. Kondireddiswami*(1) seem to misunderstand *Rama v. Tirtasami*(3), though the decision can be supported otherwise. As to *Rangayya Appa Rau v. Ratnam*(4), it is distinguishable for the suit was for rent—a suit allowable under section 87. The only question was whether a particular issue was *res judicata*. [DAVIES, J.—You admit, if the collector acts as agent of the landlord or executive officer, a suit will lie.] Probably it would lie. [DAVIES, J.—He appears throughout to do so.] [SHEPARD, J.—Section 73 implies that judgment and order mean the same thing.] [DAVIES, J.—Section 66 seems to say the contrary.] Sections 41 and 73 are consistent, because the first applies when there is no opposition, the latter when there is. An order under section 41 is appealable under section 43. No suit will lie when a remedy is governed by a particular Act and the mode of enforcement is pointed out. See *Ramachandra v. The Secretary of State*(5), a case under Madras Forest Act, 1882; *Raja Nilmoni Singh Deo Bahadur v. Ram Bandhu Rai*(6), under the Land Acquisition Act, 1870; see also *Bhojunga Thakoor v. Luchmee Nurain Sahre*(7) and *Raj Kishore*

(1) I.L.R., 17 Mad., 100.

(4) I.L.R., 20 Mad., 392.

(6) I.L.R., 7 Cal., 388.

(2) I.L.R., 9 Mad., 39.

(3) I.L.R., 7 Mad., 61.

(5) I.L.R., 12 Mad., 105.

(7) 9 W.R., (O.R.), 80.

Mullick v. Brindabun Chunder Poddar(1), and *Ramayyar v. Vedachalla*(2).

Mr. C. Krishnan in reply.—[SHEPARD, J.—How do you get over section 76?] The word revision refers to proceedings under section 58 or appeals. He referred to the preamble of the Regulation repealed by Act of 1865 and *Kummarasamy Mudaliyar v. Nallakannu Tevan*(3), and he argued that section 69 applied only to summary suits and that the cases relied on by the respondent were distinguishable, and that the acts and the order of the collector in the present case were merely ministerial and not judicial.

SHEPARD, OFFG. C. J.—The question we have to decide is whether a tenant, against whom a judgment has been properly passed by the collector under section 10 of the Rent Recovery Act, can, in a separate suit in a Civil Court, call in question the order of ejectment which under the same section the collector has passed on proof of the tenant's failure to obey the judgment.

In the case of *Ragava v. Rajagopal*(4) it was decided by a Divisional Bench that such a suit would not lie. Doubt has been thrown on that decision in recent cases and we have accordingly to consider whether the decision was right. Section 10 of the Rent Recovery Act gives the collector jurisdiction to decide with regard to the propriety of any patta which the tenant to whom it has been tendered has refused to accept. The collector has to say whether the patta tendered was a proper one, and if he holds that it was not, he has to decide in what respects it should be modified. By way of giving effect to the judgment of the collector the section further empowers him on proof of default by the tenant to pass an order for ejecting him. It has been held with regard to this section that the jurisdiction exercised by the collector under it can likewise be exercised by a Civil Court, except that it is not competent to the latter to amend the patta tendered and direct the acceptance of the patta so amended (*Ramayyar v. Vedachalla*(2)). It has also been held that the judgment given by the collector under the section with reference to the patta of one fasli does not conclude the parties when in a Civil Court a dispute arises between them as to the patta for

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(1) 15 W.R., (C.R.), 119.

(3) 5 M.H.C.R., 289 at p. 293.

(2) I.L.R., 14 Mad., 441.

(4) I.L.R., 9 Mad., 39.

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another fasli (*Rama v. Tirtasami*(1)). The contention of the plaintiff in the present case is not supported by either of these decisions, because here what the plaintiff desires is to undo the act which an official, properly empowered in that behalf, has caused to be done to his prejudice.

The Legislature having authorised the collector to give a judgment and to give effect to that judgment in a certain way, we are asked to say that a Civil Court may set aside the collector's order in execution and deprive the landlord of the practical result of the judgment in his favour. This appears to me a strange proposition. It is not suggested that the judgment itself can, so far as the particular fasli is concerned, be questioned in the suit which, if no summary suit had been brought, might have been instituted in a Civil Court. Against the judgment of the collector, there is clearly a right of appeal to the District Court under section 69 of the Act. But it is argued that, as no such right of appeal is given against the collector's order of ejectment, it must be intended that this order should be examinable in a Civil Court. It is by no means clear to my mind that the judgment mentioned in section 69 does not include the order mentioned in section 10. It would seem from other sections of the Act that the word is not used in the limited sense which in recent times it has come to bear. But however this may be, I think we should be defeating the object of the Legislature if we held that the tenant affected by an order passed under section 10 could obtain the reversal of that order in a Civil Court. If that had been the intention of the Legislature, one would have expected special provision to be made for it as there is in sections 32 and 44 of the Act. The language used in section 76 is somewhat ambiguous; but I am strongly inclined to think that section indicates the intention of the Legislature to make the judgment and order of the Collector final except in the cases specially provided for.

For these reasons, I think the decision in *Ragava v. Rajagopal*(2) ought to be followed. In my opinion, it is not inconsistent with *Rama v. Tirtasami*(1).

The facts in the more recent case, *Gangaraju v. Kondireddiswami*(3), are materially different from those of the present case, for the plaintiff claimed there to be owner and did not admit that

(1) I.L.R., 7 Mad., 61.

(2) I.L.R., 9 Mad., 39.

(3) I.L.R., 17 Mad., 106.

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he had ever held as tenant of the defendant by whom he had been ejected. There was, therefore, a question of title raised in the civil suit, whereas here there is no such question. For these reasons, I answer the question in the negative.

DAVIES, J.—The question referred to us is whether a plaintiff who has been ejected in pursuance of an order passed under section 10 of the Rent Recovery Act—Madras Act VIII of 1865—can maintain a suit to question the legality of that order. I think the ruling in *Gangaraju v. Kondireddiswami*(1) that such a suit does lie is correct and should be followed. A suit for ejectment is one on title, and title can only be tried incidentally by the Revenue Courts as held in *Rama v. Tirtasami*(2), and approved of in *Gangaraju v. Kondireddiswami*(1). It is pointed out by the learned Judges who tried the latter case that the above point was not observed by the Judges who tried *Ragava v. Rajagopal*(3). Moreover, the fact is that, according to a uniform course of decisions, no appeal lies against the summary order of ejectment passed under section 10. Appeals lie only when there has been an ejectment by the collector in a summary suit under the Act (see *Kummarasamy Mudaliyar v. Nallakannu Tevan*(4)). It would seem to follow that a suit being the only remedy, a suit should be allowed. It is contended that section 76 of the Act bars a suit; but the High Court has never yet read it in that light, or it could not have allowed the many suits that it has allowed. The section reads that “in proceedings under this Act no judgment of a collector, and no order passed by him after decree and relating to “execution thereof, shall be open to revision otherwise than by “appeal to the Zillah Court, except as allowed in section 58.” From the reference to section 58 which provides for revision of certain of his own orders by the collector, it seems to me clear that the prohibition against revision in the section applies only to revision by the collector himself. If it had been intended that no suit should lie against any judgment or order of the collector, express words to that effect would have been enacted.

Another reason that I would give for holding that a suit is maintainable is that an order for ejectment passed under section 10 is, in my opinion, an order passed by the collector not in his

(1) I.L.R., 17 Mad., 106.

(3) I.L.R., 9 Mad., 39.

(2) I.L.R., 7 Mad., 61.

(4) 5 M.H.C.R., 289 at p. 293.

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judicial, but in his executive or ministerial capacity as the instrument or agent of the landholder. It is just in this way that the collector acts in the other case where he issues an order of ejectment under section 41, and also in several other instances mentioned in the Act. Section 12 confirms this view, as it treats the ejectment under section 10 as well as that under section 41 as an ejectment made by the landholder. But it is not worth while to discuss the question further as the present Act is happily moribund and our ruling in the present case will not be required for future guidance. So far as the present case is concerned, I would answer the question referred to us in the affirmative.

MOORE, J.—The question referred to the Full Bench for decision is the following:—“Whether the plaintiff who has been ejected in pursuance of an order passed under section 10 (Act VIII of 1865, Madras) can maintain a suit to question the legality of that order.”

The Madras cases referred to at the hearing are the following:—*Kummarasamy Mudaliyar v. Nallakannu Teran*(1), *Rama v. Tirtasami*(2), *Ragava v. Rajagopal*(3), *Ramayyar v. Veduchalla*(4), *Gangaraju v. Kondireddiswami*(5) and *Rangayya Appa Rau v. Ratnam*(6). It does not appear to me to be necessary to refer to the cases from other Presidencies to which allusion has been made, as it cannot be held that they have any bearing on the question under consideration.

The decision in *Kummarasamy Mudaliyar v. Nallakannu Teran*(1) throws no light on the present case as it relates to certain proceedings taken by the Civil and Revenue Courts in connection with warrants issued under section 41 of Act VIII of 1865, Madras. The point decided in *Rama v. Tirtasami*(2) was that a decision in a Revenue Court directing a tenant to accept a patta for one fasli did not bar a suit before a Civil Court in a subsequent year to determine if the rates mentioned in the patta were proper. This ruling does not affect the present case. The question at issue in *Ramayyar v. Veduchalla*(4) was as to whether a Civil Court could entertain a suit to enforce acceptance of patta and execution of muchalka. With this question we are not now concerned.

(1) 5 M.H.C.R., 289 at p. 293.

(3) I.L.R., 9 Mad., 39.

(5) I.L.R., 17 Mad., 106.

(2) I.L.R., 7 Mad., 61.

(4) I.L.R., 14 Mad., 441.

(6) I.L.R., 20 Mad., 392.

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What was held in *Gangaraju v. Kondireddiswami*(1) was to the effect that a decision of a Revenue Court that a party was bound to accept a patta for certain land was no bar to a suit subsequently brought by him in a Civil Court to declare that he was the actual owner of the land. This is not the question now at issue. In *Rangayya Appa Rau v. Ratnam*(2), it appeared that in a suit before a Revenue Court it was decided that a patta was a proper one and it was held that this decision did not render the question of the propriety of the patta *res judicata* in a subsequent suit in a Civil Court. With this question we are not now concerned.

Ragava v. Rajagopal(3) remains for consideration. There, the High Court decided that a Revenue Court having ordered a tenant to be ejected under section 10 of Act VIII of 1865, on the ground that he had refused to accept a patta, as directed by the Court, a suit would not lie in a Civil Court to set aside the order of the Revenue Court. This decision has never been overruled. *Gangaraju v. Kondireddiswami*(1), which the District Munsif was of opinion overruled *Ragava v. Rajagopal*(3), decides, as has already been pointed out, a completely different question. It is clear that if the ruling in *Ragava v. Rajagopal*(3) is to be followed, the answer to the question referred must be in the negative, although it should be pointed out that in that decision Mr. Justice Parker observes that it may be that a suit would lie to set aside an ejectment irregularly obtained and that in the present case the finding of the District Judge is that the proceedings in ejectment were most irregular.

I am of opinion that the question referred must be answered in the negative but for reasons different from those given in *Ragava v. Rajagopal*(3). The order now under consideration is an order of ejectment issued by a Revenue officer under the last clause of section 10 in execution of the decree in a judgment passed by him. Section 76 of the Act clearly provides that no order passed by a collector after decree relating to execution thereof shall be open to revision otherwise than by appeal to the Zillah (District) Court, except in a case which does not now arise. A good deal has been said at the hearing as to the meaning of the word “revision” in this section. It appears to me that this word is here used in the widest possible sense, and that the meaning of this sentence is that

(1) I.L.R., 17 Mad., 106.

(2) I.L.R., 20 Mad., 392.

(3) I.L.R., 9 Mad., 39.

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no order of a collector in execution was to be set aside or interfered with in any way except by an appeal to the District Judge. There do not appear to me to be any grounds for supposing that by the word "revision" here the Legislature meant "revision" as provided for in Chapter XLVI of the Civil Procedure Code.

It has been stated here at the hearing of this reference that it has always been held that there is no appeal from an order passed under the last clause of section 10. It is, however, admitted that there is no reported decision of the High Court to that effect. It is in my opinion clear that Legislature intended that there should be such an appeal. I cannot possibly hold that the meaning of section 76 is that an order of a collector passed in execution of a decree of his Court cannot be set aside except by an appeal to the District Judge, but that no such appeal is to be entertained. No reference to this section is made by the Judges in *Ragava v. Rajagopal*(1).

The view, therefore, that I take is that an order of a collector ejecting a tenant under section 10 is open to appeal to the District Judge, but that in view of the provisions of section 76 of the Act it cannot be set aside otherwise, and I would accordingly answer this reference in the negative.

ORIGINAL CIVIL.

Before Mr. Justice Boddam.

HAJI MAHOMED ABDUL AZIZ BADSHA
SAHIB AND OTHERS (PLAINTIFFS),

v.

SUBBA NAIDU (DEFENDANT).*

*Civil Procedure Code—Act XIV of 1882, ss. 59, 140—High Court Rules,
Nos 39, 43, 44, and 47.*

A defendant is entitled, under the High Court Rules, to be furnished with a copy of documents sued on, which are deposited with the plaintiff.

APPLICATION on behalf of the defendant in Original Suit No. 238 of 1897 to be furnished with a copy of an agreement, dated the 30th

(1) I.L.R., 9 Mad., 39.

* Civil Suit No. 238 of 1897.

of January 1895, which was filed with the plaint as being one of the documents sued on. The Deputy Registrar, Original Side, to whom the application was first made, referred the question to the Judge.

The High Court Rules (original civil jurisdiction) referred to in the judgment are as follow :—

"39. When an original document is produced by the plaintiff "under section 59 of the Code of Civil Procedure, the same shall be "marked for identification by the record-keeper, and if, in lieu of "the original, a copy thereof is filed with the plaint, the same shall, "before return of the original, be compared therewith by one of "the examiners who shall attest the copy if it be found correct.

"43. The list of documents prescribed by section 140 of the "Code of Civil Procedure shall be in Form No. 7 and shall be "delivered to the Registrar, together with the documents therein "mentioned at or before the first hearing, or within such further "period as may be allowed by the Court.

"44. Copies of documents annexed to a plaint as exhibits may be "furnished to a defendant at any time after the summons to appear "has been served upon him.

"47. Until documents produced with a plaint, but not men- "tioned therein or annexed thereto as exhibits, have been offered "and received in evidence, inspection thereof cannot be allowed or "copies thereof furnished to a defendant, without an order to be "obtained under the following rules."

Messrs. *Branson & Branson* for plaintiffs.

Messrs. *Barclay, Morgan & Orr* for defendant.

JUDGMENT.—Section 59 of the Civil Procedure Code contem- plates the production and deposit with the plaint of documents sued on, and which therefore form part of the plaint. They have to be marked under rule No. 39 of the High Court Rules and should be considered as "annexed thereto as exhibits" within rule No. 47 of the High Court Rules and may be furnished to a defendant under rule No. 44, High Court Rules. Rules Nos. 43 and 47 are intended to apply to documents deposited under section 140, Civil Procedure Code, and inspection of these should not be allowed until they are offered and received in evidence. Let the defendant have a copy of the document in question.

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ORIGINAL CIVIL.

*Before Mr. Justice Shephard.*IN THE MATTER OF THE GOODS, CHATTELS, CREDITS OF
SLADEN (DECEASED).*1898.
January 10.*Evidence Act—Act I of 1872, s. 85—Power of attorney—Declaration before notary public in proof of power of attorney.*

On an application for letters of administration with the will annexed, made by the attorney of the executors therein named, it appeared that the applicant's power of attorney was not executed in the presence of a notary public; but, with regard to the execution by each of the executors, one of the attesting witnesses had made a declaration before a notary public to the effect that he witnessed the execution of the power of attorney by one of the executors, and that the signature of the other attesting witness was the proper signature of the person bearing that name, and each declaration was signed, sealed and certified by a notary public:

Held, that the power of attorney was sufficiently proved.

PETITION for letters of administration to the estate and effects of Joseph Banks Sladen (deceased) within the jurisdiction of the High Court with his will and codicil annexed, as set forth in an exemplification of probate issued out of and under the seal of the High Court of Justice in England, to be granted to the petitioner as one of the duly constituted attorneys of the executrix and executors named in the last will and testament of the said Joseph Banks Sladen (deceased) until the said executrix or executors or one of them should obtain probate or letters of administration granted to herself or himself.

The petition set out that the said Joseph Banks Sladen had died in the State of Florida in the United States of America on or about the 14th March 1897, having made his last will and testament, bearing date the 29th day of April 1885, and by the said will appointed his wife Elizabeth Sladen and John Ramsay Sladen and Alfred Thompson Crawshay executrix and executors thereof; that on the 21st day of July 1897 probate of the said will was duly granted by the High Court of Justice in England to the said executrix and executors named in the said will as appeared by an exemplification of such probate annexed to the petition. After a statement of the property and effects of the testator

within the jurisdiction of the High Court, the petition proceeded to state:—

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"That by a deed, poll or power of attorney under the hand and seal of the said Elizabeth Sladen, John Ramsay Sladen and Alfred Thompson Crawshay respectively, and bearing date the 23rd day of July 1897, the said Elizabeth Sladen, John Ramsay Sladen and Alfred Thompson Crawshay respectively did thereby nominate, constitute and appoint Patrick Macfadyen, Reginald James Hugh Arbuthnot, Charles Edward Patrick Vans Agnew, John Montgomery Young and your petitioner respectively therein described as all of Madras (India) jointly and severally to be their lawful attorneys or attorney for the purpose of obtaining from the proper Court or Courts, office or offices, in India, letters of administration with copy of the said will and codicil annexed of all and singular the personal estate and effects of the said Joseph Banks Sladen deceased there situate or recoverable, or otherwise to procure themselves or himself to be constituted either as the attorneys or attorney of the said Elizabeth Sladen, John Ramsay Sladen and Alfred Thompson Crawshay or otherwise the administrators or administrator of the said property or the legal representatives or legal representative of the said testator in India; and to do all acts which should be necessary in the performance of the premises, but for greater certainty as to the contents of the said deed, poll or power of attorney, your petitioner craves leave to refer to the same hereunto annexed and marked with the letter B."

The power of attorney was not executed in the presence of a notary public, but it was sought to prove it by the declarations of attesting witnesses referred to in the judgment. The question raised was whether the power of attorney was sufficiently proved.

Messrs. Barclay, Morgan & Orr for petitioner.

JUDGMENT.—A question has been raised as to the proof of the execution of the power of attorney under which the petitioner in this matter seeks to act. The power of attorney does not purport to have been executed in the presence of a notary public or any other of the persons designated in section 85 of the Evidence Act; but with regard to the execution by each of the three executors, one of the attesting witnesses has made a declaration before a notary public to the effect that he witnessed the execution of the power of attorney by one of the executors, and

* Testamentary Petition No. 133 of 1897.

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that the signature of the other attesting witness is the proper signature of the person bearing that name. To each declaration is appended a certificate signed and sealed by the notary public. In similar circumstances it has been held in Calcutta that, inasmuch as the execution is not proved in the manner indicated in section 85 of the Evidence Act, the application for letters of administration ought to be refused (*In the Goods of A. J. Primrose*(1). In arriving at this decision, Mr. Justice Norris seems to have assumed that the provision contained in section 85 is of an exhaustive character and that no other mode of proving the execution of a power of attorney is admissible. That assumption, however, is, in my opinion, not warranted by the language of the section, nor can it have been intended to exclude other legal modes of proving the fact in question, viz., the execution of the power of attorney. I cannot see why the fact should not be proved by an affidavit made before a person competent to administer an oath. The Evidence Act is expressly declared not to apply to affidavits. Seeing that the declarations are made in the form prescribed by the Statute of 1835 and before officials competent to administer an oath, I am of opinion that they ought to be received as evidence of the facts therein stated. I am told that it has been the practice here, as apparently it was in Calcutta, to receive such declarations, and I cannot say that the practice is erroneous.

APPELLATE CIVIL.

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

RATNAM AYYAR (PETITIONER), APPELLANT,

v.

KRISHNA DOSS VITAL DOSS (COUNTER-PETITIONER),
RESPONDENT.*

Limitation Act—Act XV of 1877, ss. 7, 13, sched. II, art. 165—Dispossession in execution—Application on behalf of a minor.

Limitation Act, 1877, schedule II, article 165, is applicable to a case where the applicant is a party to the decree which is being executed as well as when he is a stranger.

(1) I.L.R., 16 Calc., 776.

* Appeal against Appellate Order No. 46 of 1897.

But an application made on behalf of a minor objecting to dispossession more than thirty days after it took place is not barred by limitation by reason of Limitation Act, 1877, section 7.

APPEAL against the order of L. C. Miller, Acting District Judge of Trichinopoly, in Civil Miscellaneous Appeal No. 34 of 1895, affirming the order of S. A. Krishna Rau, District Munsif of Kulitalai, in Miscellaneous Petition No. 887 of 1895.

A decree was passed for the division of certain lands held in common by the plaintiff and defendants and for the delivery to the plaintiff of his share. The measurement of the lands took place in May 1895, and a portion was delivered to the plaintiff on the 8th. The present application was presented on behalf of one of the minor defendants objecting that he had been improperly dispossessed of part of the land which had been delivered to the plaintiff. The application was made after the expiry of thirty days from the date of dispossession, and on this ground the District Munsif dismissed the application as being barred by limitation, and his order was upheld on the same grounds by the District Judge.

The petitioner preferred this appeal.

Seshagiri Ayyar for appellant.

Pattabhīrama Ayyar for respondent.

JUDGMENT.—The respondent obtained against the appellant and others a decree for the division of some lands held in common by the parties to the suit and for the delivery of the respondent's share thereof. In execution of the decree some lands were delivered to the respondent. The appellant presented an application objecting to the delivery of certain of the parcels and complaining that he was dispossessed of them improperly. Both the Lower Courts dismissed the application on the ground that it was barred by limitation. There can be no doubt as held by the Lower Appellate Court that article 165, schedule II, Indian Limitation Act, is applicable to a case where the applicant is a party bound by the decree as well as where he is a stranger (see *Vythilinga Mupanar v. Sithalakshmi Ammal*(1), and that article therefore is the one by which the present case is governed. But though the application here was presented after the expiry of thirty days from the date of dispossession prescribed by that article, yet it is clear that the application was in time, inasmuch as the applicant

(1) Appeal against Appellate Order No. 25 of 1889 (unreported).

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was, when the right to apply accrued to him as well as on the date of the application, a minor; for unquestionably the case falls within section 7 of the Limitation Act (XV of 1877). The respondent's pleader laid much stress on the Full Bench decision in *Rama v. Venkatesa*(1). There it was held that property or right in section 19 of the Limitation Act did not include such a right as that which entitles a party to a suit or proceeding to make certain applications in the course of such suit or proceeding. It is, however, difficult to see how this decision affects the present case. Now section 7, by its very terms, applies to all applications for which a period of limitation is prescribed in the second schedule to the Act, and the application in question is of course one for which the schedule does prescribe a period. It is scarcely necessary to say that the appellant's application is not, as was assumed by the respondent's pleader in the argument, an application for execution of a decree, but one which relates to a question arising in execution between parties to the suit. Moreover, even if it were possible to treat the application in question as one for execution of a decree, it could not be held that section 7 would be inapplicable to such an application; for *Anantharama Ayyan v. Karuppanan Kalingerayen*(2) is a direct authority for the proposition that applications for execution of decrees come within section 7. The Lower Courts were therefore in error in holding that the appellant's application was time-barred. We set aside the orders of the Lower Courts and direct that the application be restored to the file and be disposed of according to law.

The costs in this Court and in the Lower Appellate Court will abide and follow the result.

(1) I.L.R., 5 Mad., 171.

(2) I.L.R., 4 Mad., 119.

APPELLATE CIVIL.

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

SUBBARAYAR AND OTHERS (PLAINTIFFS) APPELLANTS,

v.

SUBBAMMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu law—Adoption, giving and taking—Datta homam.

A Brahman took a boy in adoption, but died before the ceremony of datta homam was performed. This ceremony was performed after the death of the adoptive father by his widow:

Held, that the adoption was valid.

APPEAL against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Original Suit No. 28 of 1896.

The plaintiffs were the sons of the fourth defendant, who was the son of the paternal uncle of one Kuppayyar deceased. Subbammal, the first defendant, was the widow of the deceased: the second defendant was his alleged adoptive son and the third defendant was his mother. The plaint alleged that Kuppayyar died on the 27th February 1896 intestate without issue. It also contained the following averments:—

"That just a few hours before Kuppayyar's death, the first defendant, her father Venkatadasappayya, the third defendant Venka-lakshmi, sister of Venkatadasappayya and mother of the deceased and other relations of Venkatadasappayya brought into existence fraudulently a document purporting to be a will wherein the second defendant, his son, is alleged to have been adopted by the deceased, and whereby the bulk of properties of the latter are purported to be given away to him.

"That the allegation in the said document that the second defendant Venkataramayyar, brother of the first defendant, was taken in adoption by the deceased three years previously is altogether false and fraudulent and that the alleged adoption, even if supposed to have taken place, is not valid, the legal requirements not being complied with. And the gift of the properties to the second defendant, as being the adopted son of the donor, is invalid in law."

* Appeal No. 131 of 1897.

1898.
March 16, 17,
18.

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The plaintiffs prayed for a declaration that the will set up, bearing date the 26th of February 1896, was not executed by the deceased, and that the gift thereunder to defendant No. 2 was of no effect, and that the alleged adoption never, in fact, took place, and that if it did was invalid in law. The written statement put in by the first defendant on her own account and, as guardian *ad litem* of defendant No. 2, contained, *inter alia*, the following averments:—

“As the late Kuppayyar was issueless, he asked his father-in-law Venkatadasappayya to give away his third son Venkataramayyar to him, to be brought up by him, and to be formally adopted subsequently when his upanayanam was to be performed. The said Venkatadasappayya accordingly gave away the boy to the deceased more than three and a half years ago; and the boy was nurtured, brought up, and educated with the family of the deceased, and treated by him as son and with extreme affection.

“Apprehensive of death, the deceased made a will on the 26th February 1896, when he was fully conscious and while he was in a fit state of mind and in full possession of mental powers whereby he made a gift of all his properties to Venkataramayyar the second defendant, whom he designated as his brother-in-law, and whom he treated as adopted son, and who was the object of his bounty, and providing also that his widow should perform upanayanam, &c., on the boy. The will so made is perfectly valid in law, and the minor, second defendant, is validly entitled to take the properties bequeathed to him under the will aforesaid as the *persona designata*.

“Early on the morning of the 27th February 1896, the testator despairing of recovery, formally requested Venkatadasappayya to hand over the second defendant to him in adoption, and the gift of the boy was duly made to and accepted by the deceased and the first defendant. The deceased further directed the first defendant, his widow, to have datta homam performed, when the boy's upanayanam was to take place. First defendant has ever been perfectly willing and ready to carry out the direction of her deceased husband and would have completed it ere long, but for malicious and fraudulent obstruction caused by plaintiffs and the fourth defendant as will hereafter be mentioned.

“Defendant begs to submit that the adoption made on the 27th February, in the manner stated, is valid in law, and is enough to

“confer the status of adopted son on the second defendant. SUBBARAYAN
“Plaintiffs have no manner of right to question the disposition v.
“under the will or the status of the minor, second defendant. SUBBAMMAL.

“Defendant, therefore, begs to submit that the minor was intended by the testator to take, and he is entitled to take, under the will as *persona designata*, independently of adoption by reason of his having been treated and brought up as son by the testator; that the adoption of the second defendant formally made with the legal accompaniments of gift and acceptance on the morning of the 27th February is valid in law without more; that the formal adoption so made with a direction to the first defendant to perform the datta homam at the time of upanayanam is valid in law; that in any event, the plaintiffs have no cause of action to sue and are not entitled to impugn the will assented to and acquiesced in by their father, fourth defendant, under whom alone they claim in law.”

The first issue raised the question whether the plaintiffs were entitled to sue. The second related to the fact of the will and the third, fourth and fifth issues were as follows:—

“(3) Whether the document, if properly executed, confers any, and if so, what interest on second defendant?

“(4) Whether there was a gift and acceptance of second defendant on 27th February 1896 as alleged in paragraph 50 of the written statement, and whether such an act alone would constitute a valid adoption?

“(5) Whether first defendant was directed by the late Kuppayyar to perform datta homam by the upanayanam of second defendant and whether such a direction has any legal effect?”

As to the first issue the District Judge said that he was disposed to hold that the interest of the plaintiffs was too remote to enable them to maintain the suit. As to the second issue he held that the will was duly executed by the testator without any undue influence or fraud being used. As to the third issue he held that the second defendant had title under the will whether or not the adoption was valid. On the fourth issue his finding was “that there was a giving and taking on 26th February 1896, and that this ceremony was not invalid.”

Upon the fifth issue his finding was as follows:—“I find that deceased did authorize his wife to perform datta homam and that such authorization is valid. I regard the will as an authority to

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In the result the District Judge dismissed the suit.

The plaintiffs proffered this appeal.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar), Pattabhirama Ayyar, K. Narayana Rau and Tiruvenkatachariar for appellants.

Mr. E. Norton, Sadagopachariar and Kasturiranga Ayyangar for respondents.

JUDGMENT.—The principal questions raised in this case are, first, whether the will (exhibit I) was executed by the deceased Kuppayyar when he was of sound mind; secondly, whether the second defendant was the validly adopted son of Kuppayyar; and thirdly, if the second defendant was not validly adopted, whether he is nevertheless entitled to take the property under the will as the *persona designata*.

The District Judge has found the first question in favour of the defence, and we have no doubt that that finding is correct. That the will was executed by Kuppayyar is really beyond dispute. It is sufficient on this point to refer to the Sub-Registrar's evidence, before whom the testator Kuppayyar admitted the execution, and the fact that the fourth defendant, the nearest reversioner and father of the plaintiffs himself has attested the execution by Kuppayyar. As to the state of mind of the testator at the time of his execution of the will, it is quite true that he was then "*in extremis*," so that it lies on the party propounding the will to make out by clear and satisfactory evidence that the testator was in a fit and proper state of mind to understand and appreciate what he was doing. This has, in our opinion, been most satisfactorily established by the evidence called on behalf of the defence. There is first the evidence of the writer of the will (whom there is no ground whatever for discrediting) which shows that it was on the testator's own instructions that he drafted the will, and that those instructions were given spontaneously. Then there is the evidence of the two village officers—maniem and karnam—equally satisfactory witnesses,

which proves that the testator was fully aware of what he was doing when he signed the will, and their present evidence is corroborated by the statements made by them contemporaneously before the Sub-Registrar. The evidence of this latter officer is to our mind conclusive on the point. He questioned the testator regarding the will and satisfied himself by his own observation as well as by the evidence of the village officers whom he examined in accordance with a rule of the registration department, that the testator was in the full possession of his senses. We consider the attempt made to impute corrupt conduct to the Sub-Registrar was entirely without foundation and altogether unjustifiable. Exhibit I that was put forward to suggest that he had received an illegal gratification in the matter of the registration is a patent concoction. It bears a date corresponding with the 27th February, the day on which the document was presented, and accepted for registration, and the statement therein made that the Sub-Registrar had then been postponing return of the document from day to day is intrinsic evidence of its fabricated character. All the above direct evidence in favour of the testator's state of mind is confirmed by the fact that the testator signed his name a number of times in the schedule to exhibit I in the presence of the Sub-Registrar; and those signatures are all natural and in their appropriate places indicating that the testator was in the possession of his faculties. It is scarcely necessary to add that the fourth defendant would not have attested the document, which cut off the reversionary right of himself and his sons, unless he was fully convinced that the testator was in his proper senses. The evidence of the plaintiff's seventh, eighth and fifteenth witnesses to which our attention was specially drawn does not meet the evidence for the defence to which we have referred. It is vague and inconclusive even if true, but in our opinion it is entirely untrustworthy. Turning to the provisions of the will they are simple and required no great effort of the mind to grasp—in effect the terms amount to nothing more than that the second defendant should take the whole property, protect the two remaining members of the family and maintain the charities. We have, therefore, no hesitation in deciding the first point against the plaintiffs.

Passing next to the question of adoption, we are unable to agree with the District Judge that the giving and taking said to have taken place on the morning of the 27th February 1896 before

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the testator's death is true. If there had been such a giving and taking, reference must have been made to the fact in the subsequent documents (exhibits D, C and B) where the question of the adoption was the prominent one. On the other hand, the adoption referred to in those documents was one made three years before Kuppaiyyar's death. We must, therefore, reject the case of a gift and acceptance on the 27th of February 1896. Nevertheless, we are satisfied that the second defendant was validly adopted. It appears from the will itself that the second defendant had been treated as the adopted son for three years during which time he had resided not with his natural family, but with the deceased, and exhibit D shows what was done at the time the second defendant left his natural father. It contains a statement of the widow and the mother of deceased, certified to by the natural father and by half a dozen independent persons that there was a "vacchadatta," that is, a gift and acceptance of second defendant, but unaccompanied with the performance of datta homam which was to be performed at his upanayanam or thread ceremony. This statement was taken in reference to a complaint made by the fourth defendant to the head of the mutt, to which the parties were subject, and was made in the presence of the fourth defendant who, so far as the evidence goes, has never contradicted it until he was examined as a witness in this case. That statement too receives corroboration from the recitals in the will, the probabilities and other evidence in the case. And as the datta homam involving, of course, a formal gift and acceptance has since been performed, the adoption of the second defendant is now complete and valid. It is true that the will makes no reference in terms to the performance of datta homam by the widow. But in the circumstances of the case the direction in the will that she should cause the second defendant's upanayanam to be performed most clearly implied that the datta homam should precede the upanayanam, so that the latter ceremony was that of an adopted son, the testator having regarded the second defendant as such son. The case is within the principle of *Venkata v. Subhadra* (1). There it was the giver in adoption who had died before the datta homam and here it is the acceptor who had died; and this difference does not affect the principle. Though no express issue was framed as to the factum of gift and acceptance three years before

(1) I.L.R., 7 Mad., 548.

testator's death, the question was distinctly raised in the pleadings and was present to the minds of the parties at the trial and evidence was adduced thereon. Having arrived at this conclusion in favour of the adoption, it is unnecessary to express any opinion on the question of *persona designata* assuming that there was no adoption. The decree of the Lower Court is confirmed and this appeal dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

FOULKES (DEFENDANT), APPELLANT,

v.

MUTHUSAMI GOUNDAN (PLAINTIFF), RESPONDENT.*

1896.
August 19,
28.

Rent Recovery Act (Madras)—Act VIII of 1865, s. 11—Reduction of assessment in patta of 1840—Construction of patta prescribing rent to be paid permanently by tenant.

In 1840 a mittadar granted to a tenant a patta for certain land in which the tenant had already a heritable estate, fixing the rent at the reduced rate Rs. 40. The document provided "this sum of Rs. 40 you are to pay perpetually every year per kistbandi in the mitta catcheri." It appeared that the rent fixed was less than what was payable upon the lands previous to the date of the patta and also less than that payable upon neighbouring lands of similar quality and description:

Held (1) that the facts of the case were distinguishable from those of *Rajaram v. Narasinga* (I.L.R., 15 Mad., 199), and that the patta fixing the rent was binding upon the representatives in title of the grantor and the grantee, respectively;

(2) that the reduction in the rate of rent was not invalidated by Rent Recovery Act, 1865, section 11.

SECOND APPEAL against the decree of K. Ramachandra Ayyar, Acting Subordinate Judge of Salem, in Appeal Suit No. 91 of 1895, reversing the decree of J. Solomon Gnaniyar Nadar, Acting District Munsif of Salem, in Original Suit No. 790 of 1893.

The plaintiff who was a tenant in the defendant's mitta sued for a declaration that the patta tendered to him for Fasli 1302 was improper and that the patta fixing the rent permanently, issued to his predecessor in title in 1840 by the predecessor in title of

* Second Appeal No. 1060 of 1897.

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defendant, was binding on the defendant. The District Munsif held that the patta of 1840 did not enure beyond the lifetime of the grantee and consequently that the plaintiff had no rights under it and he dismissed the suit. The document in question was filed as exhibit A and it was, omitting parcels, in the following terms:—

“Patta of Narahari Ayyar of Velagapudi Ponnammampet. Pattayam of the assessment or rent of the lands given to Narahari Ayyar of Velagapudi, a raiyat of Mouzah Ammapet village, attached to the Salem mitta, by George Frederick Fischer, Esquire, Zamindar of Salem mitta, as follows:—‘The lands cultivated by you in the above village are :’
“Total sum for the nanja and punja together is Rs. 108-14-3;
“balance after deducting Rs. 5-13-10 for *sugavasi*, the remainder is Rs. 103-0-5; cowle therefor is Rs. 40; you should pay every year this sum of forty rupees for cowle tenure, permanently according to the kistbandi, in the mitta office and should get the receipt.”

The Subordinate Judge was of opinion that this instrument was binding on the defendant and consequently that the patta tendered to the plaintiff for Fasli 1302 was an improper patta, and he made a declaration accordingly. The Subordinate Judge said:—

“In *Rajaram v. Narasinga*(1), *Tulshi Pershad Singh v. Ram-narain Singh*(2), and *Bilasmoni Dasi v. Raja Sheopersad Singh*(3), the documents which the Courts had to construe were in the nature of leases creating a new tenancy; and it was held that the words used did not *per se* convey a hereditary estate. In the present case the estate is hereditary—*i.e.*, occupancy right is the tenant’s, the zamindar being entitled only to rent.

“Whether the reduction of the rent to less than the faisal rates by one zamindar would bind the succeeding zamindar, is the real point for consideration. In solving this question we are to be guided by section 11 of Act VIII of 1865 (Madras). The plaintiff’s father who granted exhibit A reduced the faisal rents for a proper and legal consideration, to wit—valuable services rendered to the zamindari by the grantee’s father Sambayyan (senior). Defendant distinctly admits the circumstance. Further, defendant’s father died in about 1867, and defendant has been

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“continuing to respect the terms of exhibit A. In 1884 her attempt to ignore the same by trying to enforce a patta with the faisal rates was disallowed by the dismissal of her suit. From her conduct, therefore, the Court has to hold she has become debarred from calling into question rates of rent which have been prevailing for over fifty years irrespective of who is the tenant, who is in enjoyment—whether the grantee’s family or the alienee of the family. Whether plaintiff’s successor will or will not be bound to respect the cowle, it is not now necessary to determine. All contracts of rent have to be enforced except in the excepted circumstances specified in the Rent Law.”

The defendant preferred this second appeal.

Pattabhirama Ayyar for appellant.

R. Subramania Ayyar for respondent.

SUBRAMANIA AYYAR, J.—The first question for determination is whether under exhibit A, the patta, dated the 16th November 1841, granted by the appellant’s father, the late Mr. George Frederick Fischer, the then owner of the Salem mitta, to the late Narahari Ayyar, a raiyat that held certain lands in the mitta, which are now in the possession of the respondent claiming through Narahari Ayyar’s son Ramakrishnayyan, the annual assessment in respect of those lands, fixed at Rs. 40, instead of Rs. 103-0-5 payable till that time, was fixed in perpetuity. After setting forth certain details immaterial for our present purpose, the patta concludes thus—“The remainder is Rs. 103-0-5. Cowle therefor is Rs. 40; this sum of forty rupees you shall pay perpetually (saswathamayi is the vernacular word) every year as per kist in the mitta catcheri and obtain receipt.” The learned Vakil for the appellant, in support of his argument that the patta should not be construed as fixing the assessment at Rs. 40 for ever, relied on *Rajaram v. Narasinga*(1), where the meaning of the word ‘saswatham,’ the adverbial form of which occurs in exhibit A, had to be considered and where PARKER and SHEPHARD, JJ., held that no hereditary estate was granted under the instrument then in question, though it contained as qualifying the term *izara* the words ‘kayam saswatham’—words which, in the opinion of the learned Judges, were not distinguishable from the similar expression in vogue in the North of India, viz., ‘istemarari mukarari’ which

(1) I.L.R., 15 Mad., 199.

(1) I.L.R., 15 Mad., 199. (2) I.L.R., 12 Calc., 117. (3) I.L.R., 8 Calc., 664.

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was treated by the Judicial Committee in *Tulshi Pershad Singh v. Ramnarain Singh*(1), as not conveying *per se* a hereditary estate. I do not, however, think that PARKER and SHEPHARD, JJ., intended to lay down a rule, as to the meaning of the word 'saswatham' and its derivatives, to be applied in all cases. The decision must be taken with reference to the facts there. And the conduct of the parties, noticed in the concluding part of the judgment of PARKER, J., would seem to have rendered almost inevitable the conclusion that the estate in that case was not hereditary. It is also necessary to point out that in considering the applicability of the above Privy Council decision to cases like the present, we ought not to overlook the important fact that the phrase 'istemarari mukarari,' though lexicographically importing perpetuity, has, as stated by their Lordships themselves in the case referred to, acquired a restricted customary meaning in that part of the country (*Tulshi Pershad Singh v. Ramnarain Singh*(1)), whereas the word 'saswathamayi,' with which we are now concerned, has acquired no such secondary signification here. It is quite true, as urged for the appellant, that when land or even an interest in land is intended to be transferred hereditarily, it is usual to indicate that intention by the use of the words 'from son to grandson,' 'from generation to generation,' or the like. In the present instance, however, there was no transfer of land or an interest in land, but only an agreement as to the rate at which assessment was to be paid in respect of lands, in which the party bound to pay the assessment admittedly already possessed a heritable estate. In such an agreement words, usually employed in grants intended to convey an estate of inheritance, would not be used, but the more appropriate term 'saswathamayi' found in exhibit A, or 'என்றென்றைக்கும்' (onra-raikkum) or other similar phrase would be employed to show that the arrangement was intended to be perpetual. And as there is nothing in the language of the rest of the document to warrant a different construction, we must give to the word in question its natural and ordinary meaning and hold that the patta fixes the assessment at Rs. 40 permanently and for ever, and that the respondent's right under exhibit A to object to the appellant claiming more than Rs. 40 is not affected in any way by exhibit I, inasmuch as the latter document is not shown to have been executed under circumstances

(1) I.L.R., 12 Calc., 117.

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which make it binding upon Ramakrishnayyan, who was then a minor.

It was next urged on behalf of the appellant that as the rate so fixed was less than what was payable upon the lands till the date of the patta, and also less than that payable upon neighbouring lands of similar quality and description, and as such reduction in the assessment was not granted for any of the special purposes mentioned in the second proviso to section 11 of the Rent Recovery Act, VIII of 1865, the patta should, as against the appellant as the late Mr. Fischer's successor and the present proprietor of the mitta, be held to be invalid under that proviso. But this contention is obviously unsustainable for the simple reason that the patta had been executed long before the proviso relied on was enacted. It is scarcely necessary to observe that a statute ought not to be construed retrospectively, "unless," in the words of ERLE, C.J., quoted with approval very recently by the Judicial Committee in *Young v. Adams*(1), "the intention of the legislature that it should be "so construed is expressed in plain and unambiguous language, "because it manifestly shocks one's sense of justice that an act "legal at the time of doing it should be made unlawful by some "new enactment." And it is hardly necessary to add that there is absolutely nothing in the Rent Recovery Act to show that retrospective operation was intended to be given to the proviso in question. I would, therefore, dismiss the second appeal with costs.

MOORE, J.—I concur.

(1) [1898] A.C., 469 at p. 476.

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... ss. 12, 13—Res judicata—Transfer of Property Act—Act IV of 1882, ss. 91, 95—Redemption—Ejectment suit by mortgagor—Subsequent suit for redemption:

A zamindar mortgaged his estate under four successive instruments to the same creditor who was subsequently placed in possession. On the death of the mortgagor, his son, claiming to have succeeded by the law of primogeniture to the zamindari as an impartible estate, sued to eject the mortgagee; and a decree was passed declaring what was the sum due on a date named and how far it was binding on the estate, and decreeing that, on payment of what might be due on taking an account, the mortgagee should give up possession. Many years later the zamindar applied to the Court to carry out this decree, and a like application was put in by the present plaintiff to whom seven-eighths of the equity of redemption had been assigned. Both of these applications were rejected in the High Court as barred by limitation, and the applicants applied for leave to appeal to the Privy Council against the order of the High Court. Meanwhile the plaintiff brought the present suit to redeem the mortgages of the late zamindar:—Held, (1) that the suit was not barred under Civil Procedure Code, section 12, by reason of the pendency of the application for leave to appeal to the Privy Council; (2) that, as there was no decree for foreclosure passed in the previous suit which had been treated as a suit for redemption, the present suit was not precluded by the decree therein; (3) that the findings in the previous suit as to the amount of the debt and the extent to which it bound the estate were *res judicata*; (4) that the plaintiff was entitled to redeem the whole mortgages, although he was assignee of only seven-eighths of the equity of redemption, as the owner of the remaining one-eighth was joined as defendant and did not apply to be made plaintiff.

Nainappa Chetti v. Chidambaram Chetti 15

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Act—Act XV of 1877, sched. II, arts. 115, 116—Covenant implied in registered sale-deed—Transfer of Property Act—Act IV of 1882, s. 56—Implied covenant for title—Damages for breach :

On 8th February 1889 the defendant sold to the plaintiff, under a registered conveyance containing no express covenant for title, land of which he was not in possession, and the purchase money was paid. The plaintiff and the defendant sued to recover possession, but failed on the ground that the vendor had no title. The plaintiff now sued on 7th February 1895 to recover with interest the purchase money and the amount of costs incurred by him in the previous litigation :—*Held*, that the suit was not barred by limitation, that the defendant was not entitled to give evidence of his alleged title, and that the plaintiff was entitled to the relief sought by him.

Krishnan Nambiar v. Kannan

Act XV of 1877, s. 28, sched. II, art. 124—Right to a temple office and its endowments—Adverse possession—Res judicata :

Certain offices in a temple and the endowments attached thereto were held jointly by the members of two branches of a family, represented respectively by the plaintiff and the defendant. Long previously to 1872 the defendant's branch got into sole possession, and in that year a family settlement was arrived at by which it was arranged that the offices should be held in rotation and the lands in equal shares; and, in accordance with this settlement, a certain village forming part of the endowment was delivered to the plaintiff's branch of the family. In 1889 the defendant brought a suit to recover a moiety of that village and an issue was raised whether he enjoyed the offices and the landed property in his independent right or as a servant for wages. His suit was dismissed on the ground that the offices and emoluments were indivisible and went by right to the elder branch of the family. The plaintiff now sued in 1895 to establish his right to the entire offices and to recover possession of the other village :—*Held*, that it was open to the defendant to assert in this suit a title by adverse possession as that had been made a ground of attack, though not the basis of his claim in the former suit, and that the defendant had acquired a divisible right to a moiety by twelve years' adverse possession and that the suit should, to that extent, be dismissed.

Alagirisami Naicker v. Sundareswara Ayyar 278

ss. 13, 42, 43, 462—Sanction to compromise a suit against a minor—Suit to set aside a consent decree for want of sanction—Previous suit to set aside decree on the ground of fraud on guardian ad litem :

A suit instituted in 1879 against a minor was compromised by the plaintiff and the guardian ad litem, and a decree for the plaintiff was passed by consent. In 1882 the minor sued by his next friend to have the consent decree set aside on the ground that it had been obtained by fraud practised on the guardian ad litem. That suit was dismissed. In 1884 an application was unsuccessfully made in the original suit objecting that the compromise had been entered into without the sanction of the Court. The minor having attained majority now sued to have the consent decree set aside on the ground that it had not been sanctioned by the Court under Civil Procedure Code, section 462 :—*Held*, (1) that the Court by passing the consent decree had not, *ipso facto*, sanctioned the compromise under Civil Procedure Code, section 462, and that the present suit was not barred by the order dismissing the application in 1884; (2) that the suit was barred by the decree in the suit of 1882 for the reason that the want of sanction might and ought to have been made a ground of attack in that suit.

Arunachalam Chetty v. Meyyappa Chetty 91

s. 30—Hindu Law—Agreement on adoption—Charitable endowments—Interest sufficient to support a suit relating to charity :

A Hindu shortly before his death directed his wife and mother to employ part of his property for the maintenance and upkeep of a charitable institution, being a choultry where Japta Brahmans and travellers were fed, and at the same time empowered his wife to make an adoption, declaring that the adopted son should have no interest in the property devoted to the charitable purpose. On his death the widow and mother executed a document, relating to the property, to give effect to the wishes of the deceased for the benefit of Brahmans; and three years later the widow took in adoption a boy whose father acquiesced in the deceased man's dispositions. The charitable trust having been neglected and the adoptive son having taken possession in his own right of the lands constituting the endowment, two Brahman residents in the neighbourhood who had obtained leave under section 30, Civil Procedure Code, instituted a suit as representing the Brahman community at large to remove the widow from the office of trustee, to have the adopted son declared ineligible for that office and for the appointment of a new trustee :—*Held*, that the plaintiffs possessed sufficient interest in the charity to enable them to maintain the suit, and that they were entitled to the relief claimed by them.

Ganapati Ayyan v. Savithri Ammal 10

ss. 30, 539—Public charity—Suit by trustee :

The trustee of a temple sued to recover, from the representatives of the trustee of a fund constituted for special purposes in connection with the temple worship, a sum of money misappropriated by him and to obtain the appointment in his place of himself or some other fit person. The plaintiff obtained leave to sue under Civil Procedure Code, section 30, but no sanction had been obtained under section 539 :—*Held*, that the suit was maintainable.

Nellaiyappa Pillai v. Thangama Nachiyar 406

s. 31—Misjoinder—Tenants in common—Benami mortgage—Suit by some of the heirs of the real mortgagor—Evidence of benami—Limitation—Joinder of causes of action—Specific Relief Act—Act I of 1877, s. 42 :

In 1880 A and B jointly advanced moneys on the security of a usufructuary mortgage which was taken in the name of B. In 1884 A alone advanced moneys on the security of usufructuary mortgages which were likewise taken in the name of B. A died leaving three sons, of whom the plaintiffs were two. The plaintiffs having become divided from their brother now brought suits in 1894 against B and the mortgagors for a declaration of their right to the mortgages and for possession of the documents and for rent of the land which had been collected by B. It appeared that there had been no denial of the plaintiffs' rights before 1880, that no rent had been collected for several years before suit, the mortgagors who had remained in possession as lessees after the execution of the mortgages having refused to attorn to B :—*Held*, (1) that the suits were not barred by Specific Relief Act, section 42, for want of a prayer for possession; (2) that the suits were not barred by limitation save as to the claim for rent; (3) that the suits were not bad for the non-joinder of the plaintiffs' brother; (4) that the transactions having been proved to be benami in character, the plaintiffs were entitled to a declaration of their two-thirds right under the mortgages of 1884 and a like declaration as to half of the mortgage of 1880; and (5) that the plaintiffs were entitled to possession of the mortgage documents of 1884 and the other documents connected therewith, but not the others.

Mahabala Bhatta v. Kunhanna Bhatta 378

11. *Limitation Act—Act XV of 1877, sched. II, arts. 142, 144—Suit for partition between co-owners—Possession of tenants—Adverse possession—Cause of action:*
 The plaintiff was the Zamorin of Calicut, and he sued in 1887 for a moiety of certain property in Malabar alleged to belong in equal undivided shares to his stanom and that of the defendant and to be in the occupation of tenants. The cause of action was stated to have arisen in 1881 when partition was demanded by the zamorin and refused by the defendant. In some instances the tenants in occupation represented the family, a member of which was at one time admitted by the zamorin under a demise or kanom, and had attorned to the defendant; in other instances they were shown to have been admitted by the defendant on paying off the former tenant who had been admitted by the zamorin. In all these instances the defendant intended the tenant who attorned to him to hold as his tenant to the exclusion of any claim by the zamorin, but it was not shown that the zamorin had any notice of such attempted usurpation on the part of the defendant. And on these facts the defence of limitation was raised on the ground that the land had been held for more than twelve years adversely to the zamorin. It appeared further that the zamorin had previously brought suits and obtained decrees for partition of certain parcels of land as belonging equally to the two stanoms, the defendant in each suit being the present defendant and the tenant in occupation of the land then in question. And on these facts a further defence was raised under Civil Procedure Code, section 43:—*Held*, (1) that Limitation Act, schedule II, article 144, and not article 142, was applicable to the suit, and that in the first class of cases referred to above, the tenancy under the zamorin had not been determined, and that in the second class, there had been no ouster of the zamorin, and that consequently the suit was not barred by limitation; (2) that the suit was not barred by Civil Procedure Code, section 43, by reason of the previous suits.
Ittappan v. Manavikrama ... 153
12. *Rent Recovery Act (Madras)—Act VIII of 1865, s. 18—Suit by a landlord in the Court of the District Munsif for arrears of rent for two years—Subsequent attachment for rent of a third year accrued due at date of suit:*
 A samindar brought a suit in the District Munsif's Court to recover from a tenant on his estate the arrears of rent for two years. Rent for the third year was also due. No claim for it was included in the suit, but the landlord attached the land by summary process under the Rent Recovery Act to recover it. The tenants sued in the Revenue Court under the Rent Recovery Act to have the attachment set aside as illegal:—*Held*, that the zamindar was not precluded by Civil Procedure Code, section 48, from pursuing his remedies under the Rent Recovery Act and that the attachment was not illegal.
Rajah Eswara Doss v. Venkataroyar ... 236
13. *High Court Rules, Nos. 89, 43, 44 and 47:*
 A defendant is entitled, under the High Court Rules, to be furnished with a copy of documents sued on, which are deposited with the plaintiff.
Haji Mahomed Abdul Aziz Badsha Sahib v. Subba Naidu ... 490
14. *Substituted service—Duty of process-server:*
 Mere temporary absence of a person to be served does not justify the process-server in affixing the summons to a door. It is the duty of the process-server to take pains to find out the person to be served in order that, if possible, personal service may be effected.
Subramania Pillai v. Subramania Ayyar ... 419

15. *ss. 80, 101, 108—Ex-parte decree—Substituted service of summons:*
 A decree was passed *ex-parte* against defendants on whom the summons was served by affixing it to their house. The defendants who had applied unsuccessfully under Civil Procedure Code, section 101, to be heard in answer to the suit, now preferred a petition under section 108 that the decree be set aside. This application was dismissed. On an appeal by one of the defendants:—*Held*, as it appeared from the serving officer's return that, according to the information given to him, there was no prospect of his being able to serve the defendant personally within a reasonable time, that he was justified in affixing the summons to the door of the house. *Per cur*:—The fact that an order under section 101 has been made against a defendant and has not been appealed against is no objection to an application being made by him under section 108.
Bankaralinga Mudali v. Ratnasabhapati Mudali ... 324
16. *s. 158—Application for succession certificate—Order for costs of adjournment against opposing party—Effect of non-compliance with such order:*
 A widow applied for a succession certificate to her late husband. The application was opposed by his brother who claimed to have been undivided from him. The matter came on for hearing, but was adjourned on his application, he being ordered to pay the costs. He failed to pay the costs, and the certificate was issued to the widow:—*Held*, that section 158 of the Civil Procedure Code was inapplicable to the case in the absence of a specific order making the payment of costs a condition precedent to the hearing of the evidence of the party in default.
Virabhadrapa Chetti v. Chinamma ... 408
17. *s. 209—Transfer of Property Act—Act IV of 1882, s. 86—Mortgage decree—Interest—Contract rate—Subsequent interest:*
 When a decree for sale is passed in a mortgage suit, interest at the contract rate should be decreed for the period allowed for payment by the mortgagor, and subsequent interest should be decreed at six per cent. only.
Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar ... 364
18. *s. 232—Specific Relief Act—Act I of 1877, s. 56, cl. (b)—Trusts Act—Act II of 1882, ss. 91, 95—Decree obtained on a benami mortgage by benamidar—Suit by real mortgagor—Declaration—Injunction:*
 A mortgaged land to B as either agent or benamidar for C. B sued on the mortgage and obtained a decree. C now sued A and B for a declaration that he was entitled to the benefit of the decree and had the right to execute it, and for an injunction restraining A from paying the money to B and B from receiving the money from him:—*Held*, that the plaintiff was entitled to the declaration, but not to the injunction.
Sethurayar v. Shunmugam Pillai ... 353
19. *s. 232—Transfer of decree—Benami transfer:*
 If a decree is transferred to one as benamidar for the actual purchaser, the latter is entitled to execute the decree and his right course is to apply under Civil Procedure Code, section 232.
Manikkam v. Tatayya ... 386

30. _____, s. 244 (c)—*Party to the suit*:
 A defendant, who had been exonerated from a suit, is not a party within the meaning of Civil Procedure Code, section 244 (c), and a suit by the plaintiff for contribution for his share of the costs of execution is not barred under that section.
Gadicherla China Seetayya v. Gadicherla Seetayya 45
31. _____, ss. 244, 258, 311—*Uncertified adjustment out of Court with a decree-holder—Subsequent execution—Fraud of decree-holder*:
 An adjustment was made out of Court between a decree-holder and a judgment-debtor in August 1893, but it was not certified to the Court. The decree-holder falsely stated to the judgment-debtor's agent that the requisite petition certifying the adjustment had been presented: but nevertheless he proceeded with execution, applied for and obtained leave to bid at the Court-sale and himself purchased the property in September. The judgment-debtor preferred petitions in September and November praying that the sale be set aside:—*Held*, that the judgment-debtor was entitled to prove the adjustment, and to have the sale set aside.
Ramayyar v. Ramayyar 356
32. _____, ss. 244, 310A—*Right of a mortgagee to the benefit of s. 310A—Appeal against order adverse to mortgagee*:
 A mortgagee being a party to a suit objected that the mortgage premises had been attached and sold in execution of the decree and applied to have the sale set aside on payment being made by him under Civil Procedure Code, section 310A. The purchaser was the decree-holder. The application having been refused by the Courts of First Instance and First Appeal, the applicant appealed to the High Court:—*Held*, that the appeal was maintainable and the appellant was entitled to the relief sought.
Srinivasa Ayyangar v. Ayyathurai Pillai 416
33. _____, ss. 244, 311, 588—*Execution proceedings at instance of attaching creditor—Party to a suit—Right of appeal—Irregular sale*:
 A attached a decree which B, his judgment-debtor, had obtained against C, and in execution thereof he brought to sale land belonging to C. After the publication of the proclamation of sale, one of the advertised lots was sub-divided into various lots for the purposes of the sale. B applied to have the sale set aside, and his application was refused:—*Held*, that B had a right of appeal under Civil Procedure Code, section 311, and not under section 244, but that the sub-division of the lots was no irregularity and the appellant was not entitled to the relief sought by him.
Sami Pillai v. Krishnasami Chetti 417
34. _____, ss. 244, 327 (a)—*Order directing the release of judgment-debtor—Appeal*:
 A judgment-debtor, who had been arrested in execution of a decree of a District Munsif, made an application for his release under Civil Procedure Code, section 327 (a), and his application was granted:—*Held*, that an appeal lay against the order granting the application.
Abdul Rahman v. Mahomed Kassim 29

35. _____, s. 258A—*Adjustment out of Court—Subsequent execution by decree-holder—Suit to recover money paid on adjustment*:
 It was agreed between a decree-holder and the judgment-debtors that the former should accept Rs. 200 which was paid in full satisfaction of the decree, and should certify the adjustment to the Court, and that an attachment already placed on the judgment-debtor's property should be raised. The decree-holder accepted the money, but did not carry out his part of the agreement, and more than two years later applied for execution which was ordered to issue, the judgment-debtor's objections being dismissed as out of time. The judgment-debtors now sued in a Small Cause Court to recover the money paid to satisfy the decree:—*Held*, that the plaintiffs were entitled to recover.
Periatambi Udayan v. Vellaya Goundan 409
36. _____, s. 266—*Wages of private servant—Attachment*:
 The wages of a private servant cannot be attached in whole or in part before they become due and a debt exists.
Ayyavayyar v. Virasami Mudali 393
37. _____, ss. 310A, 315—*Application by a purchaser for refund*:
 A house was attached and sold as the property of one against whom a decree of the Small Cause Court, Madras, had been passed. The property was brought to sale, and the purchase money was paid into the Madras City Civil Court. The sale was set aside under Civil Procedure Code, section 310A. Part of the purchase money was attached in execution of subsequent decrees passed against the same defendant by the Small Cause Court and was remitted to that Court under the attachment. On an application by the purchaser for the refund of the purchase money by the various persons who had received portions thereof:—*Held*, that the City Civil Court had jurisdiction to entertain the application.
Virasami Chetti v. Lilladhara Vyass 398
38. _____, ss. 311, 314—*Court-sale—Irregularity—Right of holders of other decrees to object*:
 A zamindar mortgaged his estate to a bank and the mortgagee obtained a decree in the High Court, in execution of which it was ordered that the zamindari should be sold village by village. Other persons held money decrees against the zamindar. One of them in execution of his decree had the zamindari put up for sale in one lot, subject to the bank's mortgage, and with the leave of the Court purchased it himself. The other decree-holders applied to have the sale (which had not been confirmed) set aside on the ground of material irregularity in publishing the sale by which substantial injury was caused to them. The irregularities relied on were that the proclamation was not issued in the prescribed form, and did not state the extent of the property and the revenue assessed on it, or the amount of income derived from it, and no mention was made of the order of the High Court:—*Held*, that the sale should not be confirmed.
Athappa Chetti v. Ramakrishna Nayakan 51
39. _____, s. 317—*Certified purchaser—Assignment from a certified purchaser*:
 A person taking an assignment from a certified purchaser at a Court-sale is not entitled, under Civil Procedure Code, section 317, to object to the maintainability of a suit to recover the land purchased, on the ground that the purchase was made benami.
Theyyavelan v. Kochan 7

30. _____, s. 373—Suit withdrawn without liberty to bring a fresh suit—Subsequent suit for the same matter :
In 1893 the plaintiff sued to eject the defendants alleging that they were in occupation of the land in question under a lease of 1890 from the late Zamorin of Calicut. The plaintiff's title rested on an instrument executed by him in 1892. It was objected that the instrument was not binding after the death of the grantor. The plaintiff thereupon withdrew his suit without obtaining leave to sue again. He subsequently obtained a like instrument from the present zamorin and sued again to eject the defendants:—Held, that the second suit was not maintainable by reason of Civil Procedure Code, section 373.
Achuta Menon v. Achuta Nayar 35
31. _____, ss. 412, 622—Dismissal of suit in forma pauperis without trial—Liability of plaintiff for Court-fee—Revision :
A plaintiff who sues in *forma pauperis* is liable to pay the stamp duty if his suit is dismissed without trial; and he may be ordered to do so under section 622.
Collector of Visagapatam v. Abdul Kharim Sahib 118
32. _____, s. 443—Suit against a major defendant by guardian ad litem—Acquiescence :
The managing member of a Hindu family consisting of himself and two brothers, who were minors, mortgaged the ancestral property to secure a debt properly incurred by him in his capacity as manager. The mortgagee brought a suit upon the mortgage joining as defendants the three brothers; the two younger of whom were sued by the mortgagee as their guardian ad litem. A decree for the plaintiff having been passed, the lands were sold in execution. The two younger brothers now sued to have the decree and the sale set aside as regards them, on the ground that they had both been of age at the date of the suit, and accordingly had been wrongly impleaded. It appeared that the elder plaintiff was in fact a major at the date of the previous suit, but he was aware, prior to the sale, of the suit and the execution proceedings, and still allowed his elder brother to conduct the defence and proceedings on his behalf:—Held, that both plaintiffs were bound by the decree in the former suit.
Ramachari v. Duraisami Pillai 167
33. _____, s. 522—Decree in accordance with an award—Appeal :
A suit having been referred to an arbitrator, he made an award and a decree was passed, in accordance with it, in favour of the defendant. On an appeal by the plaintiff, it appeared that the award was *prima facie* legal and proper:—Held, that no appeal lay against the decree.
Kombi Achen v. Pangai Achen 405
34. _____, s. 561—Appeal dismissed for want of necessary parties—Memorandum of objections :
The plaintiffs sued to recover possession of lands demised on kanom in Malabar. The defendants were the representatives of the mortgagee, and one (defendant No. 20) who claimed title to part of the land sought to be recovered. As to the last-mentioned part of the land, the plaintiffs obtained a decree for a portion of it only. The plaintiffs preferred an appeal bringing on to the record only defendant No. 20 who preferred a memorandum of objections. The appeal was dismissed for the reason that the mortgagee's representatives were not joined:—Held, that the appeal had been heard within the meaning of Civil Procedure Code, section 561, and accordingly that the memorandum of objections should be heard.
Kombi Achen v. Kochunni 352

35. _____, s. 575—Appeal referred owing to a difference of opinion on a point of law—Religious Endowments Act—Act XX of 1863, ss. 3, 4, 7, 11, 14—Suspension and dismissal of trustee of a temple—Powers of temple committee :
The plaintiff was appointed to the office of trustee of a Hindu temple under Religious Endowments Act, 1863, section 3, by the temple committee constituted under that Act. Subsequently the committee, having received certain complaints against him, suspended him from office pending inquiry without calling on him for an explanation. They alleged as the grounds of his suspension that he had caused loss of property and money to the temple and that he had conducted things in the temple contrary to custom so as to cause a disturbance of the peace. The trustee refused to acquiesce in the order of suspension and to give up certain records, &c., which he was by that order required to deliver, and denied the authority of the committee as asserted by them. Shortly afterwards the committee dismissed him. The plaintiff, denying that his suspension and dismissal were legal, brought two suits against the members of the committee, the first for damages for the suspension, and the second for an injunction to restrain the defendants from interfering with his discharge of his duties as trustee. Both of these suits were dismissed and the plaintiff preferred appeals to the High Court. In the appeal relating to the claim for an injunction, it was found that no misconduct had been proved against the plaintiff previous to the order of suspension:—Held, by SHEPHARD and DAVIES, J.J., that a trustee in the position of the plaintiff cannot be dismissed from office except for good cause shown, and that his conduct subsequent to the order of suspension did not amount to such good cause. In the appeal relating to damages:—Held, by SHEPHARD, J., that the order of suspension was illegal and that under the circumstances the plaintiff was entitled to substantial damages:—Held, by DAVIES, J. (finding that the committee had proceeded in the bona fide belief that they were acting for the good of the temple in suspending the plaintiff pending inquiry), that the order of suspension was not illegal and that the suit was rightly dismissed. Owing to the difference of opinion between the two Judges, the last-mentioned appeal was referred to the Chief Justice under Civil Procedure Code, section 575, and was heard by him sitting with the two other Judges:—Held, that the whole appeal was open for argument and not only the point of law on which the Judges had differed in opinion:—Held, by COLLINS, C. J., and SHEPHARD, J. (DAVIES, J., diss.), that the order of suspension was illegal and the plaintiff was entitled to substantial damages.
Per COLLINS, C. J.—The power of suspension by the committee is, in my judgment, the same as the power of dismissal. The committee, having made due inquiry and having called on the trustee for an explanation, may suspend for good and sufficient cause, but not otherwise.
Seshadri Ayyangar v. Nataraja Ayyar 179

COMPROMISE, ENFORCEABILITY OF—Pensions Act—Act XXIII of 1871, s. 4—Suit relating to inam land granted before the time of the British Government—Confirmation of inam—Construction and enforceability of compromise of suit between members of grantee's family—Removal of manager—Appointment of receiver :
Early in the eighteenth century two villages were granted by the Zamindars of Sivaganga and Guntammanikanur to the last of the Naik rulers of Madura for the maintenance of the rank and dignity of his family which was now represented by the plaintiffs and defendants Nos. 1 to 23. The property was long managed by the representative, for the time being, of the senior line. In 1844 one of the junior members instituted a suit for partition, which terminated in a decree declaring the corpus of the property to be indivisible and the annual produce to be divisible in certain shares. Subsequently in 1857 a compromise was entered into, by which the parties agreed to vary the distribution of the shares, but they agreed that the management of the estate, indivisible and inalienable, should continue to be vested in the eldest line subject to certain supervision on the

part of the other members. The compromise was long acted upon by the family; but in 1892 the representative of the senior line died, leaving only his widow and infant sons. The widow, as guardian of the elder son, then entered on the management, and, being goshia, delegated it to a stranger. The plaintiffs representing a junior line now sued for the removal of these persons from management and the appointment of another manager, alleging both that they had no right to the managership and that they had been guilty of mismanagement. All the members of the family were made parties to the suit. It appeared that the plaintiffs had not received their proper share of the produce, and the defendants in management denied in the pleadings their right thereto. The plaintiffs had not obtained a certificate from the Collector under the Pensions Act XXIII of 1871, and it appeared that the grant of the villages had been confirmed as an inam by the British Government:—*Held*, (1) that the suit did not fall within the provisions of Pensions Act, section 4, and a certificate of the Collector was accordingly unnecessary; (2) that the compromise was binding on the parties, and that under the compromise the plaintiffs had no right to joint management; and (3) that the widow of the last manager should be removed from the managership, and that until one of her sons came of age the estate should be managed by a receiver appointed from among the members of the family.

Kumara Tirumalai Naik v. Bangaru Tirumalai Sauri Naik ... 310

CONFESIONAL STATEMENTS OF ACCUSED—Subsequent retraction—Criminal Procedure Code—Act X of 1882, s. 103—Search by Police of stolen property—Charge to Jury:

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. A Jury should be asked with reference to such confessions, not whether they were corroborated by independent evidence, but whether having regard to the circumstances under which they were made and retracted and all the circumstances connected with them, it was more probable that the original confessions or the statements retracting them were true. Criminal Procedure Code, section 103, does not justify the view that the persons called upon to witness a search are to be selected by any person other than the officer conducting the search. If the Sessions Judge considers that the evidence of an Inspector of Police is necessary, he ought not to animadvert on his absence in charging the Jury; but he should intimate his opinion to the Public Prosecutor and give him the opportunity of calling that official. It is wrong for a Judge in charging the Jury to say that a Head Constable committed a breach of the Police regulations in conducting a search with a loose shirt on, without examining him on the matter and taking evidence as to whether or not his body was examined, before he began the search.

Queen-Empress v. Raman ... 89

CONSTRUCTION—Title under a will followed by a family arrangement adding to the property devised:

The will of a proprietor, who died in 1864, disposed of a zamindari, and of one village within it, as two distinct properties, giving the zamindari to the testator's two widows, and, on the other hand, giving the village in equal shares in perpetuity to the two brothers of his junior wife. Neither of the two brothers took possession of their respective moieties on the testator's death, and the whole village was treated for some time as part of the zamindari, the profits of it being received by, or on behalf of, the widows. In 1869, one of the brothers having died, leaving a son, who succeeded to his rights in the village, a family arrangement was made that the entirety of it should be made over to the surviving brother, the present claimant, the son of the other receiving from the widows satisfaction in lieu of his moiety. The junior widow having died, the senior got possession of the village, alleging that the surviving brother had merely

been appointed to act as manager of it, on behalf of herself and her co-widow:—*Held*, that under the will the claimant had been originally entitled to one-half of the village including its rents, from the testator's death; and that to this half had been added the other with title in 1869, in pursuance of the transaction in regard to it. An order, given by the widows in that year making over the village, was not a revocable one; and the interest in the additional half, conferred upon the claimant, was commensurate with what was already his own. No writing was then necessary to vest the other half in him. Such a transaction was good and valid as a family arrangement; and he had made out his title to the whole village.

Raja Vellanki Venkata Rama Rau v. Raja Papamma Rau ... 299

CONTRACT ACT—ACT IX OF 1872, s. 43—Joint promisors—Suit for money against person carrying on business of a dissolved partnership—Objection taken on ground of non-joinder:

In a suit for money due on account of dealings in clothes from 1889 to 1895, it appeared that the dealings had taken place between the plaintiff and the firm consisting of the defendant and another till 1894 when the firm was dissolved, since which date the defendant had carried on the business and dealt with the plaintiff:—*Held*, that the suit was not bad for non-joinder of the late partner. *Per cur*: it is not incumbent on a person dealing with partners to make them all defendants in a suit.

Narayana Chetti v. Lakshmana Chetti ... 256

2. s. 73—Railways Act—Act IX of 1890, s. 72—Condition under which goods despatched by Railway—Deterioration—Remoteness of damage:

The plaintiff who was a tailor delivered a sewing machine and some cloths to the Madras Railway Company (the defendant) to be sent to a place where he expected to carry on his business with special profit by reason of a forthcoming festival. Through the fault of the Company's servants the goods were delayed in transmission and were not delivered until some days after the conclusion of the festival. The plaintiff had given no notice to the Company that the goods were required to be delivered within a fixed time for any special purpose, and he had signed a forwarding note under a statement that he agreed to be bound by the conditions at the back and one of those conditions was to the effect that the Company is not liable "for any loss of, or damage to, any goods whatever by reason of accidental or unavoidable delays in transit or otherwise." The plaintiff now sued to recover from the Company a sum on account of his estimated profits and the travelling expenses of himself and his assistant at the place of destination and their expenses for food and lodging while there:—*Held*, (1) that as the plaintiff had not shown that the goods had undergone deterioration in value or otherwise the condition above cited was not void under Railways Act, 1890, section 72, although it had not been approved by the Governor-General in Council; (2) that the plaintiff was bound by the condition even if he was in fact ignorant of its effect; and (3) that the damages claimed were too remote.

Madras Railway Company v. Govindu Rau ... 172

COURT FEES ACT—ACT VII OF 1870, ss. 5, 8, 28, sched. II, art. 17 (IV)—Appeal against award under Land Acquisition Act:

An appeal against an award made by the District Judge under Land Acquisition Act I of 1894 was filed in the High Court, the appeal memorandum bearing a Court-fee stamp of Rs. 10 only and was admitted by the Registrar, no question having been raised as to the sufficiency of the stamp. On the appeal having been posted for hearing, it was objected on the part of the respondent that the stamp paid was insufficient:—*Held*,

that the appeal memorandum should have borne an *ad valorem* stamp under Court Fees Act, section 8, and that there having been no decision by the taxing officer under section 5, it was open to the respondent to raise the objection on appeal at the hearing.

Kasturi Chetti v. Deputy Collector, Bellary ... 269

2. _____, ss. 7, 11—*Mesne profits left to be determined in execution of decree—Valuation of appeal against decree:*

In a suit for land with mesne profits a decree was passed for the plaintiff in which the amount of mesne profits was left to be determined in execution, the date from which they should be computed being the date of the suit. The defendant appealed against the decree on the ground that he should not have been decreed to pay either mesne profits or costs. In the valuation of the appeal for the purposes of the Court Fees Act, nothing was included on account of the mesne profits:—*Held*, that no stamp duty was payable in respect of the mesne profits subsequent to the institution of the suit.

Maiden v. Janakiramayya ... 371

CRIMINAL PROCEDURE CODE—ACT X OF 1892, ss. 16, 260—Bench of Magistrates—District Municipalities Act (Madras)—Act IV of 1884, ss. 263, 264:

A trial on the charge of making an encroachment upon public land under District Municipalities Act (Madras), 1884, sections 167, 263 and 264, was begun before a Bench of seven Magistrates, and ended in a conviction by five of the Magistrates in the absence of the other two. It appeared that the Municipal Council had passed no resolution under District Municipalities Act, section 264:—*Held*, that on the facts of the case the conviction under section 263 was right, and that it was not invalidated by the absence at the end of the trial of two of the Magistrates before whom it had begun. *Quære*: Whether a charge under section 264 would lie in the absence of a resolution passed by the Municipal Council.

Karuppana Nadan v. Chairman, Madura Municipality ... 246

2. _____, s. 103—*Confessional statements of accused—Subsequent retraction—Search by Police of stolen property—Charge to Jury:*

It cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. A Jury should be asked with reference to such confessions, not whether they were corroborated by independent evidence but whether having regard to the circumstances under which they were made and retracted and all the circumstances connected with them, it was more probable that the original confessions or the statements retracting them were true. Criminal Procedure Code, section 103, does not justify the view that the persons called upon to witness a search are to be selected by any person other than the officer conducting the search. If the Sessions Judge considers that the evidence of an Inspector of Police is necessary, he ought not to animadvert on his absence in charging the Jury; but he should intimate his opinion to the Public Prosecutor and give him the opportunity of calling that official. It is wrong for a Judge in charging the Jury to say that a Head Constable committed a breach of the Police regulations in conducting a search with a loose shirt on, without examining him on the matter and taking evidence as to whether or not his body was examined, before he began the search.

Queen-Empress v. Raman ... 83

3. _____, ss. 195 (b), 423, 439, 476—*Whether a High Court in revision can revoke an order of a Subordinate Court under section 476, Code of Criminal Procedure:*

A High Court, as a Court of Revision, has power, under section 439, to revoke an order made by a Subordinate Court under section 476 of the Code of Criminal Procedure.

Queen-Empress v. Srinivasulu Naidu ... 124

4. _____, ss. 211, 217, 560:

A Magistrate, in acquitting persons accused on a charge of theft which he found to be false and malicious, awarded compensation to each of them to be paid by the complainant. Subsequently one of the accused applied for and obtained sanction to prosecute the complainant for bringing a false charge under Penal Code, section 211, and certain of his witnesses for the offence of giving false evidence under section 193:—*Held*, that the order granting sanction was not illegal as regards the complainant by reason of the previous award of compensation.

Adikhan v. Alagan ... 237

5. _____, s. 419—*Presentation of criminal appeal:*

A petition of appeal under the Criminal Procedure Code is not duly presented when having been signed by a pleader, it is handed in by a person who is not his clerk and over whose conduct and actions he has no control.

Queen-Empress v. Ramasami ... 114

6. _____, s. 545—*Death caused by negligence—Compensation to widow:*

A Magistrate imposed a fine in addition to a sentence of imprisonment on a conviction for the offence of causing death by a rash and negligent act and gave compensation to the widow of the deceased out of the fine imposed:—*Held*, that compensation could not be given to the widow under Criminal Procedure Code, section 545.

Yalla Gangulu v. Mamidi Dali ... 74

DECREE EXPLAINED BY REFERENCE TO THE JUDGMENT—Title of nearest reversioner:

In a prior suit a decree of the High Court awarded to the plaintiff the substantial relief claimed by him as reversionary heir entitled to inherit after the mother of the last male owner, then deceased, she holding her limited estate in the property; and the decree declared that certain alienations made by her were invalid against the reversionary heir. In the present suit the same plaintiff, as nearest reversioner, claimed possession of the property from the daughter of the mother, the latter having died of the property from the daughter alleging title through her:—*Held*, that since the prior suit; the daughter alleging title through her:—*Held*, that the judgment, in the prior suit, was admissible, and ought to be examined in the present suit, in order to see what that suit decided as to the reversioner's title. *Kali Krishna Tagore v. Secretary of State for India* (L.R., 15 I.A., 186; s.c., I.L.R., 16 Calc., 173) referred to and followed. The judgment showed that the question whether the plaintiff was the nearest reversioner having been raised in the prior suit, had been finally determined in the affirmative; and this was sufficient proof of his title in the present suit.

Sri Raja Rao Lakshmi Kantaiyamm v. Sri Raja Inuganti Rajagopal Rao ... 344

- DISTRICT MUNICIPALITIES ACT (MADRAS)—ACT IV OF 1884—Profession tax—English Insurance Company carrying on business by agents in India:**
- The plaintiff was an English Insurance Company which carried on business at Cocanada by its agents, merchants of that place, at the business premises of the agents. The Municipal Council of Cocanada having levied profession tax on the plaintiff, this suit was brought in 1896 to recover the amount:—*Held*, that the tax had been illegally levied, and that the plaintiffs were entitled to a decree for its refund.
- Municipal Council, Cocanada v. Royal Insurance Company, Liverpool* ... 5
2. _____, s. 11—Interference with a public drain:
- The owner of a house in a street at Tanjore renewed, without the sanction of the Municipal Council, the masonry covering of a drain in front of his house:—*Held*, that the act of the plaintiff did not constitute an interference with the drain within the meaning of District Municipalities Act, section 211.
- Municipal Council, Tanjore v. Visvanatha Rau* ... 4
3. _____, ss. 63, 262—House-tax assessed on school buildings—Suit to recover tax payable under protest:
- House-tax and water-tax was levied under District Municipalities Act (Madras), 1884, section 63, on the school buildings of the Native College, Madura (which were exclusively used for charitable purposes), and was paid by the managers of the college, who sued in the Small Cause Court to recover the amount:—*Held*, that the tax was illegal and the plaintiffs were entitled to recover.
- Fischer v. Twigg* ... 367
4. _____, s. 189—Keeping a private cart-stand without a license:
- It is not necessary, in order to establish the offence of using a place as a cart-stand without a license under District Municipalities Act IV of 1884 (Madras), section 189, to prove that the cart-stand is offensive or dangerous or that fees are levied there.
- Queen-Empress v. Ayyakannu Mudali* ... 393
5. _____, ss. 263, 264—Criminal Procedure Code—Act X of 1882, ss. 16, 350—Bench of Magistrates:
- A trial on the charge of making an encroachment upon public land under District Municipalities Act (Madras), 1884, sections 167, 203 and 264, was begun before a Bench of seven Magistrates, and ended in a conviction by five of the Magistrates in the absence of the other two. It appeared that the Municipal Council had passed no resolution under District Municipalities Act, section 264:—*Held*, that on the facts of the case the conviction under section 263 was right, and that it was not invalidated by the absence at the end of the trial of two of the Magistrates before whom it had begun. *Quære*: Whether a charge under section 264 would lie in the absence of a resolution passed by the Municipal Council.
- Karuppana Nadan v. Chairman, Madura Municipality* ... 246
- EJECTMENT SUIT—Title to relief completed pending a suit—Amendment of plaint:**
- A having leased land to B, sold it to C. Persons having trespassed, B offered no objection, and it was alleged that he was in collusion with them. C now sued before the expiry of the lease to eject the trespassers; the lease expired while the suit was still pending:—*Held*, that the plaintiff

was not entitled to the relief sought and could not be permitted, on appeal, to amend the plaint by adding a prayer for a declaration of his reversionary right, although the acts of the defendants were such as to be prejudicial to his rights as reversioner.

Ramanadan Chetti v. Pulikutti Servai ... 288

EVIDENCE ACT—ACT I OF 1872, s. 85—Power of attorney—Declaration before notary public in proof of power of attorney:

On an application for letters of administration with the will annexed, made by the attorney of the executors therein named, it appeared that the applicant's power of attorney was not executed in the presence of a notary public; but, with regard to the execution by each of the executors, one of the attesting witnesses had made a declaration before a notary public to the effect that he had witnessed the execution of the power of attorney by one of the executors, and that the signature of the other attesting witness was the proper signature of the person bearing that name, and each declaration was signed, sealed and certified by a notary public:—*Held*, that the power of attorney was sufficiently proved.

In re Sladen ... 492

GUARDIANS AND WARDS ACT—ACT VIII OF 1890, ss. 7, 8—Testamentary appointment of a guardian:

A Hindu mother has no authority to appoint a guardian for her son by will; it is accordingly the duty of the Court on an application under Guardians and Wards Act, 1890, for the appointment of a guardian for the son of a Hindu widow who had purported to make such an appointment to inquire, under section 7, as to the necessity for an appointment being made and itself to appoint a fit and proper person.

Venkayya Garu v. Venkata Narasimhulu ... 401

HINDU LAW—Adoption, giving and taking—Datta homam:

A Brahman took a boy in adoption, but died before the ceremony of datta homam was performed. This ceremony was performed after the death of the adoptive father by his widow:—*Held*, that the adoption was valid.

Subbarayar v. Subbammal ... 497

2. _____, Agreement on adoption—Charitable endowments—Civil Procedure Code—Act XIV of 1882, s. 30—Interest sufficient to support a suit relating to charity:

A Hindu shortly before his death directed his wife and mother to employ part of his property for the maintenance and upkeep of a charitable institution, being a choultry where Japta Brahmans and travellers were fed, and at the same time empowered his wife to make an adoption, declaring that the adopted son should have no interest in the property devoted to the charitable purpose. On his death the widow and mother executed a document, relating to the property, to give effect to the wishes of the deceased for the benefit of Brahmans; and three years later the widow took in adoption a boy whose father acquiesced in the deceased man's dispositions. The charitable trust having been neglected and the adoptive son having taken possession in his own right of the lands constituting the endowment, two Brahman residents in the neighbourhood who had obtained leave under section 30, Civil Procedure Code, instituted a suit as representing the Brahman community at large to remove the widow from the office of trustee, to have the adopted son declared ineligible for that office and for the appointment of a new trustee:—*Held*, that the plaintiffs possessed sufficient interest in the charity to enable them to maintain the suit, and that they were entitled to the relief claimed by them.

Ganapati Ayyan v. Savithri Ammal ... 10

3. ———— *Bequest to daughters—Construction of will :*

A Hindu testator died leaving three daughters. By his will he gave certain property in equal shares to his younger daughters and their descendants and disposed of the rest for the benefit of his elder daughter S and her son R as follows:—"All the remaining rent should be collected by S and her son R; they shall, when necessary, let the land to other tenants and have it cultivated, and R shall pay the assessment and subject to the directions of his mother shall enjoy the land and shall not in any way alienate the property." R predeceased S:—*Held*, that the testator's daughter took a life estate with remainder to her son, and that on her death the property passed to the heirs of the son.

Siva Rau v. Villa Bhatta 4

4. ———— *Devadasi—Adoption—Illegal purpose :*

The plaintiff sued as the adopted daughter of a deceased dancing woman to recover a share of the property left by her. It appeared that the adoption of the plaintiff, which took place in 1871, when she was six years old, was made with the intention of bringing her up to practise prostitution even during her minority:—*Held*, that the adoption was invalid.

Sanjivi v. Jalajakshi 2

5. ———— *Illatom son-in-law—Right to partition :*

The question whether an illatom son-in-law can demand partition from his father-in-law is not a pure question of law, but one that depends upon custom and can only be determined upon evidence.

Chinna Obayya v. Sura Reddi 2

6. ———— *Law of succession—Stridhanam—Husband's nieces—Bandhu :*

A Hindu widow, married according to one of the approved forms, died without issue leaving her surviving the plaintiffs who were the daughters of her husband's deceased brother, and the first defendant who was the adopted son of her sister's daughter, and the second defendant who was the adopted son of her maternal uncle, and the third defendant who was the widow of her brother. The defendants having taken possession of her stridhanam property on her death, the plaintiffs now sued as heirs under the Hindu Law for possession:—*Held*, that the plaintiffs were entitled to succeed.

Venkatasubramaniam Chetti v. Thayarammah 1

7. ———— *Law of succession—Stridhanam—Right of daughter to succeed :*

In a suit for land it appeared that it had been given to one Sellayi, deceased, after her marriage by her father. The donee died leaving her brother, defendant No. 1, her son (since deceased), the husband of defendant No. 2, and the plaintiff her daughter. Defendant No. 1 was in joint possession on behalf of defendant No. 2:—*Held*, that the plaintiff was entitled to the land.

Muthappudayan v. Ammani Ammal 1

8. ———— *Law of succession—Stridhanam—Enfranchisement of service inam :*

Land which formed the emolument of the office of moniegar was enfranchised in favour of a Hindu woman, who died leaving her surviving defendant No. 2 (her husband), the plaintiff (her unmarried daughter), and two sons and two married daughters who were not parties to this

suit. The plaintiff sued to recover the land to which she claimed to be entitled under the Hindu Law of inheritance:—*Held*, that the property belonged to the deceased as her stridhanam descendible to her heirs, and (without deciding what control, if any, defendant No. 2 had over the property) that the plaintiff was entitled to succeed according to the law of inheritance applicable to such property.

Salemma v. Lutchmana Reddi 100

9. ———— *Succession—Illegitimate children—Property of mother :*

A Hindu woman having daughters by one paramour and a son by another died leaving a house. The daughters sued for possession of the house in succession to their mother. It was, *inter alia*, pleaded for the defence that the plaintiffs could not recover the house for the reason that it had been derived from the putative father of the first defendant, but this was not proved:—*Held*, that the plaintiffs were entitled to recover. *Semle*: that the decision would have been the same even if the allegation on which the above plea was based had been established.

Arunagiri Mudali v. Ranganayaki Ammal 40

10. ———— *Transfer by Hindu widow of part of her estate—Consent of reversioner :*

A Hindu widow with the consent of A, the then nearest reversioner, sold part of the property inherited by her from her husband. A predeceased the widow and on her death B, C and D were the nearest reversioners, and they now sued to recover the property. It appeared that the sale was not justified by circumstances of legal necessity and that D had been born after the sale had taken place:—*Held*, that the sale was not binding on the plaintiffs or any of them.

Marudamuthu Nadan v. Srinivasa Pillai 128

11. ———— *Mortgage—Loan at time of mortgage—Whether mortgage binding on the share of the mortgagor's undivided son :*

In order to justify a sale or a mortgage by a father so as to bind his son's share of the property, there must be in fact an antecedent debt, i.e., a debt prior to the mortgage or sale.

Sami Ayyangar v. Ponnammal 28

INAM—*Enfranchisement of the inam in favour of a widow :*

Lands constituting the emoluments of the office of karnam were enfranchised in favour of a widow who had been in possession since the death of her husband which took place about 18 years previously. They were subsequently sold by her:—*Held*, that the vendee's title was good against the reversionary heir of the husband.

Dharanipragada Durgamma v. Kadambari Pirrazu 47

LIMITATION—*Adverse possession—Suit for ejectment by a jenmi—Defendant in possession under Government cowls :*

The plaintiffs sued for possession of land which was found to be their jenm. It appeared that the defendant had been in possession for more than twelve years under a cowle from Government, which provided that the grant of the cowle should not affect the jenmi's right, but that the defendant had never recognised the plaintiffs' title:—*Held*, that the suit was barred by limitation.

Muniappan Chetti v. Muppil Nayar 109

2. ————Order to pay money—Money paid after due date :

When an order has been made for the payment of money in a suit on a certain date and the Court was closed on that date, a payment made on the following day would be a good payment for the purposes of the order.

Aravamudu Ayyangar v. Samiyappa Nadan 86

3. ————Regulation VI of 1831 (Madras), s. 3—Village service inam—Village blacksmith :

The mortgagee of maniam land attached to the hereditary office of village blacksmith sued in the Court of a District Munsif for possession, to which he claimed to be entitled under his mortgage; and there was evidence that he had been in possession for many years up to a date not long prior to the suit:—*Held*, that, as the plaintiff could have sued only under Regulation VI of 1831 in a Revenue Court, he could not, under Limitation Act, 1877, section 28, acquire a title by prescription to the land.

Pichuvayyan v. Vilakkudayan Asari 11

LIMITATION ACT—ACT XV OF 1877, s. 5—Appeal admitted after time by District Court—Power of Subordinate Court to whom the appeal is transferred :

A District Court by an *ex-parte* order admitted an appeal filed after the expiry of the period of limitation and transferred it for disposal to the Subordinate Court, in which objection was taken that the appeal was time-barred. The Subordinate Judge held that he could not entertain the objection, and he heard the appeal and remanded the suit:—*Held*, that the Subordinate Court had jurisdiction to entertain and dispose of the objection, and that the objection was sound and that the order of remand should be set aside.

Krishna Bhatta v. Subraya 2

2. ————, ss. 7, 19, sched. II, art. 165—Dispossession in execution—Application on behalf of a minor :

Limitation Act, 1877, schedule II, article 165, is applicable to a case where the applicant is a party to the decree which is being executed as well as when he is a stranger. But an application made on behalf of a minor objecting to dispossession more than thirty days after it took place is not barred by limitation by reason of Limitation Act, 1877, section 7.

Ratnam Ayyar v. Krishna Doss Vital Doss 4

3. ————, s. 28, sched. II, art. 124—Right to a temple office and its endowments—Adverse possession—Civil Procedure Code—Act XIV of 1882, s. 13, expl. II—Res judicata :

Certain offices in a temple and the endowments attached thereto were held jointly by the members of two branches of a family, represented respectively by the plaintiff and the defendant. Long previously to 1872 the defendant's branch got into sole possession, and in that year a family settlement was arrived at by which it was arranged that the offices should be held in rotation and the lands in equal shares; and, in accordance with this settlement, a certain village forming part of the endowment was delivered to the plaintiff's branch of the family. In 1889 the defendant brought a suit to recover a moiety of that village and an issue was raised whether he enjoyed the offices and the landed property in his independent right or as a servant for wages. His suit was dismissed on the ground that the offices and emoluments were indivisible and went by right to the older branch of the family. The plaintiff now sued in 1895 to establish his right to the entire offices and to recover possession of the other village:—*Held*, that it was open to the defendant to assert in this suit a

title by adverse possession as that had been made a ground of attack, though not the basis of his claim in the former suit, and that the defendant had acquired a divisible right to a moiety by twelve years' adverse possession and that the suit should, to that extent, be dismissed.

Alagirisami Naickar v. Sundareswara Ayyar 278

4. ————, sched. II, arts. 97, 116, 120—Transfer of Property Act—Act IV of 1882, s. 68—Suit for mortgage money by mortgagee on disturbance of possession :

The defendants demised certain land to the plaintiff under a registered kanom deed in 1888. The plaintiff was evicted in February 1893. He now sued in 1896 to recover the amount of the kanom:—*Held*, that the period of limitation applicable to the suit was six years and that the suit was not barred by limitation.

Unichaman v. Ahmed Kutti Kay's 242

5. ————, sched. II, art. 111—Enforcement of vendor's lien :

In 1887 the plaintiff sold land to defendant No. 1, who, in 1894, while part of the purchase money remained unpaid, sold it to the defendants Nos. 2 to 4, who had notice of this fact. The plaintiff now in 1895 sued to enforce his vendor's lien:—*Held*, that the suit was barred by Limitation Act, 1877, schedule II, article 111.

Natesan Chetti v. Soundararaja Ayyangar 141

6. ————, sched. II, arts. 115, 116—Covenant implied in registered sale-deed—Transfer of Property Act—Act IV of 1882, s. 55—Implied covenant for title—Damages for breach—Civil Procedure Code—Act XIV of 1882, s. 13—Res judicata :

On 8th February 1889 the defendant sold to the plaintiff, under a registered conveyance containing no express covenant for title, land of which he was not in possession, and the purchase money was paid. The plaintiff and the defendant sued to recover possession, but failed on the ground that the vendor had no title. The plaintiff now sued on 7th February 1895 to recover with interest the purchase money and the amount of costs incurred by him in the previous litigation:—*Held*, that the suit was not barred by limitation, that the defendant was not entitled to give evidence of his alleged title, and that the plaintiff was entitled to the relief sought by him.

Krishnan Nambiar v. Kannan 8

7. ————, sched. II, art. 132—Suit on a hypothecation bond, dated 1876, to secure money payable on demand :

In a suit to recover principal and interest due on a hypothecation bond executed before the Transfer of Property Act was passed to secure a loan payable on demand, it appeared that the plaint was filed more than twelve years after the date of the document sued on:—*Held*, that the suit was governed by Limitation Act, schedule II, article 132, and that an actual demand was not necessary to establish a starting point for limitation and that the suit was barred by limitation.

Perianna Goundan v. Muthuvira Goundan 139

8. ————, sched. II, arts. 132, 147—Mortgage—Suit for sale :

On 2nd July 1879 the defendant mortgaged to the plaintiff certain property to secure payment of a debt with interest. The instrument purported to be a mortgage with possession, and it contained a covenant to

repay the mortgage amount on the 8th March 1882. The plaintiff never obtained possession and he brought a suit on the 29th June 1894 to recover the principal and interest by the sale of the land:—*Held*, that the suit was governed by article 132 and not article 147 of Limitation Act, schedule II, and was accordingly barred by limitation.

Ramachandra Rayaguru v. Modhu Padhi 326

9. _____, sched. II, art. 134—*Sale by mortgagee as owner:*

A mortgaged land to B and then sold it to C, and subsequently sold it to B ignoring the previous sale. C now brought a suit for redemption and B, who had been in possession for many years, pleaded limitation:—*Held*, that the suit was governed by Limitation Act, schedule II, article 134.

Rego v. Abbu Beari 151

10. _____, sched. II, arts. 142, 144—*Adverse possession—Acts of ownership:*

The defendant had used as a backyard a small piece of land situated between his house and that of the plaintiff, who was his brother, for a period of more than twelve years. In 1894 the defendant began to build on it, whereupon the plaintiff protested and now sued for possession:—*Held*, that the suit was not barred by limitation.

Chokkalinga Naicken v. Muthusami Naicken 58

11. _____, sched. II, arts. 142, 144—*Suit for partition between co-owners—Possession of tenants—Adverse possession—Civil Procedure Code—Act XIV of 1882, s. 43—Cause of action:*

The plaintiff was the Zamorin of Calicut, and he sued in 1887 for a moiety of certain property in Malabar alleged to belong in equal undivided shares to his stanom and that of the defendant and to be in the occupation of tenants. The cause of action was stated to have arisen in 1881 when partition was demanded by the Zamorin and refused by the defendant. In some instances the tenants in occupation represented the family, a member of which was at one time admitted by the Zamorin under a demise or kanom, and had attorned to the defendant; in other instances they were shown to have been admitted by the defendant on paying off the former tenant who had been admitted by the Zamorin. In all these instances the defendant intended the tenant who attorned to him to hold as his tenant to the exclusion of any claim by the Zamorin, but it was not shown that the Zamorin had any notice of such attempted usurpation on the part of defendant. And on these facts the defence of limitation was raised on the ground that the land had been held for more than twelve years adversely to the Zamorin. It appeared further that the Zamorin had previously brought suits and obtained decrees for partition of certain parcels of land as belonging equally to the two stanoms, the defendant in each suit being the present defendant and the tenant in occupation of the land then in question. And on these facts a further defence was raised under Civil Procedure Code, section 43:—*Held*, (1) that Limitation Act, schedule II, article 144, and not article 142 was applicable to the suit, and that in the first class of cases referred to above, the tenancy under the Zamorin had not been determined, and that in the second class, there had been no ouster of the Zamorin, and that consequently the suit was not barred by limitation; and (2) that the suit was not barred by Civil Procedure Code, section 43, by reason of the previous suits.

Itappan v. Manavikrama 153

_____, sched. II, arts. 178, 179—*Application for execution "struck off the file"—Further application for execution—Renewal of previous application:*

An application for execution of a decree of a District Munsif was made in April 1893, but was struck off the file on 20th July 1893, on a stay of execution having been ordered by the Subordinate Judge. After the termination of the proceedings in the Subordinate Court, the decree-holder applied again for execution on 6th July 1896:—*Held*, that the latter application should be regarded as a continuation of the former, and was not barred by limitation.

Sasivarna Tevar v. Arulanandam Pillai 261

1. _____, sched. II, art. 179—*Application for execution—Continuation of previous application:*

In June 1892, an application was made for execution of a decree, and it was dismissed, the applicant being relegated to a suit to establish his right. He did not sue, but in September 1892 he put in a fresh application to execute, which was dismissed. He then sued, and in March 1895 a decree was passed in his favour. He now put in a petition in October 1895, praying that his petition of September 1892 be revived or continued:—*Held*, that the petition was barred by limitation.

Suryanarayana Pandarathar v. Gurunada Pillai 267

1. _____, sched. II, art. 179—*Step in aid of execution—Application for lists of properties attached:*

An application by a decree-holder for a list of the properties attached in execution of his decree is not a step in aid of execution within the meaning of the Limitation Act, schedule II, article 179.

Ranga Chariar v. Balaramasami Chetti 400

LOCAL BOARDS ACT (MADRAS)—ACT V OF 1884, s. 43—*Public servant—Sanitary Inspector:*

A Sanitary Inspector appointed by the local board is a public servant within the meaning of Local Boards Act, Madras, 1884, section 43.

Queen-Empress v. Tiruvengada Mudali 428

1. _____, ss. 77, 78, 81, 94, 163—*Penal Code—Act XLV of 1860, ss. 99, 186, 353—Service of notice of demand of house-tax—Omission to fill up the house-register completely—Illegal distraint—Resistance to distraining officer:*

A notice of demand of a house-tax under the Local Boards Act V of 1884 (Madras) was affixed to the house. The owner, who was a potter and cultivator by occupation, was in the village at the time. He did not pay the tax. A warrant of distress was issued, the house-register not having been completely filled up, and a bucket and spade belonging to the defaulter were attached. The defaulter successfully resisted the distraint:—*Held*, that the provisions of the Act had been sufficiently complied with as regards the preliminary steps for making the demand and the service of notice, and the fact that the spade and the bucket were protected from attachment under section 94 did not justify the resistance, and accordingly that the defaulter was guilty of offences under Penal Code, sections 186 and 353.

Queen-Empress v. Poomalai Udayan 396

LUNATIC—ACT XXXV OF 1858—Guardian for property of lunatic—Lunatic trustee of a mutt :

A guardian may be appointed under Act XXXV of 1858 to the property vested in a lunatic as the head of a mutt.

Sitarama Charya v. Kesava Charya 402

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (MADRAS)**—ACT I OF 1887—Timber trees :**

In a suit to redeem a kanom of land on which timber has grown, the jenmi is not entitled to be credited with half the value of the timber.

Achutan Nayar v. Narasimham Patter 411

2. ———, ss. 4, 7—Improvements made before and after 1st January 1886 :

Malabar Compensation for Tenants' Improvements Act, 1887, section 7, cannot be construed retrospectively so as to invalidate agreements made with respect to improvements prior to the passing of the Act. In computing, therefore, the value of improvements made by a tenant in Malabar, who was let into possession under an agreement before the passing of the Act, it is necessary to ascertain the value of improvements made by him before the 7th January 1887, calculated according to the scales specified in his contract, and also the value of improvements effected subsequently, calculated under the provisions of the Act.

Viru Mammad v. Krishnan 149

MALABAR LAW—Pensions Act—Act XXIII of 1871, s. 12—Political pension payable to Zamorin of Calicut—Power of disposition by a will :

The Zamorin of Calicut, although a member of a Kovilagam, is entitled to dispose of his separate property by a will. The Zamorin, by his will, bequeathed to the plaintiff the malikhana due to him from the Government which might be in arrears at the time of his death. The malikhana was a political pension of Rs. 6,000 a month, payable quarterly. The Zamorin died on the 6th of August 1892. The plaintiff now sued to recover the proportionate amount due on account of the pension for the current quarter up to the time of the Zamorin's death :—*Held*, that the plaintiff was not entitled to recover the amount sued for.

Sridevi v. Krishnan 105

2. ————Powers of stani—Lease by stani of forest land attached to the stanom :

A stani in Malabar is not a tenant for life impeachable for waste. He is a person who represents the estate for the time being, and it is open to him to make a lease of forest land for a term of years, and the mere fact that the alienation is intended to hold good after his life-time will not invalidate it.

Ittirarichan Unni v. Kunjunni 144

MALABAR TENANTS' RIGHT TO COMPENSATION FOR IMPROVEMENTS—Compensation for improvements and arrears of rent set off :

As regards the right to the value of improvements, there is no distinction between a tenant under a kanom and under a verumpattom. The right of the landlord to set off against the value of the improvements any rent due to him must prevail against any alienation made by the tenant of his right to compensation.

Bressa Menon v. Shamu Patter 138

MERCHANT SHIPPING ACT AMENDMENT ACT—25 AND 26 VICT., C. 63, s. 3—Transfer of a ship—Equitable title—Destruction after agreement for sale :

The defendant agreed to purchase a ship from the plaintiff, but the sale was not completed in the manner prescribed by the Merchant Shipping Acts. The ship was delivered to the defendant in pursuance of the agreement and subsequently foundered in port owing to accidental causes. The plaintiff sued to recover the balance of the purchase money :—*Held*, that the plaintiff was not entitled to recover.

Ramanadan Chetti v. Nagooda Maracayur 395

MORTGAGE—Agreement by mortgagor to sell the mortgage premises to the mortgagee—Fetter on the equity of redemption :

A stipulation in a mortgage, that if the mortgage money is not paid on the due date the mortgagor will sell the property to the mortgagee at a price to be fixed by umpires, is unenforceable as constituting a fetter on the equity of redemption.

Kanaran v. Kuttuoly 110

——— Discharge of encumbrance by intending purchaser—'Bona fides' :

A having mortgaged land to B agreed to sell it to C and then to D, in whose favour he executed a conveyance bearing a date prior to the contract with C. C sued A and D to have the conveyance set aside and his contract specifically performed and a decree was passed in his favour. While the suit was pending, D paid off B and now sued A and C to recover the money paid by him :—*Held*, that the plaintiff occupied the position of the mortgagee whom he had paid off, and that the sum constituted a charge on the land.

Syamalarayadu v. Subbarayudu 143

MUHAMMADAN LAW—Shiyas—Inheritance by childless widows :

The childless widow of a Muhammadan of the Shiya school is not entitled to any share in the land left by her husband.

Mir Ali Hussain v. Sajuda Begum 27

NEGOTIABLE INSTRUMENT—Benami transaction—Right of benamidar to sue :

The payee and holder of a promissory note is not debarred from suing on it by reason of the fact that a third person is really interested in it.

Bojjamma v. Venkataramayya 20

NEGOTIABLE INSTRUMENTS ACT—ACT XXVI OF 1881, s. 4—Promissory note :

A debtor signed and delivered to his creditor an unstamped document as follows :—“The account executed on . . . by . . . to . . . The amount which I have this day received from you in cash is Rs. 700. This sum I am bound to pay you. Therefore, adding to this sum interest at 8 annas per cent. per mensem, I am liable to pay. This is the account in this manner executed with my consent” :—*Held*, that the document was not a promissory note and was admissible in evidence.

Tirupathi Goundan v. Rama Reddi 49

PARTNERSHIP—Settlement of accounts—Promise to pay balance :

The plaintiff and defendant, having carried on business in partnership, settled their accounts and struck a balance of Rs. 196, which the defendant agreed orally to pay in a month. The plaintiff now sued in a Small Cause Court for the amount not asking for an account to be taken :—*Held*, that the suit was maintainable.

Marimuthu v. Saminatha Pillai 266

PENAL CODE—ACT XLV OF 1860, ss. 99, 183, 353—Local Boards Act (Madras)—Act V of 1884, ss. 77, 78, 81, 94, 183—Service of notice of demand of house-tax—Omission to fill up the house-register completely—Illegal distraint—Resistance to distraining officer:

A notice of demand of a house-tax under the Local Boards Act V of 1884 (Madras) was affixed to the house. The owner, who was a potter and cultivator by occupation, was in the village at the time. He did not pay the tax. A warrant of distress was issued, the house-register not having been completely filled up, and a bucket and spade belonging to the defaulter were attached. The defaulter successfully resisted the distraint:—*Held*, that the provisions of the Act had been sufficiently complied with as regards the preliminary steps for making the demand and the service of notice, and the fact that the spade and the bucket were protected from attachment under section 94 did not justify the resistance, and accordingly that the defaulter was guilty of offences under Penal Code, sections 186 and 353.

Queen-Empress v. Poomalai Udayan ... 296

2. ————— **s. 183—Resistance to the taking of property—Attachment of goods not being property of judgment-debtor:**

A decree having been passed against the assets of a deceased debtor, execution was taken out and the officer of Court proceeded to seize certain goods. The accused successfully resisted the seizure asserting that the goods seized were his own. He was thereupon charged with having committed an offence under the Penal Code, section 183, but he was acquitted for want of proof by the prosecution that the goods were assets of the deceased:—*Held*, that the acquittal was wrong and should be set aside.

Queen-Empress v. Tiruchittambala Pathan ... 78

3. ————— **ss. 302, 304, 324—Good faith—Order of superior officer—Firing on an unlawful assembly:**

A caused crops to be sown on land, as to the enjoyment of which there was a dispute between her and B. Persons having proceeded to reap the crops on behalf of B, the servants of A went to the place with the station-house officer and some constables who were armed. The station-house officer ordered the reapers to leave off reaping and to disperse, but they did not do so; he then told one of the constables to fire, and he fired into the air. Some of the reapers remained and assumed a defiant attitude. The station-house officer, without attempting to make any arrests and without warning the reapers that, if they did not desist from reaping, they would be fired at, gave orders to shoot, and one of the constables fired and mortally wounded one of the reapers. It was found that neither the station-house officer nor the last-mentioned constable believed that it was necessary for the public security to disperse the reapers by firing on them:—*Held*, that the station-house officer and the constable were not acting in good faith and that the order to shoot was illegal and did not justify the constable and that both he and the station-house officer were guilty of murder.

Queen-Empress v. Subba Naik ... 249

PENSIONS ACT—ACT XXIII OF 1871, s. 4—Suit relating to inam land granted before the time of the British Government—Confirmation of inam—Construction and enforceability of compromise of suit between members of grantee's family—Removal of manager—Appointment of receiver:

Early in the eighteenth century two villages were granted by the Zamindars of Sivaganga and Guntamannikanur to the last of the Naik rulers of Madura for the maintenance of the rank and dignity of his family which was now represented by the plaintiffs and defendants Nos. 1 to 23. The property was long managed by the representative, for the time being, of the senior line. In 1844 one of the junior members instituted a suit

for partition, which terminated in a decree declaring the corpus of the property to be indivisible and the annual produce to be divisible in certain shares. Subsequently in 1857 a compromise was entered into, by which the parties agreed to vary the distribution of the shares, but they agreed that the management of the estate, indivisible and inalienable, should continue to be vested in the eldest line subject to certain supervision on the part of the other members. The compromise was long acted upon by the family; but in 1892 the representative of the senior line died, leaving only his widow and infant sons. The widow, as guardian of the elder son, then entered on the management, and, being *gosha*, delegated it to a stranger. The plaintiffs representing a junior line now sued for the removal of these persons from management and the appointment of another manager, alleging both that they had no right to the managership and also that they had been guilty of mismanagement. All the members of the family were made parties to the suit. It appeared that the plaintiffs had not received their proper share of the produce and the defendants in management denied in the pleadings their right thereto. The plaintiffs had not obtained a certificate from the Collector under the Pensions Act XXIII of 1871, and it appeared that the grant of the villages had been confirmed as an inam by the British Government:—*Held*, (1) that the suit did not fall within the provisions of Pensions Act, section 4, and a certificate of the Collector was accordingly unnecessary; (2) that the compromise was binding on the parties, and that under the compromise the plaintiffs had no right to joint management; and (3) that the widow of the last manager should be removed from the managership, and that until one of her sons came of age the estate should be managed by a receiver appointed from among the members of the family.

Kumara Tirumalai Naik v. Bangaru Tirumalai Sauri Naik ... 810

2. ————— **s. 12—Political pension of Zamorin of Calicut—"Payable"—Power of disposition by will:**

The Zamorin of Calicut, whether he be or not a member of a Kovilagam, is entitled to dispose of his separate property by a will. The Zamorin, by his will, bequeathed to the plaintiff the malikhana due to him from the Government which might be in arrears at the time of his death. The malikhana was a political pension of Rs. 6,000 a month, payable quarterly. The Zamorin died on the 6th of August 1892. The plaintiff having obtained a certificate under Pensions Act, section 6, now sued the new Zamorin to recover the proportionate amount of the pension for the current quarter up to the time of the Zamorin's death:—*Held*, that the plaintiff was not entitled to recover the amount sued for.

Sridevi v. Krishnan ... 105

PLEADER AND CLIENT—Authority of pleader—Compromise entered into by pleader without the client's consent:

It is not competent to a pleader to enter into a compromise on behalf of his client without his express authority to do so.

Jagapati Mudaliar v. Ekambara Mudaliar ... 274

PRACTICE—Civil Procedure Code—Act XIV of 1882, ss. 59, 140—High Court Rules Nos. 89, 43, 44, 47:

A defendant is entitled, under the High Court Rules, to be furnished with a copy of documents sued on, which are deposited with the plaintiff.

Haji Mahomed Abdul Aziz Badsha Sahib v. Subba Naidu ... 490

PRESIDENCY SMALL CAUSE COURTS ACT—ACT XV OF 1892, s. 37—Amendment Act—Act I of 1895, s. 13—Powers of Full Bench—Appeal:

Act I of 1895, section 13, does not empower the Full Bench of the Presidency Court of Small Causes to entertain appeals on questions of fact against the decrees of one of the Judges of the Court.

Srinivasa Charlu v. Balaji Rao ... 288

PROMISSORY NOTE TO A MINOR'S GUARDIAN—Minor's suit by another next friend—Note not endorsed :

An infant sued by his next friend to recover the balance due on a promissory note alleged to have been made and delivered on account of his estate to his mother and guardian who had not endorsed the note :—*Held*, that the suit was maintainable in the absence of an endorsement.

Gurumurti v. Sivayya 391

PROVINCIAL SMALL CAUSE COURTS' ACT—ACT IX OF 1887, sched. II, Arts. 11, 13—Suit for jodi :

A suit for arrears of jodi is maintainable as a small cause suit under Provincial Small Cause Courts' Act, 1887.

Venkatagiri Rajah v. Venkat Rau 243

2. —————, sched. II, Art. 18—Suit by temple manager against his predecessor for damages sustained by temple :

A suit by the manager of a temple against his predecessor in office for damages sustained by the temple owing to the negligence of the defendant is not cognizable by a Court of Small Causes.

Krishnayyar v. Soundararaja Ayyangar 245

3. —————, sched. II, Art. 35—Suit for compensation for illegal attachment—Suit to recover money paid in excess :

The plaintiff sued to recover from his landlord a sum which the defendant had collected in excess of what was properly due to him by distraint of the plaintiff's cattle :—*Held*, that the suit was cognizable by the Small Cause Court.

Karuppanan Ambalam v. Ramasami Chetti 239

RAILWAYS ACT—ACT IX OF 1890, s. 72—Contract Act—Act IX of 1872, s. 73—Condition under which goods despatched by railway—Deterioration—Remoteness of damage :

The plaintiff who was a tailor delivered a sewing machine and some cloths to the Madras Railway Company (the defendant) to be sent to a place where he expected to carry on his business with special profit by reason of a forthcoming festival. Through the fault of the Company's servants the goods were delayed in transmission and were not delivered until some days after the conclusion of the festival. The plaintiff had given no notice to the Company that the goods were required to be delivered within a fixed time for any special purpose, and he had signed a forwarding note under a statement that he agreed to be bound by the conditions at the back and one of those conditions was to the effect that the Company is not liable "for any loss of or damage to any goods whatever by reason of accidental "or unavoidable delays in transit or otherwise." The plaintiff now sued to recover from the Company a sum on account of his estimated profits and the travelling expenses of himself and his assistant at the place of destination and their expenses for food and lodging while there :—*Held*, (1) that as the plaintiff had not shown that the goods had undergone deterioration in value or otherwise the condition above cited was not void under Railways Act, 1890, section 72, although it had not been approved by the Governor-General in Council ; (2) that the plaintiff was bound by the condition even if he was in fact ignorant of its effect ; and (3) that the damages claimed were too remote.

Madras Railway Company v. Govinda Rau 172

RECEIVER, APPOINTMENT OF—PENSIONS ACT—ACT XXIII OF 1871, s. 4—Suit relating to inam land granted before the time of the British Government—Confirmation of inam—Construction and enforceability of compromise of suit between members of grantee's family—Removal of manager :

Early in the eighteenth century two villages were granted by the Zamindars of Sivaganga and Guntamaikanur to the last of the Naik rulers of Madura for the maintenance of the rank and dignity of his family which was now represented by the plaintiffs and defendants Nos. 1 to 23. The property was long managed by the representative, for the time being, of the senior line. In 1844 one of the junior members instituted a suit for partition, which terminated in a decree declaring the corpus of the property to be indivisible and the annual produce to be divisible in certain shares. Subsequently in 1857 a compromise was entered into, by which the parties agreed to vary the distribution of the shares, but they agreed that the management of the estate, indivisible and inalienable, should continue to be vested in the oldest line subject to certain supervision on the part of the other members. The compromise was long acted upon by the family ; but in 1892 the representative of the senior line died, leaving only his widow and infant sons. The widow, as guardian of the elder son, then entered on the management, and, being gosha, delegated it to a stranger. The plaintiffs representing a junior line now sued for the removal of these persons from management and the appointment of another manager, alleging both that they had no right to the managership and that they had been guilty of mismanagement. All the members of the family were made parties to the suit. It appeared that the plaintiffs had not received their proper share of the produce and the defendants in management denied in the pleadings their right thereto. The plaintiffs had not obtained a certificate from the Collector under the Pensions Act XXIII of 1871, and it appeared that the grant of the villages had been confirmed as an inam by the British Government :—*Held*, (1) that the suit did not fall within the provisions of Pensions Act, section 4, and a certificate of the Collector was accordingly unnecessary ; (2) that the compromise was binding on the parties, and that under the compromise the plaintiffs had no right to joint management ; and (3) that the widow of the last manager should be removed from the managership, and that until one of her sons came of age the estate should be managed by a receiver appointed from among the members of the family.

Kumara Tirumalai Naik v. Bangaru Tirumalai Sauri Naik 810

REFORMATORY SCHOOLS ACT—ACT VIII OF 1897, s. 8—Reformatory Schools Act—Act V of 1876, s. 22—Period of detention in reformatory—Rules under Act of 1876 :

Held, by SHEPARD, OFFG. C.J., affirming the judgment of MOORE, J. (DAVIES, J., diss.) that the rules made by Government under Act V of 1876 must be deemed to have been made under Act VIII of 1897 ; and that Magistrates acting under Act VIII of 1897 must order the detention of a juvenile offender until he attains the age of eighteen.

Queen-Empress v. Ramalingam 480

REGISTRATION ACT—ACT III OF 1877, s. 17 (d)—Transfer of Property Act—Act IV of 1882, ss. 4, 107—Lease of a shop for three years—Registration :

Leases falling under section 107 of the Transfer of Property Act are compulsorily registrable notwithstanding the Government notification issued under the proviso to section 17 (d) of the Registration Act.

Vairananda Nadar v. Miyakan Rowter 109

REGULATION VI OF 1831 (MADRAS), s. 3—Village service inam—Village blacksmith—Limitation :

The mortgagee of maniam land attached to the hereditary office of village blacksmith sued in the Court of a District Munsif for possession, to which he claimed to be entitled under his mortgage ; and there was evidence that he had been in possession for many years up to a date not long

prior to the suit:—*Held*, that, as the plaintiff could have sued only under Regulation VI of 1831 in a Revenue Court, he could not, under Limitation Act, 1877, section 28, acquire a title by prescription to the land.

Pichuvayyan v. Vilakkudayan Asari ... 134

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863, ss. 3, 4, 7, 11, 14—Suspension and dismissal of trustee of a temple—Powers of temple committee—Civil Procedure Code—Act XIV of 1882, s. 575—Appeal referred owing to a difference of opinion on a point of law:

The plaintiff was appointed to the office of trustee of a Hindu temple under Religious Endowments Act, 1863, section 3, by the temple committee constituted under that Act. Subsequently the committee, having received certain complaints against him, suspended him from office pending inquiry without calling on him for an explanation. They alleged as the grounds of his suspension that he had caused loss of property and money to the temple and that he had conducted things in the temple contrary to custom so as to cause a disturbance of the peace. The trustee refused to acquiesce in the order of suspension and to give up certain records, &c., which he was by that order required to deliver, and denied the authority of the committee as asserted by them. Shortly afterwards the committee dismissed him. The plaintiff denying that his suspension and dismissal were legal, brought two suits against the members of the committee, the first for damages for the suspension, and the second for an injunction to restrain the defendants from interfering with his discharge of his duties as trustee. Both of these suits were dismissed and the plaintiff preferred appeals to the High Court. In the appeal relating to the claim for an injunction, it was found that no misconduct had been proved against the plaintiff previous to the order of suspension:—*Held*, by SHEPARD and DAVIES, JJ., that a trustee in the position of the plaintiff cannot be dismissed from office except for good cause shown, and that his conduct subsequent to the order of suspension did not amount to such good cause. In the appeal relating to damages:—*Held*, by SHEPARD, J., that the order of suspension was illegal and that under the circumstances the plaintiff was entitled to substantial damages:—*Held*, by DAVIES, J. (finding that the committee had proceeded in the *bona fide* belief that they were acting for the good of the temple in suspending the plaintiff pending inquiry), that the order of suspension was not illegal and that the suit was rightly dismissed. Owing to the difference of opinion between the two Judges the last-mentioned appeal was referred to the Chief Justice under Civil Procedure Code, section 575, and was heard by him sitting with the two other Judges:—*Held*, that the whole appeal was open for argument and not only the point of law on which the Judges had differed in opinion:—*Held*, by COLLINS, C.J., and SHEPARD, J. (DAVIES, J., *diss.*), that the order of suspension was illegal and the plaintiff was entitled to substantial damages. *Per* COLLINS, C.J.—The power of suspension by the committee is, in my judgment, the same as the power of dismissal. The committee, having made due inquiry and having called on the trustee for an explanation, may suspend for good and sufficient cause, but not otherwise.

Seshadri Ayyangar v. Nataraja Ayyar ... 174

2. —————, s. 18—Civil Procedure Code—Act XIV of 1882, ss. 2, 588—Order for payment of plaintiffs' costs out of the funds of the institution—Appeal on behalf of the institution:

A suit having been instituted under Religious Endowments Act, 1863, section 14, *bona fide* in the interests of a Hindu temple, the plaintiffs desired to withdraw the suit with liberty to sue again and an order was made permitting them to do so, and directing that the costs be paid from the funds of the institution:—*Held*, that no appeal lay against the order as to costs.

Ramabhascor Dasaji v. Sriranga Charlu ... 42

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865, s. 3—Mokhassa-inamdars paying kattubadi to the zamindar—Obligation to accept patta:

Mokhassa-inamdars, who hold lands in a zamindari and pay kattubadi annually to the zamindar and who are not cultivating tenants, are not bound to accept a patta from the zamindar.

Lakshminarayana Pantulu v. Venkatarayanam ... 116

2. —————, s. 8—Suit to enforce tender of patta—Suit brought after expiration of fasli:

A tenant is not entitled to bring a suit under Rent Recovery Act, 1865, section 8, to enforce the tender of a patta by his landlord after the expiration of the fasli to which the patta relates.

Ramasami Mudaliar v. Rathna Mudaliar ... 148

3. —————, s. 10—Order of ejectment—Suit to set aside such order:

Held (DAVIES, J., *diss.*), that a tenant who has been ejected in pursuance of an order under Rent Recovery Act (Madras), section 10, cannot maintain a suit to question the legality of that order.

Manicka Gramani v. Ramachandra Ayyar ... 492

4. —————, s. 11—Enhancement of rent—Custom.

The imposition by a zamindar of garden assessment on land brought under garden cultivation by a tenant who improved the land by sinking a well after 1865 is illegal, although there might be a custom in the zamindari of charging a varying assessment according to the kind of crop raised.

Fischer v. Kamakshi Pillai ... 186

5. —————, s. 11—Reduction of assessment in patta of 1840—Construction of patta prescribing rent to be paid permanently by tenant:

In 1840 a mittadar granted to a tenant a patta for certain land in which the tenant had already a heritable estate, fixing the rent at the reduced rate Rs. 40. The document provided "this sum of Rs. 40 you are to pay perpetually every year per kistbandi in the mitta catcheri." It appeared that the rent fixed was less than what was payable upon the lands previous to the date of the patta and also less than that payable upon neighbouring lands of similar quality and description:—*Held*, (1) that the facts of the case were distinguishable from those of *Rajaram v. Narasinga* (I.L.R., 15 Mad., 199), and that the patta fixing the rent was binding upon the representatives in title of the grantor and the grantees, respectively; and (2) that the reduction in the rate of rent was not invalidated by Rent Recovery Act, 1865, section 11.

Foulkes v. Muthusami Goundan ... 503

6. —————, s. 14—Suit for rent—Limitation:

When a tenant has executed a muchalka specifying the dates on which the various instalments of rent are payable, the period of limitation for a suit by the landlord for the rent is to be computed from such dates.

Venkatagiri Rajah v. Ramasami ... 413

7. _____, s. 18—*Civil Procedure Code—Act XIV of 1882, s. 43—Suit by a landlord in the Court of the District Munsif for arrears of rent for two years—Subsequent attachment for rent of a third year accrued due at date of suit:*

A samindar brought a suit in the District Munsif's Court to recover from a tenant on his estate the arrears of rent for two years. Rent for the third year was also due. No claim for it was included in the suit, but the landlord attached the land by summary process under the Rent Recovery Act to recover it. The tenants sued in the Revenue Court under the Rent Recovery Act to have the attachment set aside as illegal:—*Held*, that the samindar was not precluded by Civil Procedure Code, section 43, from pursuing his remedies under the Rent Recovery Act and that the attachment was not illegal.

Rajah Esuvara Doss v. Venkatarayer 286

SERVICE INAMS—Enfranchisement of the inam in favour of a widow:

Lands constituting the emoluments of the office of karnam were enfranchised in favour of a widow who had been in possession since the death of her husband which took place about 18 years previously. They were subsequently sold by her:—*Held*, that the vendee's title was good against the reversionary heir of the husband.

Dharanipragada Durgamma v. Kadumbari Virrazu 47

SPECIFIC RELIEF ACT—ACT I OF 1877, s. 42—Benami purchase by a Government officer prohibited from acquiring land—Suit for declaration against benamidar:

The plaintiff sued for declaration of his title to certain land which had been purchased by him in the name of the defendant. The object of the transaction was to conceal from the Collector the fact that the plaintiff, who was a Tahsildar, had acquired property in his taluk contrary to the rules of his department:—*Held*, that the plaintiff was entitled to the declaration sought.

Lobo v. Brito 281

8. _____, s. 42—*Civil Procedure Code—Act XIV of 1882, s. 31—Misjoinder—Tenants in common—Benami mortgage—Suit by some of the heirs of the real mortgagees—Evidence of benami—Limitation—Joinder of causes of action:*

In 1880 A and B jointly advanced moneys on the security of a usufructuary mortgage which was taken in the name of B. In 1884 A alone advanced moneys on the security of usufructuary mortgages which were likewise taken in the name of B. A died leaving three sons, of whom the plaintiffs were two. The plaintiffs having become divided from their brother now brought suits in 1894 against B and the mortgagors for a declaration of their right to the mortgages and for possession of the documents and for rent of the land which had been collected by B. It appeared that there had been no denial of the plaintiffs' rights before 1889, that no rent had been collected for several years before suit, the mortgagors who had remained in possession as lessees after the execution of the mortgages having refused to attorn to B:—*Held*, (1) that the suits were not barred by Specific Relief Act, section 42, for want of a prayer for possession; (2) that the suits were not barred by limitation save as to the claim for rent; (3) that the suits were not bad for the non-joinder of the plaintiffs' brother; (4) that the transactions having been proved to be benami in character, the plaintiffs were entitled to a declaration of their two-thirds right under the mortgages of 1884 and a like declaration as to half of the mortgage of 1880; and (5) that the plaintiffs were entitled to possession of the mortgage documents of 1884 and the other documents connected therewith, but not the others.

Shabala Bhatta v. Kunhanna Bhatta 373

3. _____, s. 42—*Suit for declaration—Laches and delay on plaintiffs' part:*

Inasmuch as in this country a period of limitation is prescribed even for suits where the grant of relief sought is within the discretion of the Court, mere lapse of time short of the period of limitation should not ordinarily be held a good ground for refusing relief to a plaintiff.

Athikarath Nanu Menon v. Erathanikat Komu Nayar 42

4. _____, s. 56, cl. (b)—*Trusts Act—Act II of 1882, ss. 91, 95—Civil Procedure Code—Act XIV of 1882, s. 232—Decree obtained on a benami mortgage by benamidar—Suit by real mortgagees—Declaration—Injunction:*

A mortgaged land to B as either agent or benamidar for C. B sued on the mortgage and obtained a decree. C now sued A and B for a declaration that he was entitled to the benefit of the decree and had the right to execute it, and for an injunction restraining A from paying the money to B and B from receiving the money from him:—*Held*, that the plaintiff was entitled to the declaration, but not to the injunction.

Sethurayar v. Shanmugam Pillai 353

STAMP ACT—ACT I OF 1879, s. 3, cls. (9), (19)—Settlement—Gift—Conveyance:

An instrument whereby a life interest in land is created with remainder to the settlor and his heirs is a settlement within the meaning of the Stamp Act. A transfer of land, in pursuance of a compromise of a widow's suit for maintenance, is a conveyance and must be stamped accordingly.

Reference under Stamp Act, s. 46 422

2. _____, s. 3, cls. (12), (13)—*Lease—Mortgage:*

An instrument, therein described as a lease, was executed in consideration of one hundred and twenty rupees, and it provided that the party paying that sum should remain in possession of certain land for twelve years, but contained no provision for repayment of that sum or for the payment of rent:—*Held*, that the instrument was a usufructuary mortgage and not a lease.

Reference under Stamp Act, s. 46 358

STATUTE:—

25 & 26 Vict., Cap. 63, s. 3: *See* MERCHANT SHIPPING ACT AMENDMENT ACT.

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889—Village Courts Act (Madras)—Act I of 1889:

The provisions of the Succession Certificate Act apply to suits in a Village Munsif's Court.

Rasibi Ammal v. Olaga Padayachi 115

2. _____, s. 14—*Refund of deposit:*

If an application for a succession certificate is granted, the sum deposited by the applicant cannot be refunded; but if no order for the grant of the certificate has been made, a refund can take place.

Sankara Ayyar v. Nainar Mooppanar 241

SUITS VALUATION—Pecuniary limits of jurisdiction—Suit filed in superior Court :

In a suit on a mortgage, in which the amount claimed was in excess of the pecuniary limits of the jurisdiction of a District Munsif, and which was filed in the Court of a Subordinate Judge, it appeared that there had been an adjudication by a District Munsif in a previous suit affecting the rights of the parties now in issue, and that the present claim was largely composed of interest. The Subordinate Judge having framed issues relating to the claim for interest and having tried them as preliminary issues, decided that the suit was within the pecuniary limits of the jurisdiction of a District Munsif, and that the claim had been unwarrantably exaggerated with a view to filing the suit in a superior Court, and so avoiding the plea of *res judicata*, and he thereupon returned the plaint to be presented in the proper Court:—*Held*, that the procedure adopted was wrong and that the whole suit should have been tried.

Koti Pujari v. Manjaya 271

SUITS VALUATION ACT—ACT VII OF 1887, s. 8—Civil Procedure Code—Act XIV of 1882, s. 2—Suit for partition—Order by Appellate Court directing that the plaint be returned—Appeal against such order—Amendment of memorandum of appeal :

The plaintiff sued in the Court of the District Munsif to recover his share of family property. The amount of the property exceeded, but the amount of the share claimed was within the pecuniary limit of the jurisdiction of the District Munsif who passed a decree for the plaintiff. On appeal it was held that the suit was not within the jurisdiction of the Court. The decree accordingly was reversed, and it was ordered that the plaint be returned for presentation to the proper Court. The plaintiff preferred this second appeal to the High Court:—*Held*, that the Lower Appellate Court had not passed a decree within the meaning of the Civil Procedure Code, section 2, and that plaintiff's remedy was not by way of a second appeal, but he should have proceeded under Civil Procedure Code, section 588. The petition of appeal having been allowed to be amended in accordance with this ruling:—*Held*, that the Court of First Instance had jurisdiction to entertain the suit.

Chinnasami Pillai v. Karuppa Udayan 284

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, ss. 4, 107—Lease of a shop for three years—Registration—Registration Act—Act III of 1877, s. 2 (d) :

Leases falling under section 107 of the Transfer of Property Act are compulsorily registrable, notwithstanding the Government notification issued under the proviso to section 17 (d) of the Registration Act.

Vairananda Nadar v. Miyakan Rowter 109

2. _____, s. 55—Implied covenant for title—Damages for breach—Covenant implied in registered sale-deed—Civil Procedure Code, s. 13—Res judicata—Limitation Act, sched. II, arts. 115, 116 :

On 8th February 1889 the defendant sold to the plaintiff, under a registered conveyance containing no express covenant for title, land of which he was not in possession, and the purchase money was paid. The plaintiff and the defendant sued to recover possession, but failed on the ground that the vendor had no title. The plaintiff now sued on 7th February 1895 to recover with interest the purchase money and the amount of costs incurred by him in the previous litigation:—*Held*, that the suit was not barred by limitation, that the defendant was not entitled to give evidence of his alleged title, and that the plaintiff was entitled to the relief sought by him.

Krishnan Nambiar v. _____

3. _____, s. 59—Oral agreement for kanom—Suit for ejectment by a jenmi :

A jenmi in Malabar sued to eject a tenant, who proved by oral evidence that he had one year before suit paid to the plaintiff a sum of money as a renewal fee and the plaintiff agreed to demise the land to him on kanom for a period of twelve years:—*Held*, that, although no instrument has been executed and registered, the plaintiff was not entitled to eject the defendant.

Ittappan v. Parangodan Nayar 291

4. _____, ss. 60, 62—Partial redemption—Contribution :

A mortgaged two houses to B for Rs. 200. C purchased at a Court-sale A's interest in one of the houses and sold it to the plaintiff. The plaintiff sued to redeem the house and prayed that the mortgagee be ordered to convey it to her on payment of Rs. 100:—*Held*, that the suit should be dismissed.

Kuppusami Chetti v. Papathi Ammal 369

5. _____, s. 68—Limitation Act—Act XV of 1877, sched. II, arts. 97, 116, 120—Suit for mortgage money by mortgagee on disturbance of possession :

The defendants demised certain land to the plaintiff under a registered kanom deed in 1888. The plaintiff was evicted in February 1893. He now sued in 1896 to recover the amount of the kanom:—*Held*, that the period of limitation applicable to the suit was six years and that the suit was not barred by limitation.

Unichaman v. Ahmed Kutti Kayi 242

6. _____, s. 68—Usufructuary mortgage—Possession not given—Suit for sale :

A usufructuary mortgagee to whom the mortgagor fails to deliver or to secure possession of the property mortgaged is not entitled to claim in a suit for the money an order for the sale of such property.

So held by the Full Bench in a case where the mortgage contained no covenant to pay.
Arunachalam Chetti v. Ayyavayyan 476

7. _____, ss. 68, 98—Anomalous mortgage—Right to possession :

Two out of three coparceners executed in favour of a creditor in respect of land belonging to the coparcenary an instrument which contained the following terms:—"As we have received Rs. 500, you will, in lieu of the said amount and interest, enjoy the said property for three years by virtue of Arakattu otti on the condition that, on the expiry of the said three years, we should redeem the land without paying either principal or interest. You will, on the expiry of the said period, deliver possession of the said immovable property without raising any objection." The creditor obtained possession of only part of the land:—*Held*, that the instrument was an anomalous mortgage, and that the mortgagee was liable to ejectment after the expiry of the three years.

Visvalinga Pillai v. Palaniappa Chetti 1

8. _____, s. 72—Mortgage accounts—Costs incurred by mortgagee :

Land, having been mortgaged to the defendant, was let by him for rent to the mortgagor. The rent fell into arrear and the mortgagee sued and gained a decree for the rent in arrear and for possession. Subsequently on the mortgagor's death, her heir, the present plaintiff, unsuccessfully

resisted execution of the decree obtained against her, asserting that she had no right to mortgage the property which, it was alleged, had belonged to his father. The plaintiff now brought a suit for redemption:—*Held*, that in taking the account the defendant was entitled to have credit for the costs incurred in the proceedings between him and the plaintiff, but not in the proceedings between him and the original mortgagor.

Pokree Sahab Beary v. Pokree Beary 34

9. *Parties—Redemption: s. 85—Mortgagee's suit—*

A mortgaged lands X, Y and Z to B for Rs. 5,000. Lands X and Y were sold and the proceeds applied towards the discharge of the mortgage. Land Z was sold to C for Rs. 990, which was not so applied. C transferred his rights to the present defendants. B brought a suit on the mortgage joining A and C, but not C's transferees as defendants. C did not appear, and a decree was passed by consent for Rs. 1,050, and land Z was brought to sale and purchased for Rs. 270 by the plaintiff who now sued the defendants separately for possession:—*Held*, that the defendants not having been joined in the previous suit were entitled to redeem on payment of Rs. 1,050 and interest.

Sivathi Odayan v. Ramasubbayyar 64

10. *against Hindu mortgagor and two sons—Sale of mortgage premises—Subsequent suit for share of a third son: s. 85—Mortgage suit*

A Hindu having three sons executed a mortgage in favour of the defendants, who subsequently obtained a decree for sale on the mortgage and brought the property to sale in execution and purchased it themselves, the mortgagor and two only of his sons being brought on to the record. It did not appear whether the plaintiffs in that suit were aware of the interest of the third son, who now sued to recover his one-quarter share of the mortgage premises claiming that the previous proceedings were not binding on him and alleging that the mortgage was unsupported by consideration:—*Held*, that the plaintiff was entitled to have the question tried whether there was really a debt owing by the father to support the mortgage. *Quare*: Whether *Bhawani Prasad v. Kallu* (I.L.R., 17 All, 537) lays down the right rule with reference to Transfer of Property Act, section 85.

Ramasamayyan v. Virasami Ayyar 222

11. *Interest—Contract rate—Subsequent interest—Civil Procedure Code—Act XIV of 1882, s. 209: s. 86—Mortgage decree—*

When a decree for sale is passed in a mortgage suit, interest at the contract rate should be decreed for the period allowed for payment by the mortgagor, and subsequent interest should be decreed at six per cent. only.

Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar 436

12. *Ejectment suit by mortgagor—Subsequent suit for redemption—Civil Procedure Code—Act XIV of 1882, ss. 12, 13—Res judicata: ss. 91, 95—Redemption—*

A zamindar mortgaged his estate under four successive instruments to the same creditor who was subsequently placed in possession. On the death of the mortgagor, his son, claiming to have succeeded by the law of primogeniture to the zamindari as an impartible estate, sued to eject the mortgagee; and a decree was passed declaring what was the sum due on a date named and how far it was binding on the estate, and decreeing that, on payment of what might be due on taking an account, the mortgagee should give up possession. Many years later the zamindar applied to the Court to carry out this decree, and a like application was put in by the

present plaintiff to whom seven-eighths of the equity of redemption had been assigned. Both of these applications were rejected in the High Court as barred by limitation, and the applicants applied for leave to appeal to the Privy Council against the order of the High Court. Meanwhile the plaintiff brought the present suit to redeem the mortgages of the late zamindar:—*Held*, (1) that the suit was not barred under Civil Procedure Code, section 12, by reason of the pendency of the application for leave to appeal to the Privy Council; (2) that, as there was no decree for foreclosure passed in the previous suit which had been treated as a suit for redemption, the present suit was not precluded by the decree therein; (3) that the findings in the previous suit as to the amount of the debt and the extent to which it bound the estate were *res judicata*; and (4) that the plaintiff was entitled to redeem the whole mortgages, although he was assignee of only seven-eighths of the equity of redemption, as the owner of the remaining one-eighth was joined as defendant and did not apply to be made plaintiff.

Nainappa Chetti v. Chidambaram Chetti 18

13. *covenants subsequently entered into to support title—Expressum facit cessare tacitum: s. 119—Exchange—Mutual*

The plaintiff and defendant effected an exchange of land; subsequently they executed to each other documents, of which that executed by the defendant recited the exchange and continued:—"if any claim or dispute arises I hereby bind myself to settle it. If I do not so get the dispute settled, I hereby bind myself to pay an amount not exceeding Rs. 4,014-8-6 at the rate of Rs. 1-4-0 per kuli of land for lands which go out of your possession." The plaintiff, alleging that he had been ousted from the land conveyed to him, now sued to recover the land which he had given in exchange:—*Held*, that the operation of Transfer of Property Act, section 119, was excluded by the express covenant in the document quoted above.

Subramania Ayyar v. Saminatha Ayyar 69

14. *Claim affirmed by a Court—Consideration for assignment—Limitation—Construction of decree: s. 135—Actionable Claim—*

A, as guardian of the widow and legatee of the depositor, claimed a sum of money in the hands of a Bank, to which B asserted an adverse claim. Pending an application by A for a succession certificate, B sued the Bank and the widow for the money and A was joined as a defendant. A decree was passed in 1889, by which it was ordered that the Bank should pay the money to B on his giving security to pay it over to A on his obtaining the succession certificate. B furnished security and received the money in 1892. A meanwhile had obtained the succession certificate, and in 1894 he purchased the rights of the widow who had come of age. In the same year he sued B for the money:—*Held*, that the suit was not barred by limitation and that the plaintiff was entitled to a decree; but that he could recover only the price actually paid by him with interest and the incidental expenses and costs, as the case was not within Transfer of Property Act, section 135 (d), since, on the true construction of the decree of 1889, all that had been decided was who should hold the money pending the settlement of the rights of the rival claimants.

Suryanarayana Sastris v. Ramamurti Pantulu 253

TREE-PATTADAR—Right to land on which trees stand:

Held, per DAVIES and MOORE, JJ., affirming the judgment of BENSON, J., (SUBRAMANIA AYYAR, J., diss.) that persons holding a patta for palmyra trees in Tinnevely are not *ipso facto* entitled to an ordinary raiyatwari patta for the land on which the trees stand. Per SUBRAMANIA AYYAR, J.:—Land on which a man plants a palmyra tope is in his exclusive occupancy and possession as a raiyat of Government, subject to his liability to pay

any assessment or assessments which the Government may from time to time be entitled to impose and subject also to all other lawful incidents attaching to a holding of that description.

The rights of a tree-pattadar and the nature of the revenue levied on such pattadars considered.

Theivu Pandithan v. Secretary of State for India ... 433

TRUSTS ACT—ACT II OF 1882, ss. 91, 95—Specific Relief Act—Act I of 1877, s. 56, cl. (b)—Civil Procedure Code—Act XIV of 1882, s. 232—Decree obtained on a benami mortgage by benamidar—Suit by real mortgagee—Declaration—Injunction:

A mortgaged land to B as either agent or benamidar for C. B sued on the mortgage and obtained a decree. C now sued A and B for a declaration that he was entitled to the benefit of the decree and had the right to execute it, and for an injunction restraining A from paying the money to B and B from receiving the money from him:—*Held*, that the plaintiff was entitled to the declaration, but not to the injunction.

Sethurayar v. Shanmugam Pillai ... 353

VENDOR AND PURCHASER—Want of consideration for deed of sale—Evidence that a deed is not intended to have the ordinary operation:

The plaintiffs sued for certain land which they claimed in succession to Rathai Ammal deceased. The defendant who was in possession had executed a sale-deed comprising the property now in question, in favour of the deceased. But it was pleaded by him and found by the Court of First Appeal that the sale-deed was *benami*, and no consideration had passed, and a decree was passed dismissing the suit:—*Held, on Second Appeal*, that the decree should be reversed. *Per curiam*:—When a conveyance has been duly executed and registered by a competent person, it requires strong and clear evidence to justify a Court in holding that the parties did not intend that any legal effect should be given to it. It needs to be proved that both parties had it in their minds that the deed should be a mere sham, and in order to establish this proof, it needs to be shown for what purpose other than the ostensible one the deed was executed.

Ranga Ayyar v. Srinivasa Ayyangar ... 56

VILLAGE COURTS ACT (MADRAS)—ACT I OF 1889—Succession Certificate Act—Act VII of 1889:

The provisions of the Succession Certificate Act apply to suits in a Village Mansif's Court.

Rasibi Ammal v. Olaga Padayachi ... 115

2. —————, s. 73—Power of District Munsif on revision:

A District Munsif has no jurisdiction to reserve the decree of a Village Munsif on a question of evidence; he can only revise the proceedings of village courts on the grounds mentioned in section 73 of the Village Courts Act.

Giddayya v. Jagannatha Rau ... 363

