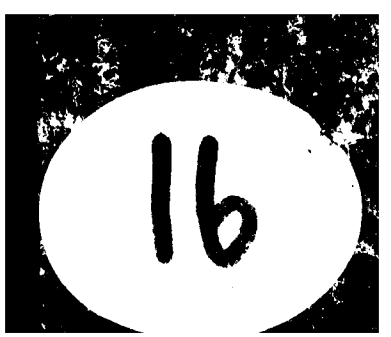

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THE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

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

REPORTED BY

Privy Council	.. ..	C. BOULNOIS, *Middle Temple.*
High Court	.. ..	K. BROWN, *Inner Temple (to 14th March).* D. CHAMIER, *Inner Temple (from 14th March).*

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1st JANUARY—31st DECEMBER 1899.

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THE INDIAN LAW REPORTS,

Madras Series.

APPELLATE CRIMINAL.

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

1898.
July 29.
August 31.
September 1.

QUEEN-EMPRESS

v.

DONAGHUE AND ANOTHER.*

Evidence Act—Act I of 1872, s. 122—Privileged communication—Letter from husband to wife—Letter taken on search of wife's house.

On a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of her house made there by the Police:

Held, that the letter was admissible in evidence against the accused.

APPEALS against the judgment of conviction and sentence pronounced by A. Thompson, Sessions Judge of North Malabar, in Sessions Case No. 6 of 1898.

"First accused" said the District Judge "is an Assistant "Engineer employed by the District Local Fund Board, Malabar, "and, as such, he is entrusted with the power to issue cheques on "any Government treasury for the amount placed to his credit "in that treasury. Among the works under his charge was the "completion of the approaches to the new Kuttupoya bridge. "The new bridge was in a slightly different position from that "of the old bridge, so that as the hill on both sides of the "bridge runs down to the river and as the old approach had "been cut out of the side of the hill, the approach to the new "had to be formed by making a further cutting out of the hill "at the side of the old cutting. The cutting done for the old

* Criminal Appeals Nos. 185 and 186 of 1898.

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"approach and the further cutting done for the new approach "are referred to by the witnesses as the old cutting and the "new cutting, respectively.

"Second accused was the contractor, or as he is called "technically the 'piece-worker,' who actually carried out the new "approach work.

"The charge against the first accused is in substance that he "dishonestly paid to the second accused sums of money belonging "to the District Board very greatly in excess of the amount which "he knew to be due to the second accused for the work actually "done by the second accused; and the charge against the second "accused is, in substance, that by dishonestly receiving large "sums of money, to which he knew that he was not entitled, "he abetted the breach of trust committed by first accused."

It appeared that the first witness for the prosecution, who was a Police officer of Pondicherry, searched the house of the wife of the first accused at Pondicherry on the 4th of December 1897 and there found, *inter alia*, a letter from the first accused to his wife, dated 6th November 1897, which was tendered in evidence by the prosecution and marked in the Magistrate's Court as exhibit V. Objection was taken in the Sessions Court to the admissibility of this document under Evidence Act, section 122, and the Sessions Judge upheld the objection on the ground that the taking of a husband's letter written to his wife from the possession of the latter by searching her house amounts to compelling the wife to disclose a communication made to her husband. On the other evidence in the case the Sessions Judge found the accused was guilty and sentenced the accused to rigorous imprisonment for three years and two years respectively.

The accused preferred these appeals.

Mr. *E. Norton* and Mr. *J. G. Smith* for the appellants.

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

BODDAM, J.—We are of opinion that the conviction of both the prisoners in this case is right.

We are satisfied from the evidence of Mr. Paul that the defence raised to the effect that the prosecution had not taken into consideration a large quantity of earth, &c., which had been removed from the Iritty side of the new bridge between the old road and the new is absolutely false. Mr. Paul has proved that the allegation of the prosecution that there was a hollow there and not

a large quantity of earth to be removed is true. This of itself is sufficient to show that the first defendant had grossly exaggerated the work done by the second defendant and has thereby been instrumental in defrauding the Local Fund Board of large sums of money which were paid to the second defendant on the false returns made by the first defendant. In these circumstances we see no reason to think that the rest of the evidence of the District Engineer and others called to corroborate him is not true.

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Whether, in fact, the first defendant made the measurements which he has vouched as being made by him or not is immaterial, for he says he made them; and even if he did not make them he vouched them and in either case he must have known that the measurements were wrong, and is equally guilty of the offences charged.

As regards the second defendant he was paid for work which he must have known perfectly well that he had never done, and we have no doubt that this was the result of arrangement between the first and the second defendants and that each shared to some extent in the proceeds.

We think the Sessions Judge was wrong in declining to receive in evidence the letter, exhibit V—a letter from the first defendant to his wife which had been found by the police when searching her house under a search warrant. Section 122 of the Evidence Act does not apply to such a case. A document, even though it contains a communication from a husband to a wife or *vice versâ*, in the hands of third persons, is admissible in evidence; for, in producing it, there is no compulsion on or permission to the wife or husband to disclose any communication. The section protects the individuals, and not the communication if it can be proved without putting into the box for that purpose the husband or the wife to whom the communication was made. For these reasons we think that exhibit V was rightly received in evidence. We think the sentence is inappropriate and excessive and should be modified. The first accused is sentenced to two years' rigorous imprisonment and a fine of Rs. 2,500, in default nine months' further rigorous imprisonment.

The second accused is sentenced to two years' rigorous imprisonment and a fine of Rs. 5,000, in default nine months' further rigorous imprisonment. If the fine is collected, two-thirds of it should be paid to the Local Fund Board.

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SUBRAMANIA AYYAR, J.—I concur and would only add a few words as to the question of the admissibility of the letters addressed by the appellant to his wife. Now as to the letters which passed into the hands of the police in Pondicherry, all that appears in the evidence with reference to the circumstances in which the police took them is that they were found in the premises occupied by the wife and were taken in execution of a search warrant issued by a Magistrate. Section 122 of the Evidence Act, relied on on behalf of the appellant in support of the contention that such letters were not admissible, does not support it. The words of the section material to our present purpose are "compelled to disclose" and "permitted to disclose." These clearly imply that the party concerned is made or allowed to say or do something by way of disclosing a communication made during marriage. But, in the instance before us, the appellant's wife had not to act and, if that were a matter of any significance, did not, in fact, act in any such way. If at the time the police took charge of the letters the wife was present, she was but a spectator of what was going on. That cannot possibly be held to come within the purview of the section quoted. Further, sections 94 and 96 of the Code of Criminal Procedure, which should be read together, are also against the appellant's Counsel's contention inasmuch as the former section excepts only documents falling under sections 123 and 124 of the Evidence Act, thus implying that documents referred to in section 122 of that enactment are not exempt from being searched for, seized, and produced in evidence in a case such as this. *Reg.* v. *Pamenter*(1), to which we were referred, is distinguishable even if it were law which is however doubted in Taylor on Evidence (9th edition, volume I, page 569, note). The American cases (*Commonwealth* v. *Griffin*(2) and *State* v. *Center*(3)), cited in page 590 of the same work, to which our attention was called, are also scarcely in point. According to Greenleaf on Evidence these cases are unfavourable to the contention urged on behalf of the appellant, since the ruling there appears to be that a third person, who has overheard a conversation between husband and wife while it was going on, may testify to it, (15th edition, volume I, page 347, note). See also *Rex.* v. *Simons*(4). Be this as it may, it is perfectly clear from the

(1) 12 Cox, C.C., 177.
(2) 110 Mass., 181.
(3) 35 Vern., 378.
(4) 6 C. & P., 540.

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passage in Greenleaf which refers to the said American cases that in the United States it has been held that a communication between husband and wife, if it is in writing, is not privileged if the writing gets into the hands of third parties. As to the letters taken by the police *from* the Post office, these having been seized before they reached the addressee, the wife, it is a question whether they can be treated as communications "made" to the wife within the meaning of section 122 relied on. But assuming that they could be so treated they must also, for reasons already given with reference to the letters taken in Pondicherry, be held to be admissible.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

SECRETARY OF STATE FOR INDIA (DEFENDANT No. 1), APPELLANT,

v.

RAJAH GOUNDAR (PLAINTIFF), RESPONDENT.*

1898. August 19. September 2, 6.

Revenue Recovery Act (Madras)—Act II of 1864, s. 37—Tender of full amount of arrears of revenue—Sale for arrears accrued since attachment.

When a defaulter, whose land has been attached and is being brought to sale for arrears of revenue, tenders the full amount of the arrears of revenue on account of which the land was attached together with interest and charges under Revenue Recovery Act, 1864, section 37, the collector is bound to stay the sale.

When, therefore, a collector notwithstanding such tender proceeded to sell on the ground that arrears had accrued between the date of attachment and the date of tender:

Held, that the sale was invalid.

APPEAL against the decree of W. J. Tate, District Judge of Salem, in Original Suit No. 18 of 1894.

The plaintiff was the holder of a mitta on which the revenue fell into arrears and a part of the mitta was attached under Revenue Recovery Act. The plaintiff subsequently tendered together with interest and charges the amount of the arrears accrued up to the date of the attachment, but further arrears having accrued in the interval the Revenue officer brought the property to sale in respect of such arrears and the property was purchased by Government. The plaintiff now sued to set aside the sale and

* Appeal No. 126 of 1897.

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to recover the land on the ground that the sale was illegal. The District Judge passed a decree for the plaintiff.

This appeal was preferred on behalf of the Secretary of State.

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

Sivasami Ayyar for the respondent.

JUDGMENT.—The facts which it is necessary to notice in this case are as follow:—The revenue due on the plaintiff's mitta for fasli 1302 fell into arrear, and a portion of it was attached and advertised for sale with the usual formalities. Some days before the date fixed for the sale the full amount (Rs. 2,766-4-0) of the arrear for fasli 1302 with interest and other charges was paid by the defaulter to the Tahsildar. Meantime, however, the revenue payable for fasli 1303 had become due, but had not been fully paid by the defaulter. The collector, therefore, refused to stay the sale already advertised and sold the land in order to recover the arrears due for fasli 1303. The District Judge found that the sale was invalid and void, and against this decree the Secretary of State for India in Council appeals mainly, as we are informed by the learned Government Pleader, for the purpose of ascertaining the meaning of section 37 of the Revenue Recovery Act (No. II of 1864, Madras). The section runs as follows:—

"It shall be competent to the defaulter . . . . to tender the "full amount of the arrears of revenue with the interest thereon, "and all charges which have been incurred in demanding the "arrears or in attaching and managing the estate, or in taking "the steps necessary for sale, and thereupon the sale shall be "stayed."

The question for our decision is whether the words "the full "amount of the arrears of revenue" mean the arrears of revenue on account of which the land was attached and the notice of sale issued, or include also arrears which accrued after the attachment and sale notice, but prior to the day of tender; in other words, whether, in the present case, the collector was bound to stay the sale on payment of the arrears of fasli 1302 specified in the attachment and sale notices, together with interest and other charges thereon, or was justified in bringing the land to sale for the arrears of fasli 1303, without making any demand or attachment or issuing any sale notice in respect thereof.

We have no doubt but that the sale of the land was, in the circumstances stated, invalid, and voidable at the option of the defaulter.

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There is nothing in section 37 or in any other section of the Act or even in the notices issued under the Act to justify the conclusion that the land when attached and advertised for sale for a specified arrear, can, after that arrear has been paid up, be legally sold for subsequent arrears. The Act gives the collector power to recover arrears in various ways, one of which is by attachment and sale of so much of the land as may be necessary, but the exercise of this power must be in accordance with the provisions of the Act. First, he must issue a demand in writing under section 25. If that is of no avail he may attach the land under section 27, and may either keep it under management (section 28), in order to recover the arrears out of the rents and profits, or may sell the land after due notice (section 36). In all these sections the wording of the Act is such as to show that the procedure laid down refers to "the arrears" for which the demand was made, the amount of which is specified in the notices of demand, attachment and sale. Then follows section 37 which gives the defaulter the right to pay up "the arrears" and charges at any time up to sunset of the day preceding the sale "and thereupon the sale "shall be stayed." If it was intended that the sale should not be stayed unless all arrears subsequent, as well as prior, to the attachment had been paid, we should certainly have expected an explicit statement to that effect, especially as the section states in detail the various sums which have to be paid in addition to "the "arrears." The simple addition of some such words as "up to date "of tender" after the words "arrears of revenue" would have made the intention, if such there was, quite plain. We do not think that there is anything to justify the importation of such words. It is argued for the appellant that it is reasonable that the terms should be made more stringent the longer the default continues; and that though the defaulter might, under section 35, obtain the release of the land from attachment by paying merely the arrears for which the attachment was made, he ought to be required to pay subsequent arrears also if he fails to take advantage of section 35 and allows the sale notice to issue. It is contended that the Legislature intended to indicate this further liability by the change in the language of section 37, that in the sections prior to section 37 and especially in section 35 reference is made simply to "the "arrears," whereas in section 37 the words are "the full amount of "the arrears" and that this change of phrase is intended to include

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subsequent arrears. We do not think that this is so. The words "the full amount" appear to be used merely to show clearly that a part payment would be of no avail. The words "the full "amount" are used in section 33 without any such special import being attached to them. If so considerable a further liability were to be imposed under section 37, we think that it ought to have been, and would have been, clearly expressed.

Again, it is argued that the security of the revenue is endangered unless we except the appellant's interpretation of section 37, inasmuch as section 42 provides that the land shall be sold free of incumbrances, and that after liquidating the arrears the balance shall be paid to the defaulter who may also (section 43) collect the rents due up to the day of sale.

In reply to this it would seem to be enough to say that possible risk to the revenue from defective legislation is no sufficient reason for putting a strained construction on the Act; but we may also add that the risk appears to be unreal, for section 42 must be read with section 2 which lays down the fundamental rule that the land is the security for the public revenue, and there seems to be little doubt but that, in accordance with the doctrine of conversion, the sale-proceeds of land sold at a sale properly held under the Act would be liable for any arrears of revenue due on the land at the date of sale. That, however, is not the question before us. The question is whether the sale was a valid sale notwithstanding that the arrears for which the land was attached had all been paid off prior to the sale. As already stated, we think that it was not valid. We observe that in section 13, clause 5 of Regulation XXVII of 1802 (superseded and repealed by Act II of 1864) provision was made in perfectly explicit language for the recovery of arrears falling due while land was under management of the collector, and in section 43 of Act II of 1864 provision is made for the defaulter to recover rents due up to the date of sale of his land. The Legislature, therefore, when passing the Act had that date prominently in view for certain purposes, and it seems to us unlikely that if they intended that land attached for one arrear should be sold after its payment, for the satisfaction of other arrears falling due up to the date of the sale, they would not have expressed the intention in plain language.

We, therefore, confirm the decree of the Court below and dismiss this appeal with costs.

APPELLATE CIVIL.

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

ACHUTAN NAYAR AND OTHERS (COUNTER-PETITIONERS, Nos. 2, 5, 6, 9 AND 10), APPELLANTS,

1897. July 9. 1898. March 25.

v.

CHERIOTTI NAYAR AND OTHERS (PETITIONERS), RESPONDENTS.*

Marumakkatayam Law—Self-acquired property—Power of disposition by will—Succession certificate—Probate.

A member of a Marumakkatayam tarwad died leaving self-acquired property. The karnavan of the tarwad applied for a succession certificate, but the application was opposed by legatees under a will of the deceased which had not been admitted to probate but was undisputed:

Held, that the will was valid, and that the succession certificate should not be granted to the karnavan but to one of the legatees.

APPEAL under Succession Certificate Act, section 19, against the order of B. Macleod, Acting District Judge of North Malabar, in Miscellaneous Petition No. 268 of 1895.

This was an application for a succession certificate, and it appeared that the deceased was a member of a Marumakkatayam tarwad of which the applicant was the karnavan, and that he left self-acquired property which he bequeathed by will to two persons who opposed the application. The property bequeathed comprised, *inter alia*, thirteen debts payable to the deceased. The will had not been admitted to probate, but it was undisputed.

The District Judge said:—"The deceased was not the last "surviving member of his tarwad, and he cannot override the right "of survivorship held by petitioner. *Fatma* v. *Shaik Essa*(1) "shews the necessity of probate. Petitioner also relies on *Kuttyas-* "*san* v. *Mayan*(2), and there is here no question of limitation. "Counter-petitioner relies on *Krishna Kinkur Roy* v. *Panchuram* "*Mundul*(3) as to probate being unnecessary. He also relies on "*Sivamma* v. *Subbamma*(4) as to the will giving a *primâ facie* title. "The self-acquired property was not disposed of during the

* Appeal against Order No. 117 of 1896.

(1) I.L.R., 7 Bom., 266. (2) I.L.R., 14 Mad., 495.
(3) I.L.R., 17 Calc., 272. (4) I.L.R., 17 Mad., 477.

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"life-time of deceased, and, at his death, passes to his family, of "which the petitioner, as karnavan, is the representative, and he "will be given certificate accordingly."

The legatees preferred this appeal.

Ryru Nambiar for appellants.

Sundara Ayyar for respondents.

JUDGMENT.—In the case of tarwad property, no doubt it is only the last surviving member of the tarwad who can validly dispose of it by will. The reason is that, in that case, there is no co-parcener in existence who can succeed by survivorship, so as to exclude the operation of the will. But, in the case of self-acquisition, this rule does not hold good, for the reason on which it rests does not exist. The case of *Ryrappan Nambiar* v. *Kelu Kurup*(1) is an authority for holding that the property, in this case, does not pass by survivorship but by inheritance, and the recent decision in *The Court of Wards* v. *Venkata Surya Mahipati Ramakrishna Rao*(2) in effect rules that the powers of gift *inter vivos* and of will are co-extensive among Hindus under the Mitakshara Law. We think that the same rule may be held to apply to persons governed by the Marumakkatayam Law, and the Bill now before the Legislative Council recognizes the right as one that exists. In the present case the will is admitted, and it is admitted, that the property is self-acquisition. No probate of the will is required, as the case does not fall under section 1, clause 4, of the Succession Certificate Act (*Kalidas Fakirchand* v. *Bai Mahali*(3)). This being so, effect must be given to the disposition of the will.

We set aside the order of the District Judge with costs throughout, and direct that the certificate be issued to the second appellant.

(1) I.L.R., 4 Mad., 150. (2) I.L.R., 20 Mad., 167.
(3) I.L.R., 16 Bom., 712.

APPELLATE CIVIL.

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

GAJAPATI RAJAH AND ANOTHER (PLAINTIFF AND HIS REPRESENTATIVE), APPELLANTS,

v.

SURYANARAYANA (DEFENDANT), RESPONDENT.*

1898. March 29.

Kattubadi—Rent—Charge.

Kattubadi is rent and does not constitute a charge on the land.

SECOND APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in Appeal Suit No. 440 of 1894, confirming the decree of G. Jagannadha Rau, District Munsif of Rajam, in Original Suit No. 343 of 1894.

The plaintiff sued to recover with interest arrears of kattubadi accrued due to him by the defendant on account of his mirasi and inam land from 1889 to 1893. The District Munsif passed a decree for three years' arrears of rent, holding the balance to be barred by limitation. The District Judge, in the first instance, passed a decree for the plaintiff for the full amount claimed, but subsequently on the petition of the defendant, he reviewed his judgment and held with reference to *Vizianagaram Maharajah* v. *Sitaramarazu*(1) that only three years' arrears were recoverable.

The plaintiff preferred this second appeal.

Rangachariar for appellants.

The respondent was not represented.

JUDGMENT.—No doubt the decisions of this Court have not been altogether uniform in the view they have taken as to whether payments due on account of kattubadi are or are not a charge on the land, but the most recent reported decision of a Division Bench (*Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rau*(2)) distinctly lays it down that, in the absence of any contract or usage to the contrary, kattubadi is not chargeable on the land. In the recent Full Bench decision in *Lakshminarayana Pantulu* v. *Venkatarayanam*(3), it was expressly assumed that kattubadi was

*. Second Appeal No. 1480 of 1896.
(1) I.L.R., 19 Mad., 100.
(2) I.L.R., 19 Mad., 329.
(3) I.L.R., 21 Mad., 116.

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rent, and it is difficult to see why it should be regarded as chargeable on the land when ordinary rent is not so chargeable.

Again in *Venkatadri Appa Rau* v. *Hassan Begam*(1) this Bench recently held that a suit for kattubadi was cognizable by a Small Cause Court, thereby assuming that it was in the nature of rent and was not chargeable on the land.

In these circumstances, we agree with the latest reported ruling to which we have referred. The decision of the District Judge is therefore right and we dismiss this second appeal.

APPELLATE CIVIL.

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

1898. April 1.

SITARAMA SASTRULU AND OTHERS (DEFENDANTS NOS. 1, 2 AND 10, AND REPRESENTATIVES OF DEFENDANT NO. 1), APPELLANTS,

v.

SURYANARAYANA SASTRULU (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 574—*Contents of appellate judgment.*

The judgment of an Appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them.

SECOND APPEAL against the decree of the District Judge of Godavari, in Appeal Suit No. 110 of 1895, affirming the decree of the District Munsif of Narsapur, in Original Suit No. 370 of 1893.

The plaintiff sued for partition of certain family property and questions were raised as to who were the individuals constituting the joint family and as to their respective rights to the property in question and the extent of the family property. Sixteen issues were framed on the pleadings. The District Munsif passed a decree against which defendants Nos. 1, 2 and 10 preferred

(1) Referred Case No. 37 of 1896 (unreported).

* Second Appeal No. 167 of 1897.

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an appeal to the District Court and calling in question the decision of the District Munsif on most of the issues. The District Judge affirmed this decree delivering judgment as follows :—

"This is an appeal against the decision of the District Munsif "of Narsapur in Suit No. 370 of 1893 on his file.

"Plaintiff sued for partition of family property and obtained "a decree. Against this decision the first, second and tenth "defendants appeal.

"This appeal is merely a reiteration of the defence that "was put forward before the District Munsif. To deal with the "grounds of appeal would be simply to repeat the judgment of "the District Munsif. I concur in the decision which the District "Munsif has given on each point. The judgment of the Lower "Court is confirmed, for the reasons therein set forth, and this "appeal is dismissed with costs."

Defendants Nos. 1, 2 and 10 preferred this second appeal.

K. Narayana Rau for appellants.

The respondent was not represented.

JUDGMENT.—We are unable to accept the judgment of the Lower Appellate Court, as one made in conformity with the law as laid down in section 574, Code of Civil Procedure. There is no express statement of the points for determination or of the decision on such point or the reasons for the decision. All we find is a general reference to the Munsif's judgment as containing the views of the Judge. Such a general and wholesale adoption of the judgment of the Court of First Instance cannot be considered as a sufficient compliance with the law. The judgment of the Appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them. There is no indication that such was the case here. We must, therefore, reverse the Lower Appellate Court's decree, and direct that the appeal be restored to the file and disposed of according to law.

Costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Davies.

1898. April 6.

VAIRAVAN ASARI (PLAINTIFF No. 2), APPELLANT,

v.

PONNAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, arts. 106, 116—Suit for an account of a dissolved partnership—Registered partnership deed.

A suit for an account of a partnership dissolved more than three years before the filing of the plaint is barred by limitation even if the instrument of partnership was registered.

SECOND APPEAL against the decree of A. F. Pinhey, Acting District Judge of Madura, in Appeal Suit No. 90 of 1896, affirming the decree of K. Krishnama Chariar, District Munsif of Madura, in Original Suit No. 582 of 1894.

The plaintiff instituted this suit on 3rd September 1894 and in the plaint prayed for an account to be taken of a partnership which had been dissolved on the 15th of June 1891 by the death of one of the partners, and for a decree for payment to him of his share of the capital and profits of the firm. In bar of limitation the plaintiff relied on the fact that the deed of partnership was a registered instrument. The District Munsif, however, held that the suit was barred by limitation and dismissed the suit. On appeal the District Judge took the same view and affirmed the decree.

Plaintiff No. 2 preferred this second appeal.

Seshachariar for appellant.

Ranga Ramanujachariar for respondent No. 1.

JUDGMENT.—A wide meaning has no doubt been given to the words of article 116 of the schedule to the Limitation Act. But the present case—a suit for an account by one partner against another after dissolution of the partnership—is in our opinion altogether beyond the scope of the article. The only case approaching this one (namely, that of *Ranga Reddi* v. *Chinna Reddi*(1)) is plainly distinguishable. We are not prepared to say that the article can

* Second Appeal No. 230 of 1897.

(1) I.L.R., 14 Mad. 405.

be stretched to cover every case in which the plaintiff's claim may in its origin be referred to a contractual relation which is expressed in a registered agreement. VAIRAVAN ASARI v. PONNAYYA.

The second appeal is dismissed with costs.

APPELLATE CRIMINAL.

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

1898. March 31. April 14.

QUEEN-EMPRESS

v.

ANGA VALAYAN AND OTHERS.*

Penal Code—Act XLV of 1860, ss. 395, 396, 412—Criminal Procedure Code—Act X of 1882, ss. 269, 307, 533—Verdict of jury and their opinion as assessors—Confessional statement.

Ten persons were committed to a Sessions Court charged with offences under Indian Penal Code, sections 395 and 396, and some of them were also charged with offences under section 412. One of the accused had made a confessional statement before the Magistrate who recorded it, but did not make on it a memorandum to the effect stated in Criminal Procedure Code, section 164, and did not admit it in evidence for the reasons that the accused was produced from the custody of the police in which he had been detained for five days, and there was a proposal on the part of the police to treat him as an approver. It appeared that a perusal of the preliminary register would have shown that the accused were either guilty under section 396 or not guilty under section 395 at all. The accused were tried by the Sessions Judge with a jury. The confessional statement was not admitted in evidence. The jury found the accused not guilty of dacoity, but the Judge disagreeing with the verdict referred the case to the High Court under Criminal Procedure Code, section 307:

Held, (1) that the procedure adopted by the Judge was wrong and that he should have tried the accused with the aid of assessors under Indian Penal Code, section 396;

(2) that the Judge should have enquired under Criminal Procedure Code, section 533, whether the confessional statement had been duly made; and

(3) that under the circumstances, the High Court should determine on the evidence on record, after giving due weight to the opinions of the Judge and the jury whether the accused were guilty under section 395.

CASE referred for the orders of the High Court under Criminal Procedure Code, section 307, by G. T. Mackenzie, Sessions Judge of Coimbatore, in Sessions Case No. 14 of 1898.

* Criminal Appeal No. 123 of 1898.

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The accused were ten persons, who were charged in the Sessions Court with the offences of (i) dacoity and (ii) dacoity with murder, and some of them were charged also with the offence of dishonestly receiving property stolen in the commission of dacoity, under Indian Penal Code, sections 395, 396 and 412, and in respect of all of them, the jury returned a verdict of not guilty. The Sessions Judge disagreed with the verdict, and he referred the case as above. In his letter of reference he made, *inter alia*, the following observations:—

"7. When the case came on, the prosecution was astonished to "see that the confession of second accused was not on record and "that no mention of it was made in the Magistrate's judgment. "At the request of the Public Prosecutor, I wrote a note to the "Magistrate, asking him to come over to the Sessions Court with "the confession. He came and the Public Prosecutor called him "as a witness to prove the confession. It is a lengthy confession, "but at the end instead of the prescribed certificate is a remark by "the Magistrate that this confession ought not to have been taken, "because the prisoner came from police custody and there was some "idea of making him a witness. The Public Prosecutor pressed the "confession, but, in the circumstances, I could not place it before "the jury.

"10. It has been suggested to me that, as section 396 is not a "jury section, I ought to have tried this case with assessors. The "charge which the Magistrate framed was one charge under sec-"tions 395 and 396, and it seemed to me that the accused had to "be convicted of dacoity by a jury before section 396 came into "operation. I, therefore, tried the case with a jury. If the High "Court decides that my procedure was erroneous, and that I ought "to have tried this case with assessors, I differ from these five "assessors, as I consider that the accused are guilty under sections "395 and 396, and I am ready to proceed with the case. Some "of the accused are said to be old offenders and the next stage "would be to call on these accused to plead to the charge under "section 75."

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

Kasturiranga Ayyangar for accused No. 2.

JUDGMENT.—In this case the ten accused persons were charged with having committed dacoity and murder in committing dacoity—offences punishable under sections 395 and 396, Indian Penal Code—

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and some of them were also charged with having received some of the stolen property under section 412, Indian Penal Code.

Offences under sections 395 and 412, Indian Penal Code, are triable by a jury: an offence under section 396 is triable by a Judge with assessors. The Sessions Judge under the impression that "the accused had to be convicted of dacoity by a jury before sec-"tion 396 came into operation," empanelled a jury, and left it to them to say whether a dacoity had been committed or not. The jury found a verdict of not guilty, and the Sessions Judge, considering the verdict corrupt, referred the case to the High Court under section 307, Criminal Procedure Code. In doing so, he suggested that if his procedure was erroneous and if he ought to have tried the case himself as an offence under section 396, Indian Penal Code, he was of opinion that all the accused were guilty under that section, and he was prepared to proceed with the case, the next step being to ascertain whether any of the accused were liable to enhanced punishment under section 75, Indian Penal Code, as old offenders. We are of opinion that the procedure of the Sessions Judge was erroneous.

The offence of committing murder in the course of a dacoity (section 396) was the offence charged against all the accused, and it is an offence triable not by a jury but by a Judge with assessors. In the present case there could be no sort of doubt but that an offence under section 396 had been committed, and the only question to be tried was whether the accused were among the offenders. In other words, a perusal of the preliminary register would have shown the Sessions Judge that the accused were either guilty under section 396 or they were not guilty of dacoity at all. That being so, the Sessions Judge should have simply tried the accused with the aid of assessors under section 396. The fact that the Magistrate had framed the charge in the inconvenient way he did, including all three offences in one count, ought not to have prevented the Sessions Judge from recasting the charge correctly. In the present case the minor charge under section 412, Indian Penal Code, might well have been reserved for a separate trial, if necessary, after the result of the trial under section 396 was known.

Had the circumstances been different, so as to give ground for supposing that the accused might be guilty of dacoity without being guilty also under section 396, then the Sessions Judge might properly have empanelled a jury, and, on the conclusion of the

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trial, he might under section 269, Criminal Procedure Code, have asked their opinion as assessors as to the guilt of the accused under section 396, Indian Penal Code, and the Judge should then have found the accused guilty or not guilty under that section. If he found them guilty, he should have proceeded to conclude the case by passing sentence. If, however, he found them not guilty, he should have then charged the jury with respect to the dacoity under section 395, Indian Penal Code, and should have taken their verdict thereon as a jury.

Such would have been the correct procedure, but it was not followed; and we have now to consider how we should deal with the case under the circumstances in which it comes before us. It has been suggested that we ought to tell the Judge to do now what he ought to have done in the first instance, viz., to try the offence under section 396 and to treat the jury as assessors and their verdict as the opinion of assessors, and then proceed with the trial as an assessors' case. We do not, however, think that we can properly do this. The Judge has left it to the jury to say, as a jury, whether the accused were guilty of dacoity or not, and the jury has found them not guilty. That verdict is binding, unless it is set aside according to law, and if the accused are not guilty of dacoity they obviously cannot be guilty of the major offence under section 396. We must, therefore, proceed to deal with the case under the powers given to us by section 307, Criminal Procedure Code, as amended by section 3 of Act XIII of 1896, and determine whether the accused are guilty of dacoity or not "after "considering the entire evidence and after giving due weight to the "opinions of the Sessions Judge and the jury." We cannot, we think, under the terms of section 307, Criminal Procedure Code, try the accused for an offence under section 396, Indian Penal Code, since that is not an "offence of which the jury could have "convicted them on the charge framed and placed before it." We might, no doubt, order a new trial by the Sessions Judge for the offence under section 396, but that would be attended with obvious inconveniences, and is not necessary for the ends of justice, as we can, in the event of a conviction under section 395, impose a sentence adequate to the requirements of the case.

Turning now to the merits of the case, we are urged by the Public Prosecutor to admit as evidence the confession of the second accused taken down in writing by the Magistrate under section

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164, Criminal Procedure Code, but not filed by him as part of the record, because, as the Magistrate explained, he found, after it was written, that under the rules framed by Government he ought not to have recorded the confession, inasmuch as "(1) the accused had "been in the police lock-up for five days and is now produced by the "police from their custody; and (2) there is a proposal on the part "of the police to treat the accused as an approver."

In regard to this we observe that the first reason is not one laid down by law or by the executive orders of Government, dated 17th December 1887, No. 2883 J., to which the Magistrate refers. All that section 164, Criminal Procedure Code, requires is that the Magistrate shall not record any confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily, and that the Magistrate, when he records a confession, shall make a memorandum at the foot thereof to the effect stated in the section. This memorandum the Magistrate failed to make in the present case and for this reason the Sessions Judge considered that he could not allow the confession to be treated as evidence. In this the Sessions Judge was in error. He should have proceeded under section 533, Criminal Procedure Code, "to take "evidence that the accused duly made the statement recorded," and he should then have admitted the statement "if the error of the "Magistrate had not injured the accused as to his defence on the "merits." The Sessions Judge did, indeed, send for the Magistrate, and he was examined with regard to the confession, but in a singularly vague and inconclusive manner. The Sessions Judge did not ascertain whether the Magistrate believed that the accused made the statement voluntarily or not. The Magistrate said that "the usual warning" was given, but we are left in ignorance as to what the Magistrate meant by "the usual warning." The Magistrate said that no police officer was present when the confession was made, but that "there was some talk" of making accused an approver. The Magistrate did not say, nor did the Sessions Judge ascertain, between whom this "talk" took place, or whether it was communicated to the accused. Obviously any such proposal not communicated to the accused could be no reason for not recording his confession.

In this vague state of the evidence as to the circumstances under which the confession was made we are unable to say whether it is admissible or not, and we do not think it necessary to call for

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further evidence on the point, inasmuch as we find the other evidence against the second accused untrustworthy and the confession, even if admissible, would not, under the circumstances, be regarded by us as a true confession on the strength of which we could convict him.

[After a discussion of the evidence the judgment proceeded as follows:—]

The accused except the second adduced no evidence to disprove the prosecution case, and raised no plea save the general one of not guilty. On the whole, we find that the first, third, eighth, ninth and tenth accused are guilty of the dacoity with which they were charged. It was a deliberate and daring offence, and one of their associates who has not yet been arrested committed murder in committing the dacoity. We sentence each of these first, third, eighth, ninth and tenth accused, viz, Anga Valayan, Rangan (son of Dasan), Parai Rangan, Katti Valayan and Rama Valayan, to seven years' rigorous imprisonment.

The other accused we find not guilty and direct that they be at once set at liberty.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

1897. November 12. 1898. April 15.

NETTAKARUPPA GOUNDAN (DEFENDANT No. 2), APPELLANT,

v.

KUMARASAMI GOUNDAN AND OTHERS (PLAINTIFFS AND DEFENDANT No. 1), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, art. 132—On demand—Accrual of cause of action.

In a suit brought in 1895 on a hypothecation bond, dated 9th October 1880, it appeared that the loan secured thereby was repayable on 9th October 1883, but it was stipulated that if interest was not paid at 10 per cent. per annum as therein provided then that the loan should be repaid with interest at 15 per cent. when the obligee should require it. Default had been made in the payment of interest in 1881, but the obligee had not called for the money:

Held, that the suit was not barred by limitation.

APPEAL against the order of K. Ramachandra Ayyar, Subordinate Judge of Bellary, in Appeal Suit No. 113 of 1896, reversing the decree of V. K. Desika Chariar, District Munsif of Namakal, in Original Suit No. 413 of 1895.

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* Appeal against Order No. 84 of 1897.

NETTA-KARUPPA GOUNDAN v. KUMARASAMI GOUNDAN.

The plaintiff sued to recover principal and interest due on an instrument, dated 9th October 1880, therein described as hypothecation debt bond, and he asked for a decree for sale of the property comprised therein. The instrument omitting names and parcels was translated as follows:—"I have hypothecated to you " . . . . . and received Rs. 800; the particulars of the "receipt of which are as follow: On 19th September 1879 last, "I hypothecated to you this land and the land bearing Survey No. "50, and received Rs. 775, the interest of which due up to date is "Rs. 80-12-0, and deducting out of this, the payments made to "you, the balance due by me is Rs. 25. As I have thus received "the entire sum of Rs. 800, it shall bear interest at Rs. 10 per cent. "per annum, and I shall not only pay the principal and interest "and receive back this bond on the 25th Purattasi of Subhanu (9th "October 1883) which is the next third year, but shall pay you the "interest due in each year and take receipt from you. In default "of paying on the above dates, I shall pay the said sum with "interest at Rs. 15 per cent. per annum, from the date of the bond, "irrespective of the above due date, whenever you make the de-"mand. Thus is the hypothecation bond executed with consent."

The District Munsif dismissed the suit as being barred by limitation. His decision was reversed on appeal by the Subordinate Judge. He said:—

"The suit bond, dated 9th October 1880, provides for repay-"ment of the principal and interest on the 25th Purattasi "Subhanu (9th October 1883). Besides, as each year's interest "accumulates I shall pay the same to you and take receipt. If "failure to pay accordingly on the dates is committed, I shall pay "with (including) interest at 15 per cent. per annum from the "date of the writing without regard to the term aforesaid when "you require."

"It is a bond contracting for payment on a date specified "with further or additional stipulation to pay earlier, in case of "non-payment of interest yearly, if the obligee so requires or "demands. It is thus the privilege of the obligee to exercise the "option or not to demand payment before the specified date. It "is not a forbearance to sue, when cause of action had arisen as in "instalment bonds.

"By article 132, Limitation Act, time on a bond to enforce "payment of money charged on immovable property begins to

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"run when the money sued for becomes due. Here the money "becomes due ordinarily after 9th October 1883; and extraordi-"narily after 9th October 1881, if so required by the creditor. "When no requisition from the creditor is shown the ordinary "calculation should be accepted.

"As observed in *Hanmantram Sadhuram Pity* v. *Bowles* (1), "the liability of the defendant being by the bond made depend-"ent on a preceding demand, the defendant could not, till such "demand was made, have considered the action as accruing "against him since the default made in October 1881.

Defendant No. 2 preferred this appeal.

Hon. *V. Bhashyam Ayyangar* and *Tiruvenkatachariar* for appellant.

Pattabhirama Ayyar and *Seshagiri Ayyar* for respondents.

JUDGMENT.—We think that in this case the words construed by the Subordinate Judge as "when you require" imply a condition as was also decided in a case where the words actually used were "on demand" (*Vythilinga Nadan* v. *Narayanasami Ayyan*(2)). There the words were not considered as merely technical words as they were interpreted to be in *Perumal Ayyan* v. *Alagirisami Bhagavathar*(3). The Subordinate Judge was therefore right in holding the suit was not barred, and this appeal is dismissed with costs.

APPELLATE CIVIL.

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

1898. April 22.

ARUMUGAM CHETTI (PLAINTIFF), APPELLANT,

v.

ARUNACHALAM CHETTI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 508, 521—*Delivery of an award.*

A suit was, at the instance of the plaintiff and defendants, referred to an arbitrator. The arbitrator made his award within the period fixed by the order of reference, but did not submit it to the Court until two days later:

Held, that the award was valid under Civil Procedure Code, section 508.

(1) I.L.R., 8 Bom., 561 at p. 568.
(2) Second Appeal No. 200 of 1897 (unreported).
(3) I.L.R., 20 Mad., 245.

* Second Appeal No. 479 of 1897.

ARUMUGAM CHETTI v. ARUNACHALAM CHETTI.

SECOND APPEAL against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in Appeal Suit No. 375 of 1896, affirming the decree of N. Sambasiva Ayyar, District Munsif of Sivaganga, in Original Suit No. 426 of 1895.

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

"Plaintiff sued for the recovery of Rs. 800, being damages "sustained by him in consequence of the misrepresentations made "by the first defendant, his paternal uncle, at a division of the "family property in respect of the outstandings due to the family.

"The first defendant denied his liability to pay the damages "and the second defendant, another uncle of the plaintiff, supported "the claim.

"At the instance of both parties the suit was referred to the "arbitration of one Subbusami Ayyar, who made an award "dismissing the suit, and submitted the same to the Court. The "Lower Court, in accordance with the award, dismissed the claim.

"The time allowed by the District Munsif for passing the "award was 7th April 1895, and the arbitrator passed the award "before that date, that is, on 3rd April 1896, and submitted it to "the Court on the 9th April. The appellant contends that inas-"much as the award did not reach the Court before the 7th April, "the same is invalid."

The order of reference to the arbitrator was as follows:—

"Whereas the abovenamed plaintiff and defendant have agreed "to refer the matters in difference between them in the above suit "to your arbitration and award, you are hereby appointed "arbitrator accordingly to determine all the said matters in "difference between the parties, and with power by consent of the "parties, to determine which party shall pay the costs of this "reference.

"You are required to deliver your award in writing to this "Court on or before the 30th March 1896 or such other day as "this Court may further fix."

The time for the delivery of the award was subsequently altered to 7th April 1896. The Subordinate Judge passed a decree for the defendant affirming that of the District Munsif.

The plaintiff preferred this second appeal.

Desikachariar for appellant.

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V. Krishnasami Ayyar and *Ranga Ramanujachariar* for respondent No. 1.

JUDGMENT.—The award in this case was made and completed within the time fixed, but it was not filed in the Court until two days after the time specified in the order for that purpose. Both the Courts below have held the award was valid, although it was not filed in Court within the time directed, and we concur in this view, as we consider the word "delivery" in section 508 of the Code of Civil Procedure is used in the sense of making the award and not in that of filing it in Court. Under section 521 of the Code of Civil Procedure, it is not the filing of an award beyond the time fixed that invalidates it, but the omission to make the award within the period allowed. In a considered judgment in *Umersey Premji* v. *Shamji Kanji*(1) Mr. Justice Jardine has arrived at the same conclusion as ours, and has declined to follow certain observations of the Judges in *Behari Das* v. *Kalian Das*(2) tending to a contrary view. The decision of the Privy Council in *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar*(3) is not inconsistent with our view.

Their Lordships evidently treat the delivery of an award and the making of it as the same thing in a question like the present.

We accordingly dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

1898. May 2.

NARAYANA KAVIRAYAN (DEFENDANT), APPELLANT,

v.

KANDASAMI GOUNDAN (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 43—Decree for specific performance of a contract for sale of land—Subsequent suit for possession.

The defendant having agreed to sell land to the plaintiff but failed to execute a conveyance, the plaintiff sued for specific performance and obtained a decree and the Court executed a conveyance of the land to him. He now sued for possession:

Held, that the right to possession having arisen at the same time of the right to the execution of a conveyance, the suit was not maintainable.

(1) I.L.R., 13 Bom., 119.
(2) I.L.R., 8 All., 343.
(3) I.L.R., 13 All., 300.

* Second Appeal No. 779 of 1897.

NARAYANA KAVIRAYAN v. KANDASAMI GOUNDAN.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Coimbatore, in Appeal Suit No. 5 of 1896, reversing the decree of P. S. Gurumurti Ayyar, District Munsif of Erode, in Original Suit No. 632 of 1894.

The District Munsif said:—

"Plaintiff obtained a decree in Original Suit No. 142 of 1893 "directing the defendant to execute a sale-deed for Rs. 200 in "respect of his lands in favour of plaintiff. Defendant having "failed to give a sale-deed accordingly, plaintiff got one executed "by this Court on behalf of the defendant and even after its "execution, defendant failed to deliver the lands to plaintiff "though demanded. Hence the suit to recover the lands with "mesne profits.

"Defendant contended that the suit is barred by section "43, Civil Procedure Code, and stated that plaintiff is not entitled "to any mesne profits, and that the suit is bad for misjoinder of "causes of action as mesne profits are claimed before cause of "action therefor accrued.

"Plaintiff was in a position to sue for possession of the "lands when he filed suit No. 142 of 1893. Instead of asking "for possession also, he confined himself there to a prayer for the "execution of a sale-deed for the lands agreed to be sold by "defendant. Having thus omitted to sue for possession there, "I do not think he has the right to ask for it in a separate suit "now as section 43, Code of Civil Procedure, is against law. I do "not think the form of the sale-deed, exhibit A, given to plaintiff "by this Court can improve matters. The suit consequently "fails and with it the claim for damages (see *Shib Kristo Dah* v. "*Abdool Sobhan Chowdhry*(1)). The result is the suit is dismissed "with costs."

The District Judge on appeal reversed the decree of the District Munsif saying:—"I am of opinion that this appeal "must be allowed. I doubt if plaintiff could sue for possession "upon a contract to sell. I think that all the relief he could "claim was the execution of a conveyance. But even if plaintiff "could have sued for possession, he need not do so. The Transfer "of Property Act regards the transfer of ownership as complete "when the document is registered and it is not contemplated

(1) 15 W.R., (C.R.), 408.

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"that a man will retain possession after he has executed a convey-
"ance. Defendant is now a trespasser upon plaintiff's land."

The defendant preferred this second appeal.

Venkatasubba Ayyar for appellant.

Mr. *Stephen Andy* for respondent.

JUDGMENT.—We are of opinion that the right to possession arose coincidently with the right to the execution of a conveyance by the defendant. Both rights are declared under section 55 of the Transfer of Property Act and in the case cited (*Nathu valad Pandu* v. *Budhu valad Bhika*(1)), it is admitted that the contract of sale created in the purchaser a right of possession. The decision appears to proceed on the peculiar facts of the case. The District Munsif was therefore right in his conclusion. We must reverse the decree of the District Judge and restore that of the District Munsif. Respondent must pay costs in this and in the Lower Appellate Court.

APPELLATE CIVIL.

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

1898. April 26, 27. August 3.

ASAN KUTHU SAHIB MERCOYAR AND OTHERS (DEFENDANTS NOS. 1 AND 4 AND REPRESENTATIVES OF DEFENDANT NO. 1), APPELLANTS,

v.

RAMANATHAN CHETTI (PLAINTIFF), RESPONDENT.*

Bottomry bond—Owner's covenant to pay—Construction of deed of hypothecation—Uncertainty of agreement.

The owners of a vessel for the purpose of repairing it borrowed a sum of Rs. 10,000 from the plaintiff and executed an instrument stating the purpose of the loan and hypothecating the vessel to him and promising to repay the principal with interest by the 12th of March 1891. The instrument proceeded as follows:—
"You have no connection with the security or sea worthiness (yogyam) of the "said ship up to the above stipulated time. If the money is not paid in the said "stipulated time we shall add vattam at Rs. 20 per cent. per annum on the "amount of principal and interest accruing on that date, adding vattam once "in twelve months until date of payment after the said stipulated time on the "hypothecation security (adamana yogyam) of the said ship, and shall get back

(1) I.L.R., 18 Bom., 537.

* Appeal No. 130 of 1897.

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"this mortgage bond." The money was not repaid on the stipulated date and the vessel after making several voyages subsequently foundered in port:

Held, that the instrument was not a bottomry bond, and the plaintiff was not entitled under it, regarded as an instrument of hypothecation merely, to recover the enhanced interest referred to in the passage above quoted, because that part of the agreement was void for uncertainty.

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in Original Suit No. 43 of 1895.

The plaintiff sued to recover from the defendants and from the remains of a wreck of the barque "Lord Harris" the sum of Rs. 36,726. The plaint set out that, on the 11th October 1890, defendant No. 1 and the father of the other defendants being owners of the "Lord Harris" which was then at the port of Coringa in need of repairs, executed an instrument of hypothecation which was filed in the suit as exhibit A. That instrument omitting the names and description of the parties was (as translated) in the following terms:—

"Now we have received from you the sum of Rs. 10,000, "having hypothecated to you our ship 'Lord Harris' of 594¾ "tons, which is in Gori in the port of Coringa. As we have "received from you, this sum of rupees ten thousand for the "repair works of the above ship, we shall pay in cash within "the 30th Masi next (12th March 1891) the principal and interest, "adding interest on the above amount at the rate of 1 rupee per "cent. per mensem, and shall get back this bond. You have no "connection with the security or sea worthiness (yogyam) of the said "ship up to the above stipulated time. If the money is not paid "in the said stipulated time, we shall add vattam at Rs. 20 per "cent. per annum on the amount of principal and interest accru-"ing on that date, adding vattam once in 12 months until date of "payment after the said stipulated time on the hypothecation "security (adamana yogyam) of the said ship, and shall get back "this mortgage bond."

The plaint alleged that the plaintiff paid the sum of Rs. 10,000 for the repairs of the vessel and that subsequently on the 14th October 1890 the executants of the above instrument gave him a power of attorney which was filed in the suit as exhibit B and contained (as translated) the following passage:—

"With respect to our ship called 'Lord Harris' of 594¾ "tons which is now in the Gori in the port attached to "Coringa, you are authorised to carry on the following on our

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"behalf for the abovementioned three years:—To carry on the "repairs and other works, &c., to appoint or dismiss paid servants, "such as the commander, &c., to execute charter parties, to let it on "hire, to load it with goods bought by you, to sell the above goods, "to get loan of money for vattam on the security or credit "(yogyam) of the said ship and that of the goods loaded therein; "to give it back after that yogyam is over, to set it sail to the "necessary places, to cause it to be anchored wherever necessary."

Various other transactions between the plaintiff and the defendants were set out which resulted according to the plaint in the defendants being indebted to the plaintiff in the above sum. In computing this amount, the plaintiff debited the defendants with interest at 20 per cent. per annum under the last part of exhibit A. The vessel foundered in port on the 8th December 1895. The suit was brought in December of the same year. The defendants denied the plaintiff's right to the remains of the vessel and objected to, *inter alia*, the claim for interest. The Subordinate Judge passed a decree for Rs. 23,406 disallowing the balance of the plaintiff's claim.

The defendant preferred this appeal.

K. Narayana Rau for appellants.

V. Krishnasami Ayyar for respondent.

SUBRAMANIA AYYAR, J.—It was contended for the appellants that the Subordinate Judge erred in finding that the respondent advanced under exhibit A Rs. 9,647-3-6 and under the arrangement come to subsequent to that document Rs. 18,198-3-1. But the Subordinate Judge has not allowed any item of advance claimed by the respondent not supported by duly proved vouchers. The evidence thus accepted by the Subordinate Judge is practically uncontradicted and, in my opinion, quite trustworthy. I have no hesitation, therefore, in holding that the plaintiff has proved that advances to the extent stated above were made by him.

The next question for determination is, whether the respondent is disentitled to recover the whole or any portion of his claim, inasmuch as the barque "Lord Harris," referred to in exhibit A, became a wreck subsequent to 12th March 1891, the date fixed in the document, with reference to the payment of the money due thereunder. This depends, in one aspect of the matter, upon whether the transaction is, as contended for the appellants, supportable

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as a bottomry bond. Now, though not only a master but an owner also may give a bottomry bond (*Duke of Bedford*(1)), yet to the validity of such a bond given by an owner, it is necessary to show, as was laid down in several cases, that he had no adequate personal credit or security other than the bond available at the port where it was given. In the early case of the *Nelson*(2) Lord Stowell observed:—"It is certainly the vital principle of this "species of bonds" (bottomry) "that they shall have been taken "where the owner was known to have no credit, no resources for "obtaining necessary supplies." This language was quoted and relied on in the case of the *Hersey*(3) where Sir John Nicholl added "if they" (the necessary supplies) "can be procured upon "the credit either of the master or of the owners or by advances "ont he freight or by passage money or upon any other credit "than the hypothecation of the ship, the bond of hypothecation" (viewed as a bottomry bond) "is absolutely void." Did the condition thus required by the authorities exist in the present case? Clearly not. For exhibit A itself shows that in the first instance, the owners undertook a personal liability which was to subsist for a period of about five months from the date of the bond, *i.e.*, up to the 12th March 1891. This circumstance alone is fatal to the contention that the transaction should be viewed as a valid bottomry bond, and it is unnecessary to consider whether another objection urged on behalf of the respondent against the appellants' said contention is well founded, the objection being that the instrument could not operate as a bottomry bond, inasmuch as it was executed by the owner in a place which was not a foreign port to him. I consequently hold that exhibit A could not be supported as a bottomry bond.

Next, taking it, as was argued for the respondent, that the transaction is a hypothecation not amounting to a bottomry bond, the question is as to the validity of the portion of the instrument which provides for the contingency of the amount lent not being paid back within the 12th March 1891. In this connection it is first necessary to consider the meaning and effect of the word "yogyam" used in the instrument to qualify the vernacular term for hypothecation. The meaning of the word does not appear to have been considered in any decided case. And no attempt was

(1) 2 Hag. Adm., 294. (2) 1 Hag. Adm., 169 at p. 175.
(3) 3 Hag. Adm., 404 at p. 408.

made in the present instance to prove what is denoted by the word according to mercantile custom, if such a custom exists with reference to it. According to Rottler's dictionary "yogyam" sometimes in Tamil usage means 'chance,' 'hazard,' 'danger' and the phrase "yogyathukku kodukkirathu" is explained in the same work (1) 'to advance money, &c., to an honest man trusting to his honesty; (2) 'to risk one's own money, &c., on a ship or otherwise.' That, in exhibit A, the word was inserted to indicate that the lender, in consideration of his receiving higher interest subsequent to the 12th March 1891, consented to his right to recover the money after that date being made to depend on the safety of the barque is not denied, though the parties are not agreed as to the circumstances in which the loss of the vessel should take place to disentitle the lender from claiming his money. The respondent in his evidence stated that he was not to be affected unless the vessel was lost during a voyage. On the other hand, one of the appellants and a relation of his say that it is immaterial whether the loss occurs during voyage or when the vessel is in port, as was the case in the present instance. Neither view could, in my opinion, be accepted, sought to be established as it is by such meagre and interested evidence, taking the evidence to have been rightly admitted. In this state of things could the provisions of the document as to what was to be the result to the lender, if the money remained unpaid within the 12th March 1891, and the barque was lost subsequently, be held to amount to a valid agreement? I think not, since though the parties might have thought that after the 12th March the money was risked by the respondent upon the safety of the vessel, yet they have failed to express themselves with the definiteness indispensable to an enforceable agreement, the term yogyam used with reference to the risk believed to be undertaken being very vague in itself, and the contract being entirely silent on several points on which in a case like this the parties thereto were bound to make up their minds and indicate with reasonable clearness what their intentions as to those points were, if effect is to be given to their agreement by a Court of Justice. To explain myself, whether it was the intention that the respondent was to be deprived of his money even if the vessel was destroyed while in port, or whether it was intended that he was to be affected only if the loss of the vessel happened during voyage, and if the latter loss, during what particular voyage or voyages, it

being distinctly understood that the barque was to make more than one, was contemplated—these are matters which should have been settled and provided for in the contract. It was equally necessary that the document should have stated loss resulting from what cause or causes, *e.g.*, such and such perils of the sea was to disentitle the lender from claiming repayment. As to these absolutely essential points, the document is completely defective. Therefore, the portion of the instrument dealt with above must be held to be void for uncertainty. And it follows that, on the one hand, the respondent's right to recover his advances is unaffected by the fact that the barque became a wreck subsequent to the 12th March 1891 and, on the other hand, that he is not entitled to the higher interest or vattam at 20 per cent. agreed to be paid in consideration of a risk which was never legally undertaken by him. I would therefore modify the decree of the Subordinate Judge by awarding to the respondent on account of the first item claimed in the plaint Rs. 9,647-3-6 with interest at 12 per cent. per annum and on account of the second item Rs. 18,198-3-1 with interest at the same rate on Rs. 17,322-3-1 thereof, minus the sums found by the Subordinate Judge to have been received by the respondent with interest thereon at the above rate. The appellants will pay and receive proportionate costs in this appeal.

As to the memorandum of objections, I think that the Subordinate Judge was justified in declining to act upon the respondent's accounts in the absence of vouchers or other more satisfactory evidence, especially with reference to so large an amount as Rs. 6,781-12-8 included in the second item in the plaint. I would therefore dismiss the memorandum of objections with costs.

DAVIES, J.—I concur.

APPELLATE CIVIL.

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

1898. August 22, 30.

VENKATAGIRI RAJAH (PLAINTIFF),

v.

SHEIK BADE SAHEB AND ANOTHER (DEFENDANTS).*

Limitation Act—Act XV of 1877, s. 19—Acknowledgment—Muchalka under the Rent Recovery Act (Madras), 1865.

A muchalka given by a tenant at the end of a fasli, containing an undertaking to pay instalments of rent at dates then passed, amounts to an acknowledgment of liability for the purpose of Limitation Act, 1877, section 19.

CASE referred under Civil Procedure Code, section 617, for the opinion of the High Court by T. Varadarajulu Naidu, District Munsif of Kanigiri.

The case was stated as follows:—

"In Small Cause Suit No. 442 of 1898, the plaintiff, the Rajah of Venkatagiri, claims to recover Rs. 35-12-6, being the balance of of rent alleged to be due by the defendants, his tenants, for fasli 1304, which commenced on 1st July 1894 and ended on 30th June 1895. The suit was instituted on 21st February 1898, and it is based upon a muchalka, alleged to have been executed by the first defendant's elder brother in favour of the plaintiff. The muchalka is dated 25th June 1895, and the dates fixed therein for payments of the three instalments in which the rent was payable, viz., 15th August 1894, 30th October 1894 and 30th January 1895, had all expired on that date.

"In the second suit, Small Cause Suit No. 338 of 1898, the Rajah claims to recover Rs. 38-12-1, being the whole rent payable by the defendants, his tenants, for fasli 1304. This suit, which was instituted on 21st February 1898, is also based upon a muchalka similar to the one in the first mentioned suit. The muchalka is dated 18th June 1895, and the dates when the instalments were payable had all expired on that date.

"For the defendant, it is urged that the suits are barred by limitation, that they are governed by article 110 of the Limitation Act, and limitation commenced to run on the dates fixed in the muchalkas as those when the rents were payable, and that the

* Referred cases Nos. 17 and 18 of 1898.

dates of muchalkas would not afford starting points for limitation, nor would the language thereof justify the view that they could operate as acknowledgments under section 19 of the Limitation Act. For the plaintiff it is contended that as the obligation of a tenant to pay rent arises on the receipt of the patta and the execution of the muchalka, time began to run under article 110 only from the dates of the muchalkas and not earlier, and that further the muchalkas afford sufficient acknowledgments in writing to prevent the suits from being barred.

"On the first point, I am clearly of opinion that the starting points for limitation in such cases are the dates of the kistbandi and not the dates when the muchalkas were executed. The case of *Sobhanadri Appa Rau* v. *Chalamanna*(1) was overruled in *Sriramulu* v. *Sobhanadri Appa Rau*(2), wherein it was held by his Lordship Mr. Justice Parker that the period of limitation began to run on the dates on which the rent fell due, though the obligation to pay the rent arose on the tender of the patta; and this view was followed in a recent case of *Venkatagiri Rajah* v. *Ramasami*(3).

"On the other point, namely, as to whether the muchalkas afford sufficient acknowledgments to save the suits from the bar of limitation, I am inclined to find for the defendants, but as the question is not free from doubt, and as about 700 small causes depend upon the decision on that point, I have deemed it proper to obtain an authoritative ruling to avoid the inconvenience and hardship that might be caused, if my view should happen to be incorrect.

"This question appears to have been raised by the District Munsif of Ongole in his reference in *Venkatagiri Rajah* v. *Ramasami*(3); but it was not expressly referred to in the order passed in the case, and the facts of the case then referred did not necessitate an express decision upon it.

"The muchalkas were taken subsequent to the dates of the kistbandi, and in the first case a portion of the rent of the year had been paid before the date of the muchalka, while in the second case the whole rent remained due on the date of the muchalka. The muchalkas appear merely to embody the terms upon which the tenants held the lands, and do not seem to contain any admission of the liabilities of the tenants to pay any sums on the dates on which

(1) I.L.R., 17 Mad., 225. (2) I.L.R., 19 Mad., 21.
(3) I.L.R., 21 Mad., 413.

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they were executed. The muchalkas may perhaps be deemed to contain admissions of a subsisting relationship of landlord and tenant, but they do not, I think, contain any acknowledgment that any rent of the year was due on the dates on which they were executed. The person making the acknowledgment, it has been held, must consciously admit that there is an existing liability in respect of the identical right which is afterwards claimed by the plaintiff (*Venkataramanayya* v. *Srinivasa*(1), *DharmaVithal* v. *Govind Sadvalkar*(2) and *Ram Das* v. *Birjnundun Das*(3)). In *Venkata* v. *Parthasaradhi*(4), his Lordship Mr. Justice Muttusami Ayyar observed that 'upon a reasonable construction of the language used 'by the debtor in writing the relation of debtor and creditor 'must appear to be distinctly admitted,| that it must be admitted 'also to be a subsisting jural relation, and that an intention to 'continue it until it is lawfully determined must also be evident.' This view was followed in *Periavenkan Udaya Tevar* v. *Subramanian Chetti*(5), where it was held that the words used must, to satisfy the requirements of section 19 of the Limitation Act, be such as to show that there was an existing jural relationship, as debtor and creditor, between the parties at the time when the admission was made or at some time within the period of limitation. In the two cases now in question it does not appear to have been the intention of the executants that they should thereby acknowledge their indebtedness at the time in any sum. In the first case, it cannot certainly be said that, by the execution of the muchalka, he admitted his liability for the whole rent of the year, for admittedly he had paid a portion of the rent before its date.

"In certain cases it was held that it was not necessary that the writing should specify the exact amount of the debt or the exact nature of the property or right in respect of which the acknowledgment was made; but invariably, there must, I think, be a distinct acknowledgment of a liability subsisting on the date of the admission, which is, I believe, wanting in the muchalkas in question.

"In *Rangayya Appa Rau* v. *Ratnam*(6) it was held that a landlord suing for rent after the expiry of the period prescribed is entitled to prove that his right was acknowledged within the period; but

(1) I.L.R., 6 Mad., 182.
(2) I.L.R., 8 Bom., 99.
(3) I.L.R., 9 Calc., 616
(4) I.L.R., 16 Mad., 220 at p. 223.
(5) I.L.R., 20 Mad., 239.
(6) I.L.R., 20 Mad., 392.

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what the exact nature of the acknowledgment then in question was, does not appear from the report, and the decision of the case did not finally turn upon that point."

Hon. *Bhashyam Ayyangar* and *Desikachariar* for the plaintiff.

The defendant was not represented.

SUBRAMANIA AYYAR, J.—This is a reference in a suit by the Rajah of Venkatagiri against a raiyat, holding certain lands in the zamindari, for the rent due for fasli 1304 ending with 30th June 1895. The rent was payable in instalments and admittedly they became due on 15th August and 30th October 1894 and 30th January 1895, respectively. The present suit was instituted on the 21st February 1898. The suit is clearly barred, unless, as contended for the plaintiff, the muchalka, executed by the defendant to the plaintiff on the 25th June 1895, contains an acknowledgment such as is required by section 19 of the Limitation Act. The question for determination is whether it contains such an acknowledgment. It is to be observed that the language employed in the muchalka amounts to more than a mere acknowledgment. There is a distinct promise to pay. But the promise as such in the muchalka is obviously void on account of the inconsistency in its terms manifest on the very face of it. For the defendant promised on the 25th June to pay rent on three dates which had already expired, viz., 15th August and 30th October 1894 and 30th January 1895. Some observations, made by Lord Ellenborough, C.J., in *Hall* v. *Cazenove*(1) where a similar point arose, may be referred to here. In that case a charter-party not executed until the 15th March contained a covenant by the owner that the ship should and would proceed from a certain port, where she then lay, on the 12th February preceding on her outward bound voyage. In dealing with this term of the contract the Chief Justice said:—"But here when the deed was executed or concluded by the deli-"very, the stipulation, which was not impossible in its nature when "the deed was first framed, had become impossible as between "these parties from the time having passed. The stipulation, "therefore, had then become wholly nugatory and cannot be under-"stood as having formed any part of the contract between the "parties without imputing to them the most manifest absurdity" (*Hall* v. *Cazenove*(1)).

(1) 4 East, 477 at p. 482.

Now in construing written instruments, which admit of more than one interpretation, that interpretation which leads to an absurd result frustrating the general intention of the parties must give way to an interpretation that would carry out that intention. The muchalka, so far as we are here concerned, could be construed so as to avoid any absurd conclusion in one of two ways. The first is that suggested by the view taken by an eminent Judge in *Doe d. Darlington* v. *Ulph*(1). There a lease for years to commence at Michaelmas 1845 which was, by a decree for specific performance at the instance of the lessee, executed on the 12th January 1847, bearing date as of the 29th September 1845, contained a covenant to insure the demised premises, and keep them insured during the term, and a power of re-entry on breach. The landlord brought an action in ejectment and proved that the premises were not insured until the 18th February 1847.

Lord Denman, C.J., Coleridge and Wightman, JJ., dealt with the case on the assumption that the covenant might be construed as a covenant to insure within a reasonable time only after the execution of the deed. They did not, however, express any decided opinion on the question whether that assumption was correct. But Patteson, J., went further and said:—"I cannot think that "the defendant was bound by this covenant to keep the premises "insured before the lease was actually executed; for till then "there was nothing to oblige him to do so. I think if he had "insured the premises shortly after the execution, he would have "complied with his covenant. In all covenants to do an act in "future, the covenantor must have some time to perform it in. It "is impossible, for instance, for a man to insure the very next "moment after he has entered into a covenant to do so; and if no "time be expressed, he must have a reasonable time in which to do "it," (*Doe d. Darlington* v. *Ulph*(1)). These observations would seem to warrant the promise in the present case to pay on the three dates before mentioned being treated as a promise to pay within a reasonable time from the date of the muchalka. This interpretation, if admissible, is less satisfactory than the second and the only other interpretation which the language of the instrument is susceptible of, viz., that it amounts merely to an acknowledgment of liability. For according to the one construction certain material words found

(1) 13 Q.B., 204 at p. 208.

in the instrument have to be completely rejected on the ground that, in the circumstances, they are meaningless, while effect is given to those words by accepting the view that they refer to the dates when certain instalments were payable and treating the words of promise as, in effect, an admission of the executant's liability in respect of those instalments. That this construction, suggested for the plaintiff, is the sounder appears also from two other equally important circumstances bearing on the matter. One is that muchalkas, such as the present, differ materially from contracts in the strict sense of the term, that is engagements entered into by parties who are free to enter into them or not as they choose, inasmuch as, except where by mutual consent an exchange of patta and muchalka is dispensed with, persons, in the possession of the plaintiff and the defendant here, are under a legal duty to interchange such documents periodically—a duty enforcible specifically. The other circumstance is that although occasionally muchalkas like the present may contain terms truly contractual, as when in any respect the old terms of a tenancy are by the instrument altered or modified, yet in the large majority of instances this class of documents contains nothing more than admissions of liability on the part of raiyats to deal with landholders during a specified period, in respect of the lands held by the former, to conform in their dealings to the terms and conditions settled by antecedent contract or established by long prevalent usage. On the whole, therefore, the construction urged for the plaintiff is, in my opinion, the better, if not the only correct construction. It remains to add a word with reference to the allegation that prior to the execution of the muchalka, the defendant had made some payments on account of the instalments in question. If that allegation be found to be true that would, of course, *pro tanto*, be a defence on the merits. But such a circumstance could not in any way render the muchalka, the less an acknowledgment for purposes of limitation.

BENSON, J.—I agree with the conclusion arrived at by my learned colleague. In order to construe pattas and muchalkas in a case like the present, we must bear in mind the circumstances under which such documents are executed.

Their purpose is to satisfy the requirements of the Rent Recovery Act (Madras Act VIII of 1865). Section 4 of that Act evidently contemplates that they shall be exchanged at the beginning of each fasli or revenue year, but, as a matter of convenience

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and of practice, they are entered into at any time during the year, and usually only a short time before its close, by which time both parties know what land has been cultivated by the tenant and what rent is payable by him. The form and language of the documents are the same whether they are executed early or late in the year, and without regard to the fact that at the time of execution some or all of the instalments of rent may have already become due, and may even have been actually paid. The promise, therefore, in the muchalka to pay the rent due for the year by instalments on specified dates must be construed with reference to these admitted facts. If any instalment is already overdue, the promise must be construed as an acknowledgment that the instalment became payable on its due date, and as a promise to pay so much of it as has not, in fact, been already paid. This promise to pay must be understood as a promise to pay, within a reasonable time, the amount then actually due and not already paid. It would be manifestly absurd to regard it as a promise to pay on a date already past, and it would be unreasonable to regard it as a promise to pay over again a sum already paid. In regard to instalments not due prior to the exchange of patta and muchalka, the promise must be regarded as an acknowledgment that the instalment will become payable on its due date, and as a promise to pay the same on such date. With regard then to instalments due before the date of the muchalka, the document must, I think, be construed as if it ran "I admit that the instalments herein "mentioned fell due on the dates herein stated, and I acknowledge "my liability to pay such part of them as I have not already paid, "and I promise to pay the same within a reasonable time." Thus there was neither an acknowledgment of liability nor a promise in regard to instalments already paid, but there was both an acknowledgment and a promise in regard to instalments not already paid. If there was an arrear then due by the tenant, the muchalka was such an acknowledgment of liability in regard thereto as is contemplated by section 19 of the Indian Limitation Act. There is nothing opposed to this conclusion in the remarks of this Court in the case of *Periavenkan Udaya Tevar* v. *Subramanian Chetti*(1) to which the District Munsif has referred, for the tenant must be held to have made the acknowledgment with reference to his actual

(1) I.L.R., 20 Mad., 239.

existing indebtedness, the fact of which was known to him at the time. The District Munsif must, therefore, ascertain, in the first instance, whether any, and, if so, what sum was due by the tenant when he signed the muchalka. The acknowledgment in the muchalka will save the time bar in respect of any such sum. The practical result is that the muchalka is an ackowledgment of liability for the purpose of saving the bar by time, but it is not an acknowledgment of liability for the purpose of binding the tenant to pay the sum acknowledged.

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APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

VENKAYYA (PLAINTIFF), APPELLANT,

v.

RAMASAMI AND ANOTHER (DEFENDANTS NOS. 2 AND 4), RESPONDENTS.*

1898. August 16. September 8.

Landlord and tenant—Agricultural land—Change in the nature of cultivation—Waste.

The defendant held from the plaintiff irrigable land which was cultivated with paddy, raggi, &c.; he had an occupancy right in his holding and paid a fixed money rent. The defendant having planted cocoanut trees on the land, the plaintiff sued to eject him and to have the trees removed:

***Held*, that the acts of the defendant did not constitute waste or a breach of the terms of his tenancy, and that the suit should be dismissed.**

SECOND APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in Appeal Suit No. 302 of 1896, affirming the decree of J. M. Nallasami Pillai, District Munsif of Chittoor, in Original Suit No. 439 of 1895.

The plaintiff was the landlord of the defendant who had an occupancy right in his holding. The lands were nanja lands used for cultivation of paddy, raggi, &c., but the defendant had planted thereon cocoanut trees, and the plaintiff's case was that this circumstance gave him a right to eject the defendant, and he accordingly brought this suit for possession of the land and for the removal of the trees. The decree of the District Munsif was in favour of the defendant, and it was affirmed on appeal by the District Judge.

* Second Appeal No. 1045 of 1897.

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The plaintiff preferred this second appeal.

Sivasami Ayyar for appellant.

Kumarasami Sastri and *Visvanadha Sastri* for respondents.

MOORE, J.—The plaintiff (appellant) sued to eject the defendants (respondents) on the ground that they had converted a piece of wet land held by them on patta under him intended for cultivation with paddy, raggi, &c., into a cocoanut garden. He also prayed that he should be awarded Rs. 2 as the cost of removing the cocoanut plants on the holding. Both the Lower Courts have dismissed his case with costs. In the pattas filed (exhibit A series) the land under cultivation is classed as wet, but nothing is said as to the nature of the crops that should be grown on it. As the District Judge remarks, the plaintiff tried to import into the terms of the tenancy a clause to the effect that the tenant should not use the land for any purpose inconsistent with its general character as paddy land, and finds that the burden of proving that such a condition was one of the terms of the tenancy was on the plaintiff and that he has not discharged it.

It is now urged in appeal that the tenants have, by growing cocoanut trees on paddy land, altered the character of the holding and that the landlord is accordingly entitled, if not to eject them, at all events, to get a decree directing the removal of the cocoanut plants and the reconversion of the land into ordinary wet land. It is urged that if this is not done, the amount of rent to be paid to the landlord may be diminished, that it may hereafter become impossible to identify the land, and that it may also be rendered difficult for him if the land is cultivated with cocoanut trees to realize the arrears due to him by attachment and sale of the crops growing thereon under the provisions of Act VIII of 1865. It does not appear to me that there is much force in these contentions. Whatever crop the tenants may grow they must, it is clear, pay the rent agreed in the patta and no alteration in the nature of the crops can, it is admitted, give them any right to claim any deduction from that sum. There can be no real danger that there will hereafter be any difficulty in identifying the land, and it does not appear to me that there is any evidence on the record to justify the supposition that the tenants who, it is shown, have a permanent right of occupancy, will run the risk of losing that right by neglecting to pay the rent due by them. It is also pleaded that if the land remains as a cocoanut tope, the landlord will, in case the

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tenants abandon it, be put to considerable expense in having the trees cleared away so as to make it fit for the cultivation of paddy, &c. As the land is valuable, the landlord need not, as it appears to me, be under any apprehension that these tenants with a permanent right of occupancy will abandon it.

It is further urged that when the tenants planted cocoanut trees on the wet land they altered the character of the holding and thereby committed an act of waste and that such being the case the landlord is entitled to a decree as prayed for. The only cases of importance that have been quoted at the hearing are *Ramanadhan* v. *Zamindar of Ramnad*(1) and *Lakshmanna* v. *Appa Rau*(2). What was held in the former of these cases was that a zamindar was entitled to compel a tenant to demolish a dwelling house which he had erected for purposes not connected with agriculture on agricultural land held by him, and in the latter that a zamindar is justified in inserting a clause in a patta preventing a tenant from erecting buildings on his holding which are not compatible with the agricultural character of the holding. These decisions, it is clear, treat of cases of a completely different nature to that at present under consideration. Turning to the latest edition of Woodfall on the Law of Landlord and Tenant (16th edition, page 648), I find that the tenor of the decisions as to waste by changing the nature of the property is briefly as follows:—"If "the tenant convert arable land into wood, *or e converso*, or "meadow into arable, it is waste; and this would appear to be the "case, even where the act is done according to the custom of the "country for the purpose of amelioration. If a tenant pull down "a malt-mill and build a corn-mill it is waste, also if he convert a "corn-mill into a fulling-mill it is waste, though the conversion "be to the lessor's advantage." Applying the principle of these decisions to the present case, it appears to me that the defendants cannot be held to have committed waste. They have not converted the holding into one of a completely different character. They have, it must, in my opinion, be held, merely chosen to grow one description of crop, cocoanuts, in lieu of another, paddy or raggi. They cannot be said to have converted 'arable land into wood,' inasmuch as a cocoanut garden is, it must be admitted, something very different from a wood. In many parts of Malabar one may

(1) I.L.R., 16 Mad., 407. (2) I.L.R., 17 Mad., 73.

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see in a stretch of wet land fields grown with coccoanut trees intermingled with plots of paddy land. Both are irrigated in much the same way and both may, it appears to me, be held to be cultivated with wet crops. As I cannot hold that the tenants have committed waste, I would dismiss this second appeal with costs.

SUBRAMANIA AYYAR, J.—In this case, so far as the present appeal goes, the appellant (plaintiff)—an inamdar—seeks to obtain a decree directing the respondent (defendant)—a raiyat—to remove certain coccoanut trees planted by him a short time before the institution of the suit in one of the parcels of land in his possession. The District Munsif and the District Judge decided against the appellant.

Now beyond putting in the pattas issued to the respondent under the Rent Recovery Act for faslis 1299 to 1304, the appellant produced no evidence. These pattas show nothing more than what the respondent himself admits, viz., that the land in question is nanja or irrigated land. On the other side, the respondent called a few witnesses to prove the prevalence of a practice, in the locality wherefrom this case comes, of persons, in the position of the respondent, planting coccoanut or other fruit trees on lands of similar description without reference to the consent of the landholder. The District Judge, however, held that no such practice was made out. The case has to be decided with reference to but three undisputed circumstances :—

1. The land has hitherto been used only for growing paddy or raggi.

2. The right, which the respondent possesses in the land, is of a permanent character though he may, if he likes, relinquish the land in accordance with the proviso to section 12 of the Rent Recovery Act.

3. The rent payable for the land is a definite money rent which is not liable to be enhanced, save for the exceptional reasons and under the conditions specified in the first proviso to section 11 of the enactment referred to.

In the absence of special rules, laid down as applicable to questions such as the present arising between persons in the position of the parties to this case, we must in dealing with such questions be guided, as far as practicable, by the principles which govern similar questions when they arise between persons who stand to each other in the relation of landlords and tenants, in the

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strict sense of the terms, to which relation that subsisting between the present parties bears, in important respects, an analogy.

Now, according to those principles, the appellant will not be entitled to any relief unless the respondent has, by planting the trees, contravened some agreement or understanding between him and the appellant as to the crops to be raised on the land; or unless the land has, by being so planted, been put to an unhusbandlike use, (assuming that the obligation to use in a husbandlike manner implied in certain circumstances is to be taken as an incident of the respondent's holding, a point as to which I shall add a few words later on); or unless the act of the respondent amounts to waste.

First, has the respondent, by the act in question, violated any agreement or understanding between him and the appellant as to the crops to be raised? In support of the contention that he has, the only circumstance, relied on, is that, as stated before, paddy or raggi alone has hitherto been grown on the land. But clearly that by itself is not sufficient to establish the existence of an agreement or understanding that the respondent was not to use the land for the cultivation of any other suitable crop or produce. In *Westropp* v. *Elligott*(1), Lord Watson, dealing with an argument similar to that urged here, said :—"though the tenant were to use the land "mainly for pasture" (that was the purpose for which the land had admittedly been used there for a considerable period), "it would "not, in my opinion, necessarily follow that the holding had been "'let to be used' for that purpose. I think it would be necessary "in addition to the mere fact of use, to prove some facts in relation "to the character and capabilities of the holding from which it "might be inferred that the tenant could not reasonably have "contemplated any other use." Next, has the respondent acted in an unhusbandlike manner? This question, of course, implies that the obligation imposed by law on an ordinary tenant that, in the absence of a contract to the contrary, he should manage the land in a husbandlike manner, is applicable to a raiyat such as the respondent. Having regard, however, to the fact that such raiyats possess in their lands a heritable and alienable interest of a permanent character, it would seem to be improper and mischievous to hold that the implied obligation, just referred to, is an incident

(1) L.R., 9 App. Cas., 815 at p. 832.

of their holdings, inasmuch as, on the one hand, it is not at all to the raiyat's interest to depart from the usual and regular course of good husbandry; and on the other such a ruling might be utilized by landholders for improper ends and might lead to vexatious litigation on their part against raiyats whom they dislike. But it is not necessary to decide that point now. For, assuming that an obligation as aforesaid is an incident of the respondent's holding, there is not a tittle of evidence to prove that, in planting the trees, the respondent acted in a manner unwarranted by good husbandry. It would be quite unreasonable to hold that a tenant, who has been in the habit of raising one kind of crop for many years, by simply changing the crop does an unhusbandlike act. If authority were necessary for so plain a proposition, I would refer to Lord Chancellor Selborne's conclusion in the case already cited, to the effect that the mere fact of use in a particular manner for a considerable period of time without more is not enough to show that any other use would be contrary to the covenant "to manage "till, and use the lands in a good husbandlike manner, and in "due and regular course of good husbandry, so that the same "might not be in any way injured or deteriorated" (*Westropp* v. *Elligott*(1)). It may not be superfluous to add that, even if I were unaware of the fact that, in different parts of the country, notably in parts of Coimbatore, valuable topes of cocoanut and arecanut trees have been and are being grown on irrigated lands paying revenue to Government, I should decline to say that the planting of such trees on similar lands, held by raiyats in zamindari and inam villages, is *primâ facie* opposed to good husbandry which is a relative term, since, in the words of Lord Ellenborough in *Legh* v. *Hewitt*(2), "what shall be considered in farming, as "good and husbandlike manner must vary exceedingly according "to soil, climate, and situation."

Lastly, does the respondent's act complained of amount to waste? It cannot be waste unless it has caused lasting or permanent injury to the appellant's right. The right to rent, which is the only tangible one that he now possesses, is obviously not affected in any way. On the contrary as the trees grow and the value of the land increases, the security for the rent would become better and better. It is quite true that if no trees had been

(1) L.R., 9 App. Cas., 815 at p. 820.

(2) 4 East, 154 at p. 159.

planted, but paddy or raggi continued to be grown, the appellant would have been in a position to distrain crops of that description for any rent remaining unpaid when such crops are on the land; whereas, in the present altered condition of the land, there would be no crop on it to proceed against until the trees come to bearing. But suppose the respondent, instead of planting the trees, had merely allowed the land to remain uncultivated. In that case also the appellant would have found nothing on the land to distrain, and such an omission would have given him no legal ground for complaint. How then is he entitled to say that the absence of distrainable crops, in the case suggested on his behalf, is an injury to him? The only other argument put forward with reference to the present point, is even more unsubstantial than the one just dealt with. It may be that, if the respondent relinquishes the land at some future time and the appellant is then disposed to remove the trees, if any, then standing on the land, in order to grow paddy, &c., thereon, he would be put to a slight expense. But the contingency of any relinquishment of the land and of the removal of any of the trees is so very unlikely and the cost of the removal would be so trifling that, in my opinion, courts would not be justified in accepting such circumstances to constitute, in point of law, any injury to the appellant and much less a lasting or permanent injury. I have consequently no hesitation in holding that the planting of the trees does not amount to waste. It is, therefore, unnecessary to consider the contention that, even if there was waste, relief should be refused to the appellant on the ground that the waste was, as it is called, meliorating or improving waste.

As to the authorities relied on behalf of the appellant, they are clearly distinguishable from the present. In *Lakshmana* v. *Ramachandra*(1) certain tenants from year to year were held disentitled to grow a mango grove on the land let. This was on the ground that such tenants were under the obligation to return the land in the condition in which it was when it was leased to them. In cases like that, it does not seem unfair on the part of the landlord to say that, as the tenant's interest was determinable on notice to quit, the planting of trees that would take years to grow would ordinarily not do any good to the tenant, whilst it

(1) I.L.R., 10 Mad., 351.

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might prove to be a burden on the landlord who is most interested and therefore such trees ought not to be grown without his consent. The next case cited (*Kunhammed* v. *Narayanan Mussad*(1)) is, in principle, similar to the decision just noticed. For, although the tenant, in the case in question, was not a tenant from year to year, yet he was one who had to surrender the land at the end of the customary kanom term of twelve years and, under the instrument of kanom which created the tenancy, even earlier if the rent fell in arrear. The reasoning, rightly adopted, in that class of cases is quite inapplicable to cases such as the present since in this latter class, there is no obligation to surrender at all. In *Ramanadhan* v. *Zamindar of Ramnad*(2) the raiyat, no doubt, possessed the same permanent interest which, the respondent possesses. But there, agricultural land was used as the site of a house built for non-agricultural purposes. Such an alteration the law prohibits because it is calculated to subject the landlord to risk and inconveniences pointed out by Lord Macnaghten in *Kehoe* v. *Marquess of Lansdowne*(3) and to which it is unjust to expose him. At page 466 of the report, his Lordship observed, "He (the Marquess) let an agricultural holding; he must take "back a congested district. 'Oh,' said the leading Counsel for the "appellants, 'these cottages can be easily removed; they need not "'subsist a day longer than anybody likes. They have only to be "'raised from the grounds and thrown aside.' Well, that is a "summary mode of eviction which would not, I should think, "commend itself to any landlord in Ireland, and which, I am sure, "the appellants themselves would hesitate to put in force. The "learned Counsel, who spoke second for the appeal, took a more "practical view; he admitted that if the land were returned to "Lord Lansdowne with these cottages upon it, he could only get "rid of them by actions of ejectment. Everybody knows what "that means—expense, delay and odium! And all the time while "the landlord was vindicating his rights, and probably for a very "long time afterwards, the lands would lie idle and unprofitable. "To my mind, that is a grave injury as well as an imminent "danger." Between such a case and this, there is no similarity.

I therefore concur in dismissing the second appeal with costs.

(1) I.L.R., 12 Mad., 320. (2) I.L.R., 16 Mad., 407. (3) [1893] App. Cas., 451.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

SRI AHOBALAMATAM JEER.*

1898. December 1.

Criminal Procedure Code—Act X of 1882, s. 350—Transfer of Magistrate—Part-heard case.

A Head Assistant Magistrate during the pendency of a criminal case, of which the trial was almost finished, was appointed to the office of Deputy Magistrate in another part of the same district. The case was transferred by an order of the District Magistrate to the file of the Deputy Magistrate:

Held, that the Deputy Magistrate could proceed with the trial from the point at which he had arrived as Head Assistant Magistrate.

PETITION under Criminal Procedure Code, section 526, praying the High Court to transfer Calendar Case No. 62 of 1897 on the file of the Special Deputy Magistrate of Salem to the file of the Head Assistant Magistrate of Tiruppattur.

The Head Assistant Magistrate of Tiruppattur, having almost completed the trial of a criminal case, was appointed to the office of Deputy Magistrate of Salem in the same district; and the case was, by the order of the District Magistrate, brought on to the file of the Court of the Deputy Magistrate. The accused applied to have the case transferred to the Court of the Head Assistant Magistrate on the ground that the Magistrate before whom it was pending would be compelled in his new capacity to begin the proceedings *de novo*.

Mr. *E. Norton* for the petitioner.

The Public Prosecutor (Mr. *E. B. Powell*) *contra*.

JUDGMENT.—Mr. Norton urges the transfer solely on the ground that, if it is not made, the Magistrate Mr. Gopalasami Ayyar must, under section 350, Criminal Procedure Code, commence the trial *de novo*, and that, as the case is now nearly completed, this will involve unnecessary expense to his client and delay in the disposal of the case. We are unable to see that there is any objection, either on legal or on any other grounds to

* Criminal Miscellaneous Petition No. 138 of 1898.

QUEEN-EMPRESS v. SRI ARORALA-MATAM JEER.

Mr. Gopalasami Ayyar, as Deputy Magistrate, proceeding with the case from the point at which he had arrived as Head Assistant Magistrate prior to his transfer to the post of Deputy Magistrate.

The present case is not provided for by section 350, nor, as far as we know, by any other section of the Criminal Procedure Code, nor is there anything in that Code to prohibit the proposed procedure, and it is obviously convenient. There is no change of Magistrate, and consequently no reason for commencing the trial *de novo*. It is the same judicial mind that is brought to bear on the evidence throughout the case, and the Magistrate has the same magisterial powers, though his judicial designation and his local jurisdiction are changed. But the change of local jurisdiction does not matter since the want of local jurisdiction is cured by the special jurisdiction given by the order of the District Magistrate transferring the case.

The Calcutta case referred to by Mr. Norton (*The Queen* v. *Khan Mahomed*(1)) has no bearing on the present question, nor has the decision of the Full Bench of the Allahabad High Court (*Empress of India* v. *Anand Sarup*(2)). In the latter the Magistrate who completed the trial had been transferred to another district before he completed it, and there was no legal transfer of the case to him as a Magistrate of that district. He therefore had no jurisdiction.

The remarks of the Judges seem to imply that, had he remained in the same district, they would have regarded the verbal order of the District Magistrate, directing him to complete the trial as a sufficient transfer of the case and as an authority to proceed with the trial from the point at which he had arrived before his transfer to the other district. Such being our view of the law, there is no ground for the transfer applied for. We dismiss the petition.

(1) 24 W.R. (Cr. R.), 53.

(2) I.L.R., 3 All., 563.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard (Officiating Chief Justice), Mr. Justice Subramania Ayyar, Mr. Justice Benson, and Mr. Justice Moore.

In Appeal No. 9 of 1898 :—

RAMASAMI NADAN (PLAINTIFF), APPELLANT,

v.

ULAGANATHA GOUNDAN AND OTHERS (DEFENDANTS), RESPONDENTS.

In Appeal No. 22 of 1898 :—

ARUNACHALA GOUNDAN AND ANOTHER (DEFENDANTS NOS. 2 AND 4), APPELLANTS,

v.

RAMASAMI NADAN (PLAINTIFF), RESPONDENT.*

1898. September 30. October 4, 14, 17, 18. November 4.

Hindu Law—Son's liability for father's debts in life-time of father—Suit against father and sons—Decree against sons.

A creditor of a Hindu brought a suit against him and his sons whom it was sought to make liable on the ground that the debts were incurred for the benefit of the family, but he did not obtain a decree against the sons :

Held, that the plaintiff could have prosecuted his claim against the sons in that suit, and have obtained a decree making their shares in the family property liable for the father's debt.

APPEALS against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Original Suit No. 68 of 1896.

The facts of the case are stated sufficiently for the purpose of this report in the following order of reference to the Full Bench, which was made by SHEPHARD, OFFG. C.J., and MOORE, J., before whom the appeals first came on for hearing.

ORDER OF REFERENCE TO THE FULL BENCH.—The defendants are the sons of one Tirumalai who died on the 13th December 1893. At the time of his death two suits were pending in which the present plaintiff charged Tirumalai as the executant of certain bonds and sought to make his sons also liable on the ground that the bonds were executed by the father for the family benefit. On the 8th January 1894 the fact of Tirumalai's death not having

* Appeals Nos. 9 and 22 of 1898.

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been notified to the District Munsif, judgment was given against Tirumalai, but as regards the defendants the suits were dismissed.

The question now raised is whether it is open to the plaintiff to bring a second suit against the defendants. If the decision in *Natasayyan* v. *Ponnusami*(1) is right, there seems to be no doubt that the present suit is maintainable, for it was there held that the claim to enforce the obligation of sons under Hindu Law gives a cause of action arising only on the death of the father, and that case was approved, certainly not disapproved, in *Ramayya* v. *Venkataratnam*(2). It seems to us extremely doubtful whether this decision can be supported, and the point is one of general importance. In the particular case cited the point was one of limitation, and it was held that the creditor's suit against the son was governed by article 120 of the schedule to the Limitation Act, the time being counted from the date of the father's death. At the same time it is observed in the judgment that the creditor might, if he chose, bring a suit during the father's life-time to establish his right against the son (see page 102). This observation is difficult to reconcile with the conclusion at which the Court arrived. But it is certainly correct to this extent that a creditor may, when suing the father for a debt, also obtain a declaration as against the sons that the debt is of such a kind as to make their shares of the property responsible for it. It seems impossible to say that such a suit may not be brought in order to anticipate any objection which the sons might otherwise raise on the occasion of effect being given to an order for sale of the property. If it is right to say that such a suit may be brought, it is but a short step to say that a decree may be obtained against the sons which can itself be executed against their property. It is certainly desirable that all the questions between the creditor and his debtor and the debtor's sons should be raised and determined in one suit.

The precise question we wish to refer is :—

Whether the plaintiff could, in the suits 160 and 324 of 1893, have prosecuted the claim against the sons of Tirumalai and have obtained a decree making their shares in the family property liable for Tirumalai's debt?

(1) I.L.R., 16 Mad., 99.

(2) I.L.R., 17 Mad., 122.

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

V. Krishnasami Ayyar for appellant in Appeal No. 9 of 1898. *Sivasami Ayyar* for respondent No. 2.

Hon. *Bhashyam Ayyangar* and *Sivasami Ayyar* for appellants in Appeal No. 22 of 1898.

V. Krishnasami Ayyar and *R. A. Krishnasami Ayyar* for respondent.

Bhashyam Ayyangar for defendant No. 4.—The question is whether there is a cause of action against the son before the father's death. For a debt contracted by the father for a purpose not illegal or immoral the son is liable to be sued, the debt being recoverable out of the joint family property of father and son and the other property of the father. In regard to such debts the British Courts under Civil Courts Act, section 16, enforce the liability arising under Hindu Law to this extent only, and hold that the debt is not payable out of the son's self-acquired property. Under Hindu Law the son was liable to pay the father's debt as his own—this obligation is not enforced under Civil Courts Act, section 16. In Madras before *Girdharee Lall* v. *Kantoo Lall*(1), it was supposed that this obligation only began on the death of the father who therefore could not alienate *inter vivos* as against the son unless it was for a family purpose. The Privy Council laid down the true rule and the obligation of the son as such to pay a debt of his father (apart from all questions of agency) is the same whether or not the debt was incurred for family necessity, provided it was not illegal or immoral. The debt cannot be recovered from the son personally, but against joint family property. A plaint against the father and son should aver that the debt was incurred for a purpose not illegal or immoral, the son may say it is immoral and would have the onus of proving it; it is a suit on a contract against a person not a party to it. If the debt is proved to be immoral, the plaint should be amended accordingly and the son's name should be removed from the record. The cause of action is the character of the debt. If the plaintiff succeeded in full the decree would be (1) against father personally and (2) against the joint family property. But the plaintiff is not bound to sue the son; he can get a decree against the father, attach family property and sell;

(1) L.R., 1 I.A., 321 at p. 330.

but the sale will have no greater effect than that of a private alienation by father to discharge his debt. The son would not be bound and can deny the debt or assert its immorality and recover his share of the property brought to sale. But the plaintiff is prudent to join the son in order to have the decree in the form I have suggested. On one cause of action against several defendants, different reliefs may be got against them. It is so in such a case as the present.—X sues A and B on B's contract; when the law allows such a suit to be brought the relief against A need not be the same as against B. Compare the case of a suit against a legal representative of a deceased debtor, in which case, though the legal representative is sued on the same cause of action, his liability is limited to assets derived from the deceased. If the plaintiff does not get such a decree, but only one against the father, I do not say he cannot sue the sons, but he executes the decree against the father, or against his property in the hands of the sons as legal representatives. If he wants another decree and sues the son the suit is on the same cause of action. The cause of action against the sons exists against them in the father's life-time. See *Girdharee Lall* v. *Kantoo Lall*(1) and *Ponnappa Pillai* v. *Pappuvayyangar*(2). The obligation to be enforced is incidental to the heritage and so attaches in the father's lifetime. See *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(3) where the Privy Council made it clear that *Girdharee Lall* v. *Kantoo Lall*(1) was applicable in Madras. In *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(4) the law is elaborated and explained. *Mussamut Nanomi Babuasin* v. *Modun Mohun*(5) points out the distinction between the question of the liability of the entire estate and the question of the sons being bound by proceedings against the father, and it is shown that the creditor could, by joining the sons, show that he wished to proceed against the whole estate, though the sons could show the debts to be illegal. See *Laljee Sahoy* v. *Fakeer Chand*(6) as to which it must be noticed that the Madras Court allows a coparcener to alienate his share, but that does not affect this case where only a money decree is in question. *Laljee Sahoy* v. *Fakeer Chand*(6) was

(1) L.R., 1 I.A., 321 at p. 330. (2) I.L.R., 4 Mad., 1 at pp. 64, 71.
(3) L.R., 9 I.A., 128; s.c., I.L.R., 6 Mad., 1 at p. 16.
(4) L.R., 6 I.A., 88 at p. 106; s.c., I.L.R., 5 Calc., 148.
(5) L.R., 13 I.A., 1; s.c., I.L.R., 13 Calc., 21.
(6) I.L.R., 6 Calc., 135.

a mortgage case, but as against the sons that was immaterial. See *Luchmun Dass* v. *Giridhur Chowdhry*(1); *Gunga Prosad* v. *Ajudhia Pershad Singh*(2), where the form of decree is discussed at pages 136, 137; *Khalilul Rahman* v. *Gobind Pershad*(3); *Badri Prasad* v. *Madan Lal*(4); *Kunhali Beari* v. *Keshava Shanbaga*(5) where MUTTUSAMI AYYAR, J., had to change his mind after the case of *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(6) had been decided in Privy Council. When a decree is passed against a father and the whole estate in the property is attached, the sons ordinarily put in claims under Civil Procedure Code, and sometimes though erroneously their shares are released under Civil Procedure Code, section 278. Really all should be sold in view of the extensive powers of the father, and the sons should not be allowed to object to the execution, but should be left to sue. *Sami Ayyangar* v. *Ponnammal*(7) which accords with *Kunhali Beari* v. *Keshava Shanbaga*(5) is the latest case—the sons were parties and the decree as a money decree bound them because the debt was not proved illegal, but the mortgage as such was not binding. *Umed Hothising* v. *Goman Bhaiji*(8) is against the Madras view as to the effect of such a decree and its execution against the sons as legal representatives. [SHEPHARD, J.—That seems to be beside the point.] The view of the Bombay Judges is erroneous; it would no doubt prevent a second suit, but to allow the nature of the debt to be gone into in execution must be wrong. The distinction between debts binding against the father and the son and debts binding against the father only is very slight; practically almost all debts not binding against the sons are not binding against the father either. In *Natasayyan* v. *Ponnusami*(9) the question of limitation was raised, and the Judges said (*quære* whether *obiter*) the time runs from the death of the father. It cannot be so any more than in the case of a suit against a representative on the death of the debtor. We must clearly go back to original obligation. [SUBRAMANIA AYYAR, J.—That view assumes the son is a representative.] I only use that as illustrative. Another illustration is the case of a husband

(1) I.L.R., 5 Calc., 855. (2) I.L.R., 8 Calc., 131.
(3) I.L.R., 20 Calc., 328. (4) I.L.R., 15 All., 75.
(5) I.L.R., 11 Mad., 64 at p. 75.
(6) L.R., 9 I.A., 128; s.c., I.L.R., 6 Mad., 1 at p 16.
(7) I.L.R., 21 Mad., 28. (8) I.L.R., 20 Bom., 385.
(9) I.L.R., 16 Mad., 99.

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who was sued in England for ante-nuptial debts of his wife (*Beck* v. *Pierce*(1)). Under the common law the husband was liable without assets, as was the case here in Hindu Law, before the English Courts began to enforce this pious duty only in connection with property and succession thereto. See Civil Courts Act, section 16. [SUBRAMANIA AYYAR, J.—If a creditor gets a decree on a bond against the father and executes it and sells the whole estate, and the purchaser seeks a declaration that an after-born son is liable, from what date does limitation run?] It would be six years from the date when he is interested to deny that his interest is bound. That is not a suit to enforce the obligation. Moreover under Specific Relief Act, section 42, such a suit for declaration would not lie; however the point is that that would not be a suit to enforce the obligation. So the question when the obligation arose would be immaterial. [SUBRAMANIA AYYAR, J.—If in such a case the father dies before execution what is the creditor to do?] He cannot execute against the son, but can sue to recover the unrecovered part of the debt from the sons. The father and sons are not jointly liable as joint debtors; but the obligation is the same. In *Natasayyan* v. *Ponnusami*(2) the decree was against the father, the decree-holder sought to execute against sons who objected that the property was not liable to be attached, and the decree-holder was referred to a regular suit against the sons. The decree-holder sued and got a decree that the property was liable. [SHEPHARD, J.—The question of limitation is the only question relevant now.] My contention in arguing that case was it should be regarded in some sense as a suit on the judgment, and that for that reason the suit was not barred, not because the obligation does not arise until the death of the father. The Judges say, however, the obligation does not arise on the father's death. But they say on the limitation question that as the right to sue does not arise till the father's death, the period of limitation does not run till then. That is clearly illogical. It must be noted that as against the son the creditor could get exactly the same relief before or after the father's death. In cases falling under section 244, Code of Civil Procedure, a suit cannot be brought on a judgment as it can be in England; and where a suit can be

(1) L.R., 23 Q.B.D., 316.

(2) I.L.R., 16 Mad., 99.

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brought on a judgment against the son as such, it would be open to him to show that the decree debt was illegal and immoral. See *Muthumadeva Naik* v. *Sevattamuthumadeva Naik*(1), as to the analogy from *res judicata* under the old law when it was lawful to bring two suits for the same relief on different causes of action —asserting the same right on different grounds was disallowed. See also *Kameswar Pershad* v. *Rajkumari Ruttan Koer*(2) and *Arunachalam Chetty* v. *Meyyappa Chetty*(3). The closest parallel is the English law as to ante-nuptial debts. The husband was liable personally under the common law apart from the question of his getting any property with his wife: then his liability was limited by statute to the property that came with her and under the Married Woman's Property Act the wife remains liable in respect of ante-nuptial debts to the extent of her separate property. In *Beck* v. *Pierce*(4) part of the plaintiff's work was done more than six years from date of suit. *First*, it was held that *King* v. *Hoare*(5) was inapplicable, because the liability was not joint (nor is the liability of son here joint with the father). *Secondly*, that the suit was barred in respect of all work done six years before suit. After B becomes liable on A's contract his position as defendant is just the same as it would be, if he had been a party to the contract throughout. This is an analogy, but the Hindu son's position is not the same in all respects as that of an English husband. No suit could be brought against the son alone in the father's life-time for the latter's debt, because the son during the father's lifetime has no power to sell joint family property except to the extent of his individual share, *i.e.*, the interest of the whole family in the property to pay the father's debt which may be binding on all the sons, and the creditor cannot do by suit what the judgment-debtor cannot do. [SHEPHARD, J.—What do you say the accurate form of decree would be in a suit against father and son on father's debt?] Decree against father personally and in default of payment by father or son, the same be recoverable out of the joint family property of first and second defendants—just like a decree against assets in the hands of an executor. No declaration of charge or anything else of the sort is necessary. Nor is there any need to fix a time. If the debt

(1) 7 M.H.C.R., 160.

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

(3) I.L.R., 21 Mad., 91.

(4) L.R., 23 Q.B.D., 316.

(5) 13 M. & W., 494.

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is proved to be illegal or immoral, then declare the debt does not bind the son, amend the plaint and give a decree against the father alone. [SUBRAMANIA AYYAR, J.—Why not merely a decree against the father personally and declare the debt is binding on the son?] That would be inadequate. The son is joined because a remedy is wanted against him. [SUBRAMANIA AYYAR, J.—It is unnecessary to mention the fund against which the decree can be executed. It is not done in an ordinary suit for debt.] The sale in execution must be one expressly authorized by the decree, otherwise the execution purchaser would not be safe against the sons, who might allege their interest had not passed. The creditor wants more than a bare declaration against the son but actual substantial relief. Under the Privy Council decision in *Deendyal Lal* v. *Jugdeep Narain Singh*(1) the son can be sued with the father on the father's covenant on a mortgage. To summarize. The son was, under Hindu Law, liable for father's debt like his own after his father's death. [Sometimes also in his lifetime (*e.g.*, when he had gone to live abroad, &c.)] But British Courts enforce the son's obligation only to a limited degree by reason of the son's succession as joint owner by birth with the father to the entire joint family property by survivorship on the death of the father. [SUBRAMANIA AYYAR, J.—Under Hindu Law the absolute liability could not ordinarily arise till father's death. Has that been abrogated or maintained subject to limitations?] Absolute obligation is not recognised. Justice, equity and good conscience does not warrant the enforcement of the father's debt against the son as his own personal debt. The whole Hindu Law is not enforced by English Courts as binding, but only so much of it as relates to marriage, inheritance and succession which is applicable as much to succession by birth as by survivorship. Therefore till *Girdharee Lall* v. *Kantoo Lall*(2) the Courts enforced the obligation only against joint family property after father's death. The next step was inasmuch as all is liable after father's death it was held to follow logically that the son cannot question the father's alienation, *inter vivos*, which prevents the liability arising later. This is in exact accord with Hindu Law apart from the judicial and legislative changes. The son could not interfere if the father himself sold to save himself from the effects of sin which the son would have been

(1) I.L.R., 3 Calc., 198 at p. 204. (2) L.R., 1 I.A., 321.

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afterwards personally bound to obviate. The next step is the joinder of the sons in suits against father. See *Ponnappa Pillai* v. *Pappuvayyangar*(1), per TURNER, C.J. [SHEPHARD, J.—Turner, C.J., says personal obligation. Is that right?] Not "purely personal." [SUBRAMANIA AYYAR, J.—Then the decree you propose is wrong: you do not propose a personal decree against the son.] It follows that the obligation of the son arises before his father's death, and the son's obligation then is, not to interdict the alienation discharging the debt. So limitation runs from the time when the obligation begins.

Krishnasami Ayyar contra.—Can a suit be brought against father and son to recover the debt? I answer no. There is no authority to the contrary (mortgage cases being distinguishable) in spite of the long time since *Girdharee Lall* v. *Kantoo Lall*(2). On the texts, sons are under no obligation to pay debts of father out of joint estate during the father's life-time except when the father is civilly dead and in other especially excepted cases. Civil Courts Act, section 16, allows portions of Hindu Law other than those specified to be administered, and they are administered by the Courts as being in accord with equity and good conscience. [SUBRAMANIA AYYAR, J.—You say that on a simple bond no suit can be brought against father and sons.] I say so; there is no case in the reports allowing that course and there is authority to the contrary. The Privy Council cases are to be taken with the texts:—(1) Volume VII, Sacred Books of the East, page 44, Vishnu, chapter VI, sloka 27; (2) Volume XXXIII, Sacred Books of the East, page 41, Narada, sloka 2; (3) Volume XXXIII, Sacred Books of the East, page 328, Vrihaspati, chapter XI, slokas 47, 48; (4) Volume II, Sacred Books of the East, page 241, Gautama, chapter XII, slokas 40, 41; (5) Volume XXV, Sacred Books of the East, page 282, Manu, chapter VIII, slokas 158–166; (6) Volume XIV, Sacred Books of the East, page 82, Vasishta, chapter XVI, sloka 31; (7) Macnaghten and Colebrooke's Translation of the Mitakshara, page 109, chapter VI, sloka 50. None of these writers make the sons liable before the father's death. [SUBRAMANIA AYYAR, J.—In cases of partition, would not sons be so liable?] No, because it is not said so, though the

(1) I.L.R., 4 Mad., 1 at p. 64, (2) L.R., 1 I.A., 321.

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Mitakshara at any rate treats fully both of partition and of the son's liability for the father's debts. With the texts already cited must be taken :—(1) Mandlik's Translation of Vyavahara Mayukha, Part II, pages 112, 113; (2) Volume I of Colebrooke's Digest of Hindu Law, 4th edition, pages 183, 184, 186, 187, and pages 193, 198. [SUBRAMANIA AYYAR, J.—Do they not assume that the father has such full and complete control of ownership over the family property that the present question could not arise?] They do not assume that, for they declare the son's liability subject to certain limitations stating the exceptional cases in which it arises in the life-time of the father. West and Buhler's Hindu Law, 3rd edition, page 642. Sons must discharge the father's debt. The estate taken by a son is liable, but none of the commentators say that the son is liable during the father's life-time, even if the debt be incurred for the benefit of the family. [SUBRAMANIA AYYAR, J.—Then no suit cannot be brought during the father's life-time for a son's debt. SHEPHARD, J.—It is quite clear his interests can be jeopardised: it is only a question of when this may occur.] The liability of the son should not and cannot be enlarged. If a creditor could sue both father and son, there would have been boundless cases so framed. [SHEPHARD, J.—Such cases have been brought in this Court.] Only in cases when the debt is contracted for a family purpose. The observations in *Laljee Sahoy* v. *Fukeer Chand*(1) go too far. [SHEPHARD, J.—That case shows it is a common thing to join father and son.] In the case of *Sami Ayyangar* v. *Ponnammal*(2) the point was not argued. Where the cause of action against the father and son is the same, where you bring a suit against the father, you cannot bring a second suit against the son. In *Gurusami* v. *Chinna Mannar*(3), it was held a second suit could not be brought against the son, because the cause of action was the same—*vide* observations of Muttusami Ayyar, J., at page 46. The force of this is great, for it is to be remembered that this followed the case of *Ponnappa Pillai* v. *Pappuvayyangar*(4). If the cause of action against both the father and son is the same, only one suit can be brought. *Narasinga* v. *Subba*(5) is the only case where, upon a bond executed by a father, a suit was brought against him and his sons; the sons

(1) I.L.R., 6 Calc., 135 at p. 138.
(2) I.L.R., 21 Mad., 28.
(3) I.L.R., 5 Mad., 37.
(4) I.L.R., 4 Mad., 1 at p. 38.
(5) I.L.R., 12 Mad., 139.

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were exonerated from liability. [SHEPHARD, J.—The only question then was whether a second appeal lies.] I submit the Divisional Bench considered the question of son's liability. See as to the applicability of *King* v. *Hoare*(1), and the general question as to whether the obligation is joint, *Hanumantha* v. *Hanumayya*(2). *Gurusami* v. *Chinna Mannar*(3), *Arunachala* v. *Zamindar of Sivagiri*(4), and *Venkatarama* v. *Senthivelu*(5) follow *Hanumantha* v. *Hanumayya*(2). *Arunachala* v. *Zamindar of Sivagiri*(4) is in accord with the doctrine established by these cases. *Natasayyan* v. *Ponnusami*(6) and *Jamna* v. *Nain Sukh*(7) recognized the distinction I contend for between cases of suits against the sons themselves and suits (at page 494) where sons come in to get relief against a sale in execution of a decree against father, and it explained *Luchmun Dass* v. *Giridhur Chowdhry*(8) and *Gunga Prosad* v. *Ajudhia Pershad Singh*(9). In cases of mortgage it is of vital importance to determine whether there is an antecedent debt or not; see in addition to the cases already cited *Sami Ayyangar* v. *Ponnammal*(10). In *Laljee Sahoy* v. *Fakeer Chand*(11) the Judge's observations go very far, but the facts were simple and the case clear and does not touch the present point. *Khalilul Rahman* v. *Gobind Pershad*(12) employing the word antecedent with relation to the suit is wrong; there must be a debt in all cases before suit. The Privy Council cannot be taken to have employed the expression in that sense. As to *Deendyal Lal* v. *Jugdeep Narain Singh*(13), the debt was a family debt; it was like *Hanumantha* v. *Hanumayya*(2) and does not touch the present point. It does not show a suit for a father's personal debt can be brought against father and sons. [SUBRAMANIA AYYAR, J.—It does not show that such a suit will not lie.] The Privy Council's use of the word pious indicates the obligation to pay a father's debt (resting on the theory of releasing father from sin) does not arise till his death. *Mussamut Nanomi Babuasin* v. *Modun Mohun*(14) is a case like *Luchmun Dass* v. *Giridhur Chowdhry*(8). The next

(1) 13 M. & W., 494.
(2) I.L.R., 5 Mad., 232.
(3) I.L.R., 5 Mad., 37.
(4) I.L.R., 7 Mad., 328.
(5) I.L.R., 13 Mad., 265.
(6) I.L.R., 16 Mad., 99.
(7) I.L.R., 9 All., 493.
(8) I.L.R., 5 Calc., 855.
(9) I.L.R., 8 Calc., 181.
(10) I.L.R., 21 Mad., 28.
(11) I.L.R., 6 Calc., 135 at p. 138.
(12) I.L.R., 20 Calc., 328.
(13) I.L.R., 8 Calc., 198 at p. 204.
(14) L.R., 13 I.A., 1; s.c., I.L.R., 13 Calc., 21.

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question is limitation. It is argued limitation runs from the date of the debt even if sons not liable till the death. But the question is covered by authority. *Beck* v. *Pierce*(1) is distinguishable on the facts and the analogy is not perfect on the question of law. [SHEPHARD, J.—As far as limitation is concerned the son's position is worsened, if the cause of action did not arise till the death of the father—a longer period and a later starting point. Will a suit lie against father and son in the father's life-time —that is the substantial question.] Put the case of a money decree against the father followed by a partition and an application to execute against the son's shares. On the position taken up by the other side he could not do so, but this is clearly wrong and shows how radically wrong that position is. [SHEPHARD, J.—Take this case: debts incurred by father, partition; no provision for payments of debts; then the father dies. Whose property is liable?] My contention is the father's property alone is liable. Only one liability exists under Hindu Law, viz., that arising after the father's death. The causes of action against father and son are distinct. One cause of action arises in the father's life-time, and the other only after his death. It would be really a misjoinder of causes of action. If it were a joint cause of action, *King* v. *Hoare*(2) would preclude a separate suit, but *Gurusami* v. *Chinna Mannar*(3) shows a separate suit is maintainable. *Badri Prasad* v. *Madan Lal*(4) is immaterial here, because it is exactly covered by the Privy Council decision. The only case exactly in point is *Narasinga* v. *Subba*(5) which is not shaken. The question whether the father has been sued to judgment or not is immaterial (*Krishnasami Ayyangar* v. *Vedanta Chari*(6)).

SHEPHARD, OFFG. C.J.—The question referred appears to me in itself a very simple one when once the true nature of a son's obligation under Hindu Law is understood. The reference was rendered necessary by the decision in *Natasayyan* v. *Ponnusami*(7), which has apparently been approved in later cases. There are, moreover, dicta in the reports to the effect that the son's liability under Hindu Law in respect of the father's debts arises only on

(1) L.R., 23 Q.B.D., 316.
(2) 13 M. & W., 494.
(3) I.L.R., 5 Mad., 37.
(4) I.L.R., 15 All., 75.
(5) I.L.R., 12 Mad., 139.
(6) Second Appeal No. 1650 of 1891 (unreported).
(7) I.L.R., 16 Mad., 99.

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the death of the father. The question is whether that opinion can be reconciled with the doctrine of the son's liability which has been developed in a series of cases beginning with *Hanooman-persaud Panday* v. *Mussumat Babosee Munraj Koonweree*(1) in 1856. Referring to that case in 1874 the Judicial Committee say:—"That "is an authority to show that ancestral property which descends to "a father under the Mitakshara law is not exempted from liability "to pay his debts, because a son is born to him. It would be a "pious duty on the part of the son to pay his father's debts, and "it being the pious duty of the son to pay his father's debts, the "ancestral property, in which the son as the son of his father "acquires an interest by birth, is liable to the father's debts," (*Girdharee Lall* v. *Kantoo Lall*(2)). Since 1874, the decisions of the Judicial Committee are consistent in holding that as the son's liability may be enforced through the medium of a sale of the ancestral property executed by the father, so it may be enforced by a sale in execution of a decree against the father and that in neither case can the son recover the property except by proving that the debts were of a kind for which he would not be liable (*Suraj Bunsi Koer* v. *Sheo Proshad Singh*(3)). As regards both of the two points involved in this proposition there was considerable reluctance on the part of this Court to abandon their former view and to adopt that enunciated by the Judicial Committee. In the Sivagiri case (1880) (*Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(4)) this Court held that although there was a pious duty binding the son to pay his father's debts, the duty was not a legal one unless it were shown that the debt was incurred for the benefit of the family. This decision was overruled by the Judicial Committee and so the legal obligation of the son to pay his father's debts was distinctly declared for this Presidency.

On the other point, viz., the operation of a decree against the son of a Hindu judgment-debtor, not made a party to the suit, this Court was also unwilling to adopt the view which favoured the interest of the creditor. This point arose alike in cases in which there was a decree against the father and in cases in which it was sought to use the decree against members of the family not

(1) 6 M.I.A., 393.
(2) L.R., 1 I.A., 321 at p. 331.
(3) L.R., 6 I.A., 88; s.c., I.L.R., 5 Calc., 148 at p. 169.
(4) L.R., 9 I.A., 128; s.c., I.L.R., 6 Mad., 1.

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being sons of the judgment-debtor (*Ponnappa Pillai* v. *Pappuvayyangar*(1), *Sivasankara Mudali* v. *Parvati Anni*(2), *Gurusami* v. *Chinna Mannar*(3), and *Subramanian* v. *Subramanian*(4)). For both cases alike, the Judicial Committee has authoritatively declared the law. Although the decree may have been passed against the father or the manager of the family only, the son or the other members of the family are not at liberty to challenge the consequent sale except by questioning the existence or nature of the debt (*Mussamut Nanomi Babuasin* v. *Modun Mohun* (5) and *Daulat Ram* v. *Mehr Chand*(6)). In the matter of proof there is undoubtedly a distinction between the two cases,—against the son the creditor has to make a negative allegation while against other members of the family he has to assert that the debt was incurred by the manager for their benefit. In other respects, as it appears to me, the two kinds of claim stand on the same footing. In either case the creditor is seeking to do through the Court what the father or manager who has incurred the debt could lawfully do for himself. The same form of decree would serve in both cases. The decree after stating the sum due should declare that the debt is binding on the defendant who, as father or manager, incurred it and on the other defendants as members of an undivided Hindu family and should then direct payment of the same by the father or manager in the ordinary way and, as to the other defendants, should direct payment by them out of the ancestral property of the said family. It is argued that, notwithstanding the operation which may be given to a decree against the father, there is no cause of action against the son during the father's life-time, because under Hindu Law the liability to pay the debt arises only after his death, and texts of Hindu Law are cited in support of the argument. But when in effect it is conceded that the qualified obligation of the son may be enforced in the only way possible during the father's life-time, this contention is, in my opinion, wholly unsustainable. For no apparent reason a distinction must be made between the two cases above mentioned. Against the members of the family along with the manager the creditor may bring a suit founding his claim against the manager on the contract, and against the others on

(1) I.L.R., 4 Mad., 1 at p. 38.
(2) I.L.R., 4 Mad., 96.
(3) I.L.R., 5 Mad., 37.
(4) I.L.R., 5 Mad., 125.
(5) L.R., 13 I.A., 1 ; s.c., I.L.R., 13 Calc., 21.
(6) I.L.R., 15 Calc., 70 at p. 81.

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the rule of law making the ancestral property liable for debts properly incurred by the manager. In that case all the questions which can arise between the creditor and the family may be decided in one suit to which they are all parties, and, according to the view formerly taken, that was the only proper way for bringing such questions to decision. But as against the son, it is said that the creditor's cause of action does not arise until the father dies; and then it is said the cause of action is not founded on the contract with the father, and therefore as regards the law of limitation both the starting point and the period are different from what they are in the father's case. This was the point apparently decided in *Natasayyan* v. *Ponnusami*(1). In the judgment in that case the contention that a son's obligation arises only on the father's death was overruled, and it is not denied that a suit may be brought against the sons in the life-time of their father. The suggestion, as I understand, is that there may be a declaratory suit against the son combined with the claim against the father, or the creditor may wait till the father has died and then get an executable decree against the son. The reasoning of the judgment I am unable to follow. In my opinion it is a mistake to say that a creditor wants a declaratory decree against the debtor's son. The decree which he requires and to which he is entitled is, as I have said, precisely the same decree as that which he can, on proper proof, obtain against other members of the family. The fact that such a decree may be obtained means that the son is subject to a present obligation, and if there is such an obligation, it cannot be said that there is not a cause of action.

For these reasons I answer the question in the affirmative.

SUBRAMANIA AYYAR, J.—For the purposes of the present reference it is not quite necessary to enter into the history of the general question of a Hindu son's liability in respect of his father's debt discussed with much learning in the elaborate judgments delivered in *Ponnappa Pillai* v. *Pappuvayyangar*(2). Nor do I consider it necessary to deal with the points incidentally raised in the argument before us. I shall, therefore, confine myself to the sole question referred, which, notwithstanding what was strongly urged on behalf of the respondent, seems to be scarcely arguable from the point of view suggested for him. The argument on his behalf to

(1) I.L.R., 16 Mad., 99.
(2) I.L.R., 4 Mad., 1.

the effect that the Hindu Law does not recognise any liability on the part of a son with respect to his father's personal debt, not secured by a mortgage of their joint property, so as to entitle the creditor to sue the sons in the father's life-time, was rested, if I am not mistaken, on the circumstance that, while numerous direct and distinct statements are to be found in the smritis and the commentaries as to a son's (now obsolete) liability independent of assets, no similar statement is to be found in those works as to the existence of the liability now in question. This absence of express authority on the matter in the Hindu treatises of the class mentioned is, however, in my opinion, quite explicable consistently with the view that such liability was nevertheless recognised by the old Hindu Law. Now attachment and sale of family lands for debt are among the peculiar features of British Judicature and are creatures of modern legislation, such remedies having been entirely unknown to the indigenous system of law. The chapter of the Mitakshara "on the administration of justice," so far as one can ascertain from Macnaghten's translation, make no allusion at all to remedies of that description, and it may be taken that no other early Hindu treatises on law provide for such remedies, considering that West and Buhler in their Digest say that "*nowhere* amongst the "provisions of the Hindu Law for enforcing payment of debts is such "a process as the attachment and sale of the lands of a family men-"tioned" (page 649). Again the rule that a son is not estopped by adjudications in judicial proceedings to which his father is a party, but he himself is not (now generally enforced strictly), was apparently not so enforced according to the Hindu system, under which the representative character of a father appears to have been admitted to a much greater extent than our Courts are disposed to allow at the present day. For, a suit by a father alone with reference to what concerns the family can now be objected to successfully on the ground of non-joinder of the sons; whereas, such an objection was clearly untenable in the days of the commentators as will be seen by what Vijnaneswara says when treating of a plaint or declaration. He there points out that "the "term plaintiff or complainant includes the sons and grandsons of "those persons, their interests being equally involved" (Mitakshara, chapter I, section IV, 13, Macnaghten and Colebrooke's translation, page 19). When such a state of things prevailed, questions like those which so frequently crop up since the decision of the Judicial

Committee in *Girdharee Lall* v. *Kantoo Lall*(1), with reference to the effect of decrees obtained by a creditor against a father and of the attachment and sale thereunder upon the rights of the judgment-debtor's sons, could not possibly have arisen when the smritis or the commentaries were written. And it seems to me that is why no rules bearing on such questions are propounded in those works. Moreover, notwithstanding the recognition of the equal right of coparceners inclusive of sons in the family property, the position of a manager in a family appears to have been in those early days one of such trust and responsibility that even with regard to debts unquestionably binding on all the members of an undivided family consisting of brothers, the books speak as if the duty of meeting those obligations lay, not on all the coparceners as it really did, but on the managing member alone. In support of this statement I may quote from that portion of the Mitakshara which relates to the topic of "Debts payable by whom and "when" the following passage:—"(In the text under consider-"ation) the plural number has been used as 'sons or son's sons'; "consequently if there are many sons if divided, they must pay the "debt, according to their respective shares. It appears from this, "that if they are undivided, and have joint concern, he, amongst "them who is the head or chief, is bound to pay." (Mitakshara, Chapter VI, section III, 18.) When such was the view in regard to a brother in management, it is easy to understand why old Hindu writers, in dealing with the law as to payment of debts in the father's lifetime, do not expressly refer to the sons except where that natural and pre-eminent head of a family is unwilling or incapacitated to perform the functions incident to his position. The point will be rendered still clearer when we consider the ground on which payment of debt is enforced. The duty of paying one's debts was perhaps never more impressively laid down than it was by the smritis and the commentaries. The duty is sought to be enforced not only as a legal and moral duty, but also as a religious duty, it being laid down that one dying indebted must undergo pains and penalties in his *post-mortem* existence and even in future births. It is to extricate the father from continuing to suffer from such evils that the son was, after the former's death, compelled by that law to pay his debts notwithstanding that

(1) L.R., 1 I.A., 321.

he left no assets. How then can it, with any show of reason, be maintained that there was under that law, as it stood before the British rule, no liability on the part of the son, even when he is possessed of assets, because the father is alive? Such a contention must have appeared very strange to legislators and lawyers who admitted that even in the life-time of a father his creditor was legally entitled to arrest the son and detain him in order to put pressure on the father to pay up the debt as will be seen from a text of Vrihaspati quoted by commentators, where it is stated:—"When a debtor is forced to pay his debt by the tying of his son, "wife, and cattle, and by the doorway being obstructed (by the "creditor), then is acharitam (confinement) said to be used," (see *e.g.*, Vyavahara Mayukha, Chapter V, section IV, 1–4, Mandlik's Hindu Law, page 109; see also Colebrooke's Jagannatha's Digest, CCXXXIX, Higginbotham's Edition, Volume I, page 233).

No doubt owing to the facility now unavoidably afforded to an unscrupulous person, whether he be a creditor of one who is undivided, or an undivided member who is concerned in the payment of a debt, to commit fraud through the machinery of the Courts, the question of the liability of a son in respect of his father's debts, in so far as the former's interest in the joint estate is concerned, has become one of great practical importance. But that was not the case, as already stated, in times when involuntary alienation of family lands by attachment and sale was unknown; and a point like the one we are considering naturally enough called for no notice at the hands of the lawyers and legislators of those times, and was therefore not discussed or provided for by them.

Be this as it may, it is impossible to hold under the law, as it stands established by the repeated decisions of the ultimate Court of Appeal, that a creditor suing a Hindu for his personal debt is not entitled to include, as defendants in the suit, the debtor's sons. For, in cases like the present, the sons, as persons likely to be affected by proceedings taken against their father, have an undoubted right to raise questions as to the existence or the character of the debt, notwithstanding any decree passed against the father without the sons having been made parties, and to raise such questions during the life-time of the father. How could the other party, concerned in the trial thereof, be held to be precluded from calling upon his adversary in the matter to raise any objection he wishes to urge against the creditor's claim to recover his debt

even against the adversary's share of the estate, so as to guard against further litigation which might arise and very often does arise if a decree is obtained against the father alone, and to render impossible the doubt, uncertainty, and trouble, which generally attend an execution sale under such a decree? For the due protection of the rights of the class of creditors and debtors under consideration, and on the general principle that all persons having any interest in the subject of litigation may be made parties, it must be held that a creditor, in the position of the appellants, is entitled to make the sons defendants in a suit for the father's debt, even when it has not been incurred for the benefit of the family or has not been secured by a mortgage of the joint estate.

The answer to the question referred is in the affirmative.

BENSON, J.—I am of opinion that the question referred to us must be answered in the affirmative.

However reluctant this Court may have been to admit to the fullest extent the liability of a Hindu son's interest in the joint family property for a personal debt incurred by his father, it must be conceded that that liability has been established by a series of decisions of the Privy Council by which we are bound.

Speaking broadly the father may himself alienate the property in order to satisfy such a debt, or the creditor may obtain a decree against the father, and, in execution of it, he may by proper steps bring the whole family property to sale, and the son can resist such alienations if he can show that the alleged debt had no existence or was incurred for "an illegal or immoral purpose" in the technical sense in which those words are understood in the law books; but otherwise the alienations will bind the son's interest, even though he has not joined in the sale or been a party to the suit, or execution proceedings (*Girdharee Lall* v. *Kantoo Lall*(1), *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(2), *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(3), and *Musamut Nanomi Babuasin* v. *Modun Mohun*(4)). Such a suit therefore affects, or may affect, the son's interest, and the son, if not made a party to it, may, in the execution proceedings thereon, or in a subsequent suit even in the life-time of the father, question the existence or binding character of the debt. It follows that the

(1) L.R., 1 I.A., 321. (2) L.R., 6 I.A., 88; s.c., I.L.R., 5 Calc., 148.
(3) L.R., 9 I.A., 128; s.c., I.L.R., 6 Mad., 1.
(4) L.R., 13 I.A., 1; s.c., I.L.R., 13 Calc., 21.

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creditor suing the father, in a case like the present, may, and in fact ought to join the sons whose interest he intends to bind, and thus obtain a determination of the whole question in one suit, rather than leave the liability of their interests to be determined in subsequent litigation.

This view is in no way repugnant to the principles of Hindu Law, but is in accordance with them as shown in the judgment of my learned colleague Mr. Justice Subramania Ayyar, with whom I concur.

MOORE, J.—I concur with Mr. Justice Subramania Ayyar in holding that a creditor suing a Hindu for a personal debt is entitled to include as defendants in the suit the debtor's sons, and therefore return an affirmative answer to the question referred to the Full Bench.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard (Officiating Chief Justice), Mr. Justice Subramania Ayyar, Mr. Justice Davies, Mr. Justice Benson, Mr. Justice Boddam, and Mr. Justice Moore.

1898. August 15, 18. October 14, 28, 31.

CHAPPAN (RESPONDENT), APPELLANT,

v.

MOIDIN KUTTI (PETITIONER), RESPONDENT.*

Letters Patent, s. 15—Appeal from judgment of a single Judge made under Civil Procedure Code, s. 622.

An appeal lies against an order made by a single Judge of the High Court under Civil Procedure Code, section 622, when such order amounts to a judgment.

APPEAL under Letters Patent, section 15, against the order of Mr. Justice Boddam made in Civil Revision Petition No. 371 of 1897, which was an application under Civil Procedure Code, section 622, praying the High Court to revise the order of M. R. Kelappan Nayar, Acting District Munsif of Quilandy, on Miscellaneous Petition No. 156 of 1897.

The application in the Court of the District Munsif was made under Civil Procedure Code, section 315. The karnavan of the

* Letters Patent Appeal No. 4 of 1898.

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applicant had in 1875 purchased certain land at a Court sale on behalf of the tarwad, and subsequently the representative of another tarwad instituted a suit to recover possession of the land and obtained a decree as prayed. The present application was for the purchase money together with interest thereon which should be paid to the applicant. The District Munsif dismissed the application on two grounds, viz., firstly, that section 315 of the Civil Procedure Code of 1882 was inapplicable as the sale in question had taken place before its enactment, and secondly, that it was not shown that the judgment-debtor in the first of the abovementioned suits had no saleable interest in the property. He accordingly dismissed the application.

The petition under Civil Procedure Code, section 622, came on for hearing before Mr. Justice Boddam who set aside the order of the District Munsif and remanded the petition to be re-heard. Against this order the respondent in the petition preferred this appeal under the Letters Patent, section 15.

The appeal having come on for hearing before SUBRAMANIA AYYAR and MOORE, JJ., an objection was taken that the appeal was not maintainable, and their Lordships referred the matter to a Full Bench as follows:—

ORDER OF REFERENCE TO THE FULL BENCH.—This is an appeal from an order of a single Judge of this Court under section 622, Code of Civil Procedure.

It is urged that there is no appeal and reference is made to the provisions of section 591, Code of Civil Procedure. In *Achaya* v. *Ratnavelu*(1) it was held that section 15 of the Letters Patent was controlled by section 629 of the Code of Civil Procedure, and that there was consequently no appeal from an order of a single Judge of this Court rejecting an application for review of judgment. In *In re Rajagopal*(2) it was laid down that, as section 15 of the Letters Patent was controlled by section 588 of the Code of Civil Procedure, no appeal lay from an order of a single Judge of this Court rejecting an application for leave to appeal *in formâ pauperis*. In *Sankaran* v. *Raman Kutti*(3) it was decided that no appeal lay from a decree passed by a single Judge of this Court in an appeal against an order of remand passed under clause 28 of section 588

(1) I.L.R., 9 Mad., 253. (2) I.L.R., 9 Mad., 447. (3) I.L.R., 20 Mad., 152.

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of the Code of Civil Procedure. Again, in *Vasudeva Upadyaya* v. *Viswaraja Thirthasami*(1) it was held that no appeal lay from an order of a single Judge of the Court dismissing an appeal against an order of remand passed under section 562, Code of Civil Procedure (clause 28, section 588, Code of Civil Procedure).

On the analogy of these rulings it would appear that we should decide in view of the provisions of section 591 of the Code of Civil Procedure that no appeal lies from an order by a single Judge of the High Court passed under section 622, Code of Civil Procedure.

We may add that the question now under consideration does not appear to have been raised when the decision in *Vanangamudi* v. *Ramasami*(2) was arrived at. Our attention has, however, been drawn to the following observation of their Lordships of the Privy Council made in a judgment in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia*(3):—"It only remains to observe that their "Lordships do not think that section 588, Act X of 1877, which "has the effect of restricting certain appeals, applies to such a case "as this where the appeal is from one of the Judges of the High "Court to the Full Court." We are of opinion that it is advisable that the decisions of this Court which we have now quoted should be re-considered with reference to this observation, and we would accordingly refer the following question to a Full Bench:—

"Does an appeal lie from an order passed by a single Judge of the High Court under section 622, Code of Civil Procedure?"

The Rules of Practice of the High Court, Appellate Side, provide, *inter alia*, (rule I, clause 4) that 'every application for the 'admission of an application for revision of proceedings of a Civil 'Court shall ordinarily be heard and determined by a Bench of one 'Judge' and (rule II, clause 3) that 'every application for the 'revision of the proceedings of any Civil Court admitted under the 'preceding rule shall ordinarily be heard and determined by a 'Bench of two Judges.'

The case was then argued before a Bench constituted of SHEPHARD, OFFG. C.J., SUBRAMANIA AYYAR, BODDAM, and MOORE, JJ.

(1) I.L.R., 20 Mad., 407. (2) I.L.R., 14 Mad., 406.
(3) L.R., 10 I.A., 4; s.c., I.L.R., 9 Calc., 482.

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K. Narayana Rau and *Rangachariar* for appellant.

Appu Nedungadi for respondent.

Narayana Rau.—The question is under Letters Patent, section 15, whether an appeal lies from any decision under Civil Procedure Code, section 622. The decision clearly is a judgment, and the only question is whether section 15 is controlled by the Civil Procedure Code. The provisions of the Civil Procedure Code relied on are sections 588 and 589. I submit that section 15 in the special Act, Letters Patent, cannot be modified by the Civil Procedure Code, which is a general Act, by implication. See Maxwell on the Interpretation of Statutes, page 198. The two provisions stand together and effect can be given to each independently. Section 589 defines the forum, the orders of which are within the purview of chapter XLIII. See also sections 590, 591; also 595, 597, as to Privy Council appeals, under which the order or decree of one Judge is not appealable. Therefore section 15 of the Letters Patent is unaffected. [SHEPHARD, J.—You mean there must be some appeal, but that begs the question whether this order is final.] The view I contend for is in accordance with the interpretation placed on the provisions in question by the Privy Council in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia*(1). [SHEPHARD, J.—The observation is made with reference to the argument that the order was not a judgment.] It is submitted that the observation is made with reference to the reasoning of the Chief Justice which is not restricted to that argument. See also at pages 486–87. The other side relies on, firstly, *Achaya* v. *Ratnavelu*(2) as to appeal after a review, but the Privy Council decision was not considered; also the case is under section 629 and is distinguishable on that ground, but it is submitted that the decision is erroneous. Secondly, reliance will be placed on *In re Rajagopal*(3) which followed the previous case, and related to a pauperism application. [SHEPHARD, J.—There would be no judgment if it was a finding that there was no pauperism, but that does not appear.] The other Madras cases against me are *Sankaran* v. *Raman Kutti*(4) related to section 562, and *Vasudeva Upadyaya* v. *Viswaraja Thirthasami*(5). Here BENSON, J., is wrong in distinguishing *Hurrish Chunder Chowdry* v. *Kali Sundari Debia*(1), putting the order of

(1) L.R., 10 I.A., 4; s.c., I.L.R., 9 Calc., 482, at p. 494.
(2) I.L.R., 9 Mad., 253. (3) I.L.R., 9 Mad., 447.
(4) I.L.R., 20 Mad., 152. (5) I.L.R., 20 Mad., 407.

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Pontifex, J., as being a decree within section 2 and so appealable under section 540, on a different footing from the orders within section 588. But it was not a decree and it could not come under section 540, where the appeal is from one Court to another Court which is not the case under section 15. I rely on *R.* v. *R.*(1) therein referred to as showing that a discretionary order is subject to appeal under Letters Patent, section 15. That was an order which under Civil Procedure Code would have come under section 591 and not section 588. *Vanangamudi* v. *Ramasami*(2) is under section 62[illegible] and is in point because the objection taken to the appeal (turning on the word judgment) was cognate to the present objection. [SHEPHARD, J.—Is it clear that section 15 applies to High Court as an appellate or revisional Court—that it applies otherwise than to cases on the original side?] It is submitted that it is. See High Court Charter Act, section 15, apart from Letters Patent. [SHEPHARD, J.—If the Letters Patent had stopped at section 15 there would have been no mofussil appellate jurisdiction, and the question could not have arisen.] See Charter Act, sections 8, 9 and 10. In the absence of section 16, Letters Patent, the High Court would have all the powers of the Sudder and Supreme Courts. *Muhammad Naim-ul-lah Khan* v. *Ihsan-ul-lah Khan*(3) is the latest decision of Allahabad High Court. See at page 230 the observations on the Privy Council case which are much the same as those of Benson, J., and at page 232 as to the applicability of section 10 to orders under section 622. [BODDAM, J.—How do you meet that?] There is a fallacy, the appellant under section 15 in such a case asks the Divisional Bench to exercise the revisional functions of the High Court. It is not an appeal in the ordinary sense—not an appeal against the order or decree sought to be revised. Section 622 does not contemplate the revisional jurisdiction being exercised by a single Judge. [SHEPHARD, J.—That contention would include also references, &c.] That is so: the jurisdiction is that of the High Court and not of one Judge. The one Judge only acts for the Court under the rules, but that does not exclude the jurisdiction of the Full Court when it is invoked. See *Venkata Reddi* v. *Taylor*(4). Section 597 shows by implication that any decree of one Judge is appealable to two Judges, otherwise why should it not be appealed

(1) I.L.R., 14 Mad., 88.
(2) I.L.R., 14 Mad., 406.
(3) I.L.R., 14 All., 226.
(4) I.L.R., 17 Mad., 100.

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to the Privy Council? Compare the phraseology of this section with section 15 of the Letters Patent. Section 591 does not affect the matter. Appeals against the order of a single Judge under section 622 have often been entertained without objection. See *Krishnayya* v. *Unnissa Begam*(1), *Appandai* v. *Srihari Joishi*(2), *Kammathi* v. *Mangappa*(3), *Subbarayadu* v. *Pedda Subbarazu*(4), *Sriramulu* v. *Sobhanadri Appa Rau*(5), *Srinivasa Ayyangar* v. *Seetharamayyar*(6), and *Kaliyanaramayyar* v. *Mustuk Shah Saheb*(7). The case would come under the general revisional powers which are uncontrolled by the Code. See *Shiva Nathaji* v. *Joma Kashinath*(8). [SUBRAMANIA AYYAR, J.—There are like decisions in the Calcutta reports.] See also *Tej Ram* v. *Harsukh*(9). [SHEPHARD, J.—Then section 36 has to be considered.] But I contend the revisional jurisdiction cannot be exercised by one Judge. Assuming that the revisional jurisdiction is part of the appellate jurisdiction as seems to be implied by the rules, the section 15 clearly applies.

Appu Nedungadi for respondent.—The case is concluded by the Madras cases cited and *Banno Bibi* v. *Mehdi Husain*(10), which considers *Hurrish Chunder Chowdry* v. *Kali Sundari Debia*(11), in dealing with sections 588, 591, and was followed in *Muhammad Naim-ul-lah Khan* v. *Ihsan-ul-lah Khan*(12). See at page 238, especially as to section 622 and compare *Guise* v. *Jairaj*(13). *Navivahoo* v. *Narotamdas Candas*(14) also supports my case; see also *The Bombay and Persia S.N. Company, Limited* v. *The S.S. "Zuari"*(15). [SUBRAMANIA AYYAR, J.—That is not on the Letters Patent.] Muttusami Ayyar, J., one of the Judges in *Achaya* v. *Ratnavelu*(16) who took part in *Venkata Reddi* v. *Taylor*(17), made reference to *Achaya* v. *Ratnavelu*(16) and was dealing with Provincial Small Cause Courts Act which has no provision corresponding to section 588. The rest of the arguments adduced on the other side are answered by BENSON, J. Revisional power is part of the appellate jurisdiction. In the cases quoted in which appeals against orders

(1) I.L.R., 15 Mad., 399.
(2) I.L.R., 16 Mad., 451.
(3) I.L.R., 16 Mad., 454.
(4) I.L.R., 16 Mad., 476.
(5) I.L.R., 19 Mad., 21.
(6) I.L.R., 19 Mad., 72.
(7) I.L.R., 19 Mad., 395.
(8) I.L.R., 7 Bom., 341.
(9) I.L.R., 1 All., 101.
(10) I.L.R., 11 All., 375.
(11) L.R., 10 I.A., 4; s.c., I.L.R., 9 Calc., 482.
(12) I.L.R., 14 All., 226.
(13) I.L.R., 15 All., 405.
(14) I.L.R., 7 Bom., 5.
(15) I.L.R., 12 Bom., 171.
(16) I.L.R., 9 Mad., 253.
(17) I.L.R., 17 Mad., 100.

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of a single Judge acting under section 622 have been entertained the point was not raised. Again, this is not a judgment and for that reason too there is no appeal—no rights are determined. See also *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*(1), *Somsundaram Chetti* v. *Administrator-General*(2), *Tirunarayana* v. *Gopalasami*(3), and *Kalikristo Paul* v. *Ramchunder Nag*(4).

Rangachariar in reply: referred to *Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami*(5).

In consequence of a difference of opinion among the Judges the case was re-argued before a Full Bench constituted of six Judges as above.

Rangachariar for appellant.—Appeal is claimed under section 15 of the Letters Patent; there must therefore be a judgment of a Judge acting under section 13 of the Charter Act, which applies (*Ranee Surnomoyee* v. *Luchmeeput Doogur*(6)) to the appellate as well as the original side of the High Court. I assume there was a judgment. [BODDAM, J.—The reference says order not judgment.] I assume the order was a judgment in view of what took place at the last argument. Then was the case heard under section 13? Yes, the Judge heard it under rule 1 framed under section 13 which empowers one Judge to dispose of civil revision petitions. But though that was so as a question of fact it may perhaps be said it was not so in law. See Charter Act, which in section 9 onwards give the powers of the High Court including powers of superintendence including revision in its appellate jurisdiction. [SHEPHARD, J.—Why in appellate jurisdiction?] It is so because the superintendence is over the Courts subject to appellate jurisdiction under section 15. The Charter Act contemplates no revisional jurisdiction as distinguished from appellate. The distinction in section 9 is between appellate and original. In *Queen* v. *Nyn Singh*(7), four Judges agreed as to this construction to be put in the word appellate in section 13. It is only under this section that the revisional work can be entrusted to a single Judge or two Judges—if the construction is wrong all revisional work must come before a Full

(1) 8 B.L.R., 433.
(2) I.L.R., 1 Mad., 146 at p. 151.
(3) I.L.R., 13 Mad., 349.
(4) I.L.R., 8 Calc., 147.
(5) I.L.R., 10 Calc., 814.
(6) B.L.R., Sup. Vol., 694.
(7) 2 N.W.P.H.C.R., 117 at p. 124.

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Bench. See also *In the matter of the Petition of Huris Chunder Mitter*(1). [SHEPHARD, J.—Was that original or appellate?] It was revisional, *i.e.*, exercise of powers of revision in appellate jurisdiction. [SUBRAMANIA AYYAR, J.—There was no judgment there; it was an order of dismissal, under disciplinary powers.] Possibly that is the right view, but it is section 13 of the Act which covers all the functions of the High Court and under which alone rules can be made for the distribution of work among the Judges. The same view is taken in *Girdharee Singh* v. *Hurdoy Narain Sahoo*(2) where section 39 of the Letters Patent was in question with section 15 of the Charter Act. For thirty-four years this view has been acted on and revisional work has been done by single Judges under rules framed by Courts under section 13. [BODDAM, J.—Then one Judge can make rules or call for a return. DAVIES, J.—And you say an appeal would lie.] Then there would be no judgment; such would not be judicial but ministerial acts. Anyhow such powers have not been delegated to one Judge and probably could not be under section 9, because it is not a matter of administration of justice. [SHEPHARD, J.—Consider what the power of superintendence amounted to at that time; then it was power of prohibition and the power of compelling the exercise of jurisdiction. See the Code of 1877.] Code of 1861, section 31, was insufficient; so, section 15 of the Charter Act was invoked; the cases are collected in *Tej Ram* v. *Harsukh*(3) and *In the matter of the Petition of Lukhykant Bose*(4). [SHEPHARD, J.—Suppose the Court is not set in motion by a party, but the case is taken up *suo motu* by a Judge?] He acts in the exercise of the appellate jurisdiction coming under section 15 of the Charter Act. The rules prescribe that such jurisdiction may be exercised by one Judge. The Code of Civil Procedure cannot be taken as guide in construing the Letters Patent and Charter Act. Section 320 enacted in 1888 is the only section which makes any distinction between appellate and revisional jurisdiction. It may be, though that is not clear, that the distinction is valid throughout the Code where no absurdity would result but that does not help here. Letters Patent, sections 27 and 28, help my argument as to civil cases. The jurisdiction in referred

(1) 10 B.L.R., 79.
(2) 21 W.R., (C.R.), 263.
(3) I.L.R., 1 All., 101.
(4) I.L.R., 1 Calc., 180.

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cases, and it is submitted in revisional cases also is clearly part of the appellate jurisdiction. [SHEPHARD, J.—Can you not associate section 28 of the Letters Patent with section 9 of the Statute?] It is all part of the appellate jurisdiction—the powers of reference and revision were exercised under the Procedure Code of 1861, which is referred to in the letter enclosing the Letters Patent. With section 28 of the Letters Patent as to criminal matters compare section 16 of the Letters Patent as to civil matters. [DAVIES, J.—That assumes revisional powers.] Because they are included in appellate jurisdiction. [BODAM, J.—Section 15 of the Act gives powers of superintendence which are not mentioned in the Letters Patent but are nevertheless valid. SHEPHARD, J.—The Letters Patent effectuate section 9; the following sections gave the jurisdiction and operated immediately apart from the Letters Patent.] Nevertheless, it is only in the appellate jurisdiction that they can be exercised. Properly speaking there is no revisional jurisdiction; there are only revisional powers in the appellate jurisdiction. Therefore section 13 cannot be said not to apply to revisional cases. Assuming then that section 15 applies, the argument on the other side is that the appeal there given is taken away by Civil Procedure Code. It is not taken away expressly; repeal by implication is not favoured and special Acts are not, unless expressly affected, at all affected by a general Act. Here the Letters Patent and the Civil Procedure Code can co-exist. See *Dodds* v. *Shepherd*(1), *Thorpe* v. *Adams*(2) and *Vasudeva Upadyaya* v. *Visvaraja Thirthasami*(3). Really the intention of the Civil Procedure Code was to keep the Letters Patent intact: the chapter XLIII relied on on the other side relates only to interlocutory orders, which do not come under section 622; see *In re Nizam of Hyderabad*(4). See section 591 which leaves the party the remedy of appeal ultimately after the decree is made. [SHEPHARD, J.—Look at section 588, clauses (17) and (29).] These are matters really in the execution of decree. See section 589, which provides for appeals from one Court to another; compare also sections 632 and 638. If the chapter applies to High Courts what forum is to hear appeals against orders by High Court Judges of the class mentioned in

(1) L.R., 1 Ex., 75 at p. 78.
(2) L.R., 6 C.P., 125.
(3) I.L.R., 20 Mad., 407 at p. 418.
(4) I.L.R., 9 Mad., 256.

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section 588, clause (28), since there is no forum under section 589? Clearly the forum is supplied in the Letters Patent. Section 597 again compared with Letters Patent, section 15, supports my view; also section 575. See *Sri Gridhariji Maharaj Tickait* v. *Purushotum Gossami*(1). Again appeals lie to the Privy Council against an order made under section 622 by two Judges (see *Amir Hassan Khan* v. *Sheo Baksh Singh*(2) and *Girdharee Singh* v. *Hurdoy Narain Sahoo*(3), but section 575 would prevent this if the order was by one Judge only. *Muhammad Naim-ul-lah Khan* v. *Ihsan-ul-lah Khan*(4) will be relied on against me. The Chief Justice points out that the power under section 622 is discretionary. What we want is not an appeal from the original decree, but against the order of the single Judge. Compare the extensive right of appeal in England against orders of mandamus, which order is the remedy where the applicant cannot appeal. See *Pritchard* v. *Mayor, &c., of Bangor*(5). Then I say the question is concluded by the Privy Council decision in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia*(6). The constitution of the Court determines the question whether appeals lie under the Letters Patent and the nature of the order determines the question under the Civil Procedure Code. The Privy Council authority just cited has not been considered in any Madras case, except *Vasudeva Upadyaya* v. *Visvaraja Thirthasami*(7). *In re Rajagopal*(8), the pauper appeal case, is in point against me, but the Privy Council case was not cited. In numerous cases the Court has acted on the view I contend for, *e.g.*, *Venkata Reddi* v. *Taylor*(9) and *Vanangamudi* v. *Ramasami*(10) where the point was taken; and about ten more in four years. Here in the particular case the order under section 622 is reversed and the case remanded. If the point is decided against me, an anomaly arises under section 588, clause (28), which contemplates and allows an appeal.

Appu Nedungadi for respondent.—The distinction between appellate and revisional jurisdiction is substantial. The High

(1) I.L.R., 10 Calc., 814.
(2) I.L.R., 11 Calc., 6.
(3) 21 W.R., (C.R.), 263.
(4) I.L.R., 14 All., 226.
(5) L.R., 13 App. Cas., 241.
(6) L.R., 10 I.A., 4; s.c., I.L.R., 9 Calc., 482 at p. 494.
(7) I.L.R., 20 Mad., 407 at p. 418.
(8) I.L.R., 9 Mad., 447.
(9) I.L.R., 17 Mad., 100.
(10) I.L.R., 14 Mad., 406.

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Court, as an appellate tribunal, had the powers given to it under Act VIII of 1859 as amended in 1861. As a revisional tribunal, it had jurisdiction in cases not within its appellate jurisdiction. A Court will not interfere of its own motion or otherwise in revision where appeals will lie. The distinction appears clearly in the Charter Act and also it is submitted in the Letters Patent. There were no revisional powers under the Act of 1859, but they were first given in an incomplete form in 1861. Then comes the present section 622 which gives the same power of superintendence as the Charter. See *Muhammad Suleman Khan* v. *Fatima*(1)—a power only exercised where there is no appeal. In *Sreemutty Dossee* v. *Sreenibash Dey*(2), appellate and revisional jurisdictions are clearly distinguished. *Anthony* v. *Dupont*(3) is a case of revision without application of party. Revisional jurisdiction is an extraordinary jurisdiction not part of the appellate jurisdiction which is ordinary; for instances where revision cases are so treated, see *Madhub Chunder Giree* v. *Sham Chand Giree*(4), *Rayachand Mayachand* v. *Sultan Rahimbhai*(5), *Gurubasaya* v. *Channalappa* (6), and *Shidhu* v. *Bali*(7). As to *In the matter of the Petition of Lukhykant Bose*(8) cited against me, it really maintains the distinction for which I contend. In *Nilmoni Singh Deo* v. *Taranath Mukerjee*(9), the Privy Council treats revisional powers as equivalent to the powers of superintendence. It follows that the judgment was not under section 13 and therefore no appeal under section 15. As to the practice for one Judge to exercise the jurisdiction—it must be taken that he acts for the High Court as a whole, and his order is the order of the High Court. Even if that practice is irregular, even if the delegation of the functions of the High Court to one Judge is illegal that does not affect the legal aspect of the question and it does not make the revisional powers of the High Court, part of the appellate jurisdiction. As to the second point—the effect of Civil Procedure Code on Letters Patent—section 9 of Charter Act refers to the future legislation in India and see section 44 of the Letters Patent. If the Civil Procedure Code does not operate, no

(1) I.L.R., 9 All., 104.
(2) 12 W.R., (C.R.), 74.
(3) I.L.R., 4 Mad., 217.
(4) I.L.R., 3 Calc., 243 at p. 248.
(5) I.L.R., 18 Bom., 347.
(6) I.L.R., 19 Bom., 286.
(7) I.L.R., 15 Bom., 180.
(8) I.L.R., 1 Calc., 180.
(9) I.L.R., 9 Calc., 295.

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judgment of a single Judge can ever be final, *i.e.*, not subject to appeal. Section 588 is conclusive on the point which is not affected by section 589. Sections 632–648 show that chapter XLIII applies to the High Court. As to the Privy Council case (*Hurrish Chunder Chowdry* v. *Kali Sundari Debia*(1)), I refer to the observations of BENSON, J., in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami*(2) and see cases there cited. Then this order is not a judgment and it is not final. [SHEPHARD, J.—That is not within the reference.]

Rangachariar in reply.—Letters Patent, sections 19 and 21, maintain the sole distinction between original and appellate jurisdiction. The revisional jurisdiction must be exercised according to the law applied in the appellate side of the High Court. The argument from Bombay decisions is based merely on the mode of arrangement and classification of the cases, and does not go to the substance of the question.*

SHEPHARD, Offg. C.J.—The first question is "Whether any appeal lies under clause 15 of the Letters Patent from orders passed under the provisions of section 622 of the Civil Procedure Code?" Considering this question with exclusive reference to the language used by the framers of the Letters Patent and the Charter Act, I should have great difficulty in holding that clause 15, read as it must be with section 13 of the statute, was intended to give a right of appeal in such matters. In order to hold that orders passed on revision come within the scope of clause 13 it must be held that they are made by the High Court in the exercise of its appellate jurisdiction. But for the opinion expressed in Allahabad shortly after the passing of the statute and practically acquiesced in by all the High Courts since that time, I should have thought that the power of superintendence conferred on the High Courts by section 15 of the statute stood quite apart and distinct from their appellate jurisdiction, so that it could not possibly be said that in passing orders of a revisional character the High Court was exercising its appellate jurisdiction. I hesitate however to assert my opinion in contradiction to the opinion hitherto entertained and acted upon by this as well as by the other High Courts,

(1) L.R., 10 I.A., 4; s.c., I.L.R., 9 Calc., 482 at p. 494.
(2) I.L.R., 20 Mad., 407 at p. 418.
* See *Hiralal* v. *Bai Asi* (I.L.R., 22 Bom., 891) which was reported after the decision of the present case by the Full Bench.—REPORTER'S NOTE.

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especially when I find that cases have been brought before the Judicial Committee in which the present question might have been but was not raised.

Accordingly I think it must be assumed that the judgment of a single Judge acting under section 622 of the Code is open to appeal, unless the right of appeal has been taken away by section 588 of that Code. On that question I entirely agree with Mr. Justice Subramania Ayyar. The question is, in my opinion, concluded by authority which it is beyond our province to criticise.

The answer which I would give to the question referred is that, if the order appealed against amounts to a judgment, an appeal against it does lie.

SUBRAMANIA AYYAR, J.—The first question for consideration is "Whether the power of revision exercised by this Court under section 622 of the Code of Civil Procedure is, within the meaning of the High Courts Act and the Letters Patent constituting this Court, a part of the Court's appellate jurisdiction?"

Now, according to Webster's Dictionary the first meaning, in law, of the noun 'appeal' is "the removal of a cause or a suit from "an inferior to a superior Judge or Court for re-examination "or review." The explanation of the term in Wharton's Law Lexicon, which is only different in words, is "the removal of a "cause from an inferior to a superior Court for the purpose of "testing the soundness of the decision of the inferior Court." And in consonance with this broad meaning of the word, "appellate jurisdiction" means "the power of a superior Court to review "the decision of an inferior Court" (*Ib.*). Here the two things, which are required to constitute appellate jurisdiction, are the existence of the relation f superior and inferior Court and the power on the part of the former to review decisions of the latter. This has been well put by Story:—"The essential criterion of "appellate jurisdiction is, that it revises and corrects the proceed-"ings in a cause already instituted and does not create that "cause. In reference to judicial tribunals an appellate jurisdic-"tion, therefore, necessarily implies that the subject-matter has "been already instituted and acted upon by some other Court, "whose judgment or proceedings are to be revised," (section 1761, Commentaries on the Constitution of the United States).

It was, however, argued that, except where the superior Court is called upon to revise a decision of the inferior Court by a party

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entitled so to set it in motion, the exercise of the power of revision cannot be said to be an exercise of appellate jurisdiction. This argument clearly misses the true point which is intended to be conveyed and is conveyed by the term appellate jurisdiction. That point is the capital distinction between jurisdiction which is original and jurisdiction which is *not* original, irrespective of the circumstances and conditions in which the latter is to be exercised. Those circumstances and conditions are important, no doubt. Clearly they do not affect the abstract character of the jurisdiction but relate only to its application and practical working. "An appellate "jurisdiction," as pointed out by Story in the passage immediately following that already quoted, "may be exercised in a variety of "forms and indeed in any form which the Legislature may choose "to prescribe." Such jurisdiction may be exercisable only in certain specified classes of cases. Its exercise may be claimable by a party as a matter of right or only subject to his obtaining the leave of the Court which passed the decision to be appealed against. Again, the power to review or revise may be confined to points of law or may extend to matters of fact also. Clearly legislative provisions as to such matters only lay down some of the limitations under which the jurisdiction is allowed to be exercised. Nor are the conditions, prescribed by section 622 for the exercise of the power of revision conferred by it, different in essence from the kind of limitations just above referred to and more commonly imposed by Legislatures on the exercise of appellate functions. But none of such limitations, however much it may circumscribe the exercise of the power, touches, as already remarked, the intrinsic quality of the power itself. Now, as section 622 in question gives in terms to this Court the power to revise decisions of Courts subordinate to it, it follows that the essential criterion of appellate jurisdiction, enunciated in the above quotation, is present in the case of proceedings held by this Court under that section and that the power exercised in such proceedings is therefore a part of the Court's appellate jurisdiction. It may not be out of place to add that to take the word "appellate" in the sense explained above, is not opposed even to ordinary usage. In support of this remark it is perhaps sufficient to refer to the fact that such writers as Sir Frederick Pollock and Professor Maitland speak in their History of English Law not only of the "process in error," but also of the processes known as "attaint," "certification," "prohibition,"

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"removal of actions" and "false judgment" as "processes which "have about them more or less of an appellate character" (Vol. II, pages 661–665). It is scarcely necessary to say that there is nothing in any portion of the High Court Act or the Letters Patent inconsistent with the construction put, as above, on the term "appellate jurisdiction." On the contrary, there are clear indications in some of the provisions that that is the meaning intended. In clauses 19, 20 and 21 of the Letters Patent, with reference to the law to be administered in civil cases by the High Court, its jurisdiction is for that purpose classified into ordinary original, extraordinary original, and appellate; from which it is clear that all the powers exercisable by the Court, that are not included under original, must come under appellate jurisdiction—a classification which is adopted and recognised by the Judicial Committee in the case, to be referred to hereafter, relying on these very clauses.

It seems, therefore, to be clear that the term "appellate jurisdiction" is both grammatically and logically wide enough to comprehend the power exercisable under section 622 referred to.

Turning now to the decisions on the point, *Queen* v. *Nyn Singh*(1) is a direct authority in favour of the above construction; Morgan, C.J., Ross, Turner and Spankie, JJ., having therein unanimously held that the term "appellate" does include a High Court's judicial functions as a Court of revision. The only other decision bearing on the point, so far as I am aware, is that of the Judicial Committee in the Bombay case of *Navivahoo* v. *Turner*(2). There, Counsel contended that under the High Court's Act and Charter the division of jurisdiction is fourfold, ordinary original, extraordinary original, appellate, and those special matters which are the subject of special and separate provisions. Their Lordships, however, held that the last mentioned specially provided matters did not form a distinct head of jurisdiction and that the real division is threefold: ordinary, extraordinary, and appellate. This decision seems to go against the view that the power to revise exercisable under section 622 is not a part of the appellate jurisdiction.

The power to revise may be taken to be, so far as it goes, analogous to the power of superintendence, exercisable by the Court under section 15 of the Statute under which the Privy Council held, in *Nilmoni Singh Deo* v. *Taranath Mukerjee*(3), that a High Court

(1) 2 N.W.P.H.C.R., 117. (2) L.R., 16 I.A., 156. (3) I.L.R., 9 Calc., 295.

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is competent to revise certain decisions of the Courts subordinate to it. And the ruling of the Judicial Committee that the classification is threefold implies that the power of superintendence, though specially provided for, being obviously neither ordinary original jurisdiction nor extraordinary original jurisdiction, within the meaning of the Statute and the Letters Patent as expounded by the Committee itself in the case cited, must come under the remaining head specified by their Lordships, viz., appellate jurisdiction. Consequently the analogous power to revise, exercisable under section 622, must likewise come under that head.

Before passing to the remaining question, I would briefly notice the suggestion that, if the view taken above is correct, the powers of this Court exercisable as a Court of reference, under the chapter of the Civil Procedure Code in which section 622 is to be found, should also be held to come under appellate jurisdiction. This, I admit, must be conceded. But, that there is nothing anomalous in such a conclusion will be evident if the real character of the proceeding on a reference under the chapter is borne in mind. Such a reference is not merely consultative and is therefore unlike the case of *Ex parte County Council of Kent and Council of Dover*(1), where the Court of Appeal held that, upon the application made to the Court under the Statute there in question, the Court was not even bound to hear the parties concerned, if any; that there was no actual determination of an existing dispute in which a private right was involved; that the application was consequently purely consultative and therefore that form of procedure did not involve a right of appeal (see also *In re Knight and Tabernacle Permanent Building Society*(2)). But in the case of references under the Code of Civil Procedure this Court must hear the parties and is expressly empowered to alter, cancel, or set aside any decree or order which the Court making the reference has passed in the case, out of which the reference arose, and make such order as it thinks fit, the Lower Court being bound to give effect to the judgment or order so passed by this Court. *Overseers of the Poor of Walsall* v. *London and North-Western Railway Co.*(3), is an authority (if authority were necessary with reference to such a plain point) for the view that the decision of this Court on a reference of the kind under consideration is a judicial determination of the rights of the parties

(1) [1891] 1 Q.B., 725. (2) [1892] 2 Q.B., 613. (3) L.R., 4 App. Cas., 30,

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which, as Lord O'Hagan expressed it in the last mentioned case, is mandatory or, as Lord Bowen put it (*In re Knight and Tabernacle Permanent Building Society*(1)), effective, and is therefore attended with the ordinary and usual incidents attaching to such determinations.

With reference to the remaining question in the case, I have but few observations to make. If I am right in the view that appellate jurisdiction includes revisional powers, it follows that against an order passed under section 622 an appeal lies if the particular order amounts to a judgment within the meaning of clause 15 of the Letters Patent; unless the said clause has, as contended before us, been modified by section 588 of the Code of Civil Procedure. This contention is, however, opposed to the ruling of the Judicial Committee in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia*(2) in which their Lordships laid down that that section does not apply to a case such as the present where the appeal is from one of the Judges of the Court to the Full Court. I am unable to persuade myself, as I have already stated on a previous occasion, that the observations of the Committee on the point are mere *obiter dicta*. The contention that section 588 modified clause 15 was not only distinctly raised but was also strongly pressed by Counsel in the argument. Their Lordships had therefore to give a decision upon the soundness or unsoundness of the contention. That, it appears to me, they did in unmistakeable terms.

I, therefore, hold that an appeal does lie against an order passed by a single Judge of this Court under section 622 of the Code of Civil Procedure when such an order is a judgment within the meaning of clause 15 of the Letters Patent.

DAVIES, J.—The question referred to us is "Does an appeal lie from an order passed by a single Judge of the High Court under section 622 of the Code of Civil Procedure?" The said section 622 empowers the High Court to pass orders in cases in which no appeal lies when any Civil Court subordinate to it has (1) exercised a jurisdiction not vested in it by law, or (2) has failed to exercise a jurisdiction so vested, or (3) has acted in the exercise of its jurisdiction illegally or with material irregularity. The power exercised by the High Court is therefore one exercised

(1) [1892] 2 Q.B., 613. (2) L.R., 10 I.A., 4; s.c., I.L.R., 9 Calc., 482.

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in its revisional capacity. The chapter XLVI of the Code under which section 622 appears indeed describes the power as one of revision. Now, under the rules of this Court of the 6th of November 1879, the only order which a single Judge of this Court can pass in relation to the revision of the proceedings of a Civil Court is to admit an application for such revision or to reject it *in limine* (*vide* rule 1, clause 4). When such application has been admitted by a single Judge it must be heard and determined by a Bench of two Judges under rule II, clause 3. In the present case the order of a single Judge was not one of admission or rejection but was passed on the merits after hearing the parties.

My answer to the reference therefore is that an appeal does lie against the order passed in the present case but on the sole ground that it was passed without jurisdiction, a single Judge not being empowered to pass it and an appeal being the only remedy for cancelling the order which must have full force and effect and be binding on the Lower Court so long as it remains uncancelled. But in cases where the order is one admitting or rejecting the application for revision which can be legally passed by a single Judge no appeal under clause 15 of the Letters Patent in my opinion lies. I consider that the right of appeal given by clause 15 of the Letters Patent from the judgment of one Judge of this Court extends only to cases falling within the original or appellate jurisdiction of the High Court, and that the phrase "appellate "jurisdiction" does not include its revisional jurisdiction under section 622 of the Code of Civil Procedure.

Section 622 of the Civil Procedure Code which may be compared with section 35 of Act XXIII of 1861, under which a limited power of revision was given to the Sadr Court, may be said to be a development of the provision contained in section 15 of the Statute 24 and 25 Vict., Cap. 104. That section declares that each of the High Courts established under this Act shall have superintendence over all Courts which may be subject to its appellate jurisdiction and then goes on to give other powers, the power of calling for returns, directing transfer of cases, making rules of practice, and the like. In the original Letters Patent it is clear that orders passed by the High Court in the exercise of its powers of superintendence were not judgments in respect to which an appeal could be brought under clause 14 of those Letters Patent corresponding to clause 15 of the amended Letters Patent;

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because clause 14 of the Letters Patent of 1862 mentions only judgments in cases of original civil jurisdiction. Clause 15 of the amended Letters Patent is, however, expressed in wider terms. An appeal is given from the judgment "of one Judge of the said "High Court or one Judge of any Division Court pursuant to "section 13 of the said recited Act." This clause and section 13 of the Statute must therefore be read together. Section 13 of the Statute provides for the exercise of the original or appellate jurisdiction vested in the High Court. Reading the section with the clause of the Letters Patent it could not have been intended to give an appeal in any matters other than those arising in the exercise of the original or appellate jurisdiction of the High Court. Clause 36 of the Letters Patent when considered with clause 15 and with section 13 of the Statute puts the matter in a still clearer light. Clause 36 is founded on section 13 of the Act and like clause 15 refers to it expressly. Section 13 having provided for the exercise of the original and appellate jurisdiction by one or more Judges or by Division Courts, clause 36 declares that "any function which is hereby directed to be performed by "the said High Court in the exercise of its original or appellate "jurisdiction" may be performed by any Judge or by any Division Court constituted under the provision of the 13th section of the Act. It goes on to provide that in the event of a difference of opinion among the Judges of a Division Court the opinion of the majority or of the senior Judge shall prevail. This provision is supplemented by that contained in the latter part of clause 15, which, in the case of an equal division of opinion in a Division Court, gives the right of appeal to the High Court. It can hardly be doubted that the two clauses thus related to each other and both expressly referring to section 13 of the Statute refer to the same jurisdiction of the High Court and that, if the provision for a difference of opinion made in clause 36 refers only to matters arising under the original or appellate jurisdiction of the Court, the provision in clause 15 refers to no other matters. The language of clause 36 is clear. It refers to the functions hereby directed to be performed in the exercise of the original or appellate jurisdiction of the Court, and the language indicates that the appellate jurisdiction does not include revisional jurisdiction, for the mention of functions hereby directed to be performed in the exercise of original or appellate jurisdiction cannot include the function of

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superintendence because that is not a function directed by the Letters Patent to be performed. The power of superintendence conferred by section 15 of the Statute is not controlled by anything in the Letters Patent.

Further, it does not seem possible to identify the appellate jurisdiction with the power of superintendence given under section 622 of the Code. So far from it being correct to say that the two powers are identical, it would be more correct to say that the one is exclusive of the other. The power of revision or superintendence is invoked when there is no right of appeal and its existence may be attributed to the absence of that right. There is no necessary connection between the one jurisdiction and the other. A jurisdiction similar to that which may be exercised under section 15 of the Statute or under section 622 of the Code was exercised by the Court of Queen's Bench over inferior Courts which were not subject to its appellate jurisdiction. The writ of *certiorari* serves the purpose for which the power of transferring suits or appeals is given by section 15 of the Statute, and there is the writ of *mandamus* the object of which is to compel the inferior Courts to exercise their jurisdiction and there is the writ of prohibition devised to restrain the inferior Courts from acting beyond the bounds of their jurisdiction. In view of the same objects, namely, that of compelling Courts to exercise their jurisdiction and that of keeping them within their jurisdiction, a power of superintendence was given to the High Court by section 15 of the Statute, and section 622 of the Code of Civil Procedure refers solely to questions of jurisdiction. An appeal involves a re-hearing of the case—an entire re-hearing or a re-hearing limited to questions of law. It involves a possibility of a new decree or a judgment substituted in the place of that passed by the Lower Court. The power of superintendence involves neither a re-hearing nor a fresh decree. It extends only to ordering a thing to be done, or not to be done, or to be undone and done over again. It is in the interests of the public as much as in those of the individual that this power of control is given, and the Court may therefore act of its own motion under section 622 which it cannot do in appellate matters. Again, the connection in which the power of superintendence is given under section 15 of the Statute shows that it is something distinct from appellate jurisdiction. It appears as one of a group of powers conferred on the High Court. In the same sentence the section

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says the High Court shall have superintendence over all Courts which may be subject to its appellate jurisdiction and shall have power to call for returns and to direct the transfer of any suit or appeal and shall have power to make rules of practice and to prescribe forms. If the term "appellate jurisdiction" be taken to denote the first-mentioned power, it would be difficult to say why it should not equally denote all the other powers mentioned in the section. Yet it could hardly be argued that the power of making rules is one of the functions for which provision is made in clause 36 of the Letters Patent. It seems to me therefore that it would involve a strain on the plain language of the Statute and of the Letters Patent to hold that an order passed in revision is a judgment passed in the exercise of the appellate jurisdiction of the Court. Such are my reasons for holding that when a single Judge of this Court has passed an order admitting or rejecting an application for revision made under section 622 of the Code, which he may lawfully do under our rules, no appeal lies against that order.

BENSON, J.—The question referred for our decision involves two other questions, viz.:—

(1) whether the jurisdiction exercised by the High Court under section 622, Civil Procedure Code, is included in the expression "appellate jurisdiction" as used in section 13 of the High Court Act (24 and 25 Vict., Cap. 104) and in section 36 of the Letters Patent of 1866? and

(2) whether the right of appeal given by section 15 of the Letters Patent against an order passed by a single Judge of the High Court is controlled and limited by sections 588 and 591, Civil Procedure Code?

I am of opinion that both of these questions must be answered in the affirmative, the first for the reasons stated by my learned colleague Mr. Justice Subramania Ayyar in the judgment which he has just delivered, and the second for the reasons stated at length in the judgment which I recently delivered in the case of *Vasudeva Upadyaya* v. *Visvaraja Thirthasami*(1).

As to the first question, I think that, in considering what was the intention of the Legislature, we may well look to the consequences that would follow from our adoption of any interpretation

(1) I.L.R., 20 Mad., 407.

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that is urged upon us for acceptance. Now if we accept the view that the term "appellate jurisdiction" refers only to appeals properly so called, but does not include the powers which the High Court possesses as a Court of reference and revision under chapter XLVI of the Civil Procedure Code (which are essentially similar to the powers in regard to reference and revision possessed by the High Court under Act XXIII of 1861 before the High Court Act was passed); if we accept this view, it follows that every reference to, and every act of revision by, the High Court must be dealt with by the whole Court consisting of the Chief Justice and five Judges. More than this, even the transfer of a suit or appeal under section 15 of the High Court Act will require to be made by the whole Court. Again section 25 of the Provincial Small Cause Courts Act empowers the High Court to call for the records in order to satisfy itself that any decree or order of a Small Cause Court is according to law, and pass such order thereon as it thinks fit. Is it possible to suppose that the Legislature required that such comparatively small matters should be dealt with by the whole Court, while it allowed the largest interests, civil and criminal, original and appellate, including even life and death to be dealt with by one or two Judges of the High Court under rules made by the High Court in that behalf? The jurisdiction of the High Court on a reference made under chapter XLVI is essentially appellate in its character. The reference may be originated by either party moving through the Lower Court, and the High Court is obliged to hear the parties in person or by pleader. Is it not a greater strain on language to hold that this function of the High Court is included in the general power of "superintendence" under section 15 rather than in the term "appellate jurisdiction" in section 13 of the High Court Act, and can it be supposed that the Legislature intended the whole Court to sit and hear parties or their pleaders in each of these references? In applications for revision under section 622 and under the Small Cause Courts Act and for transfer of suits it is also the practice, founded on obvious convenience, to hear the parties by their pleaders. The procedure is of an essentially appellate character as invoking the interference of a superior Court, and I am of opinion that all these acts were intended to be included in the term "appellate," as opposed to "original," jurisdiction in section 13 of the High Court Act and in section 36 of the Letters Patent founded thereon.

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As to the second question, every argument urged before us in the present case has been fully dealt with in my judgment already referred to. The reasons I have there set forth would, I think, be regarded as absolutely conclusive, but for an observation of their Lordships of the Privy Council in *Hurrish Chunder Chowdry* v. *Kali Sunduri Debia*(1), I have, however, given reasons for thinking that that observation was not intended to lay down a general interpretation of the law applicable to all cases in which an appeal is sought to be made to the Full Court under section 15 of the Letters Patent against an order of a single Judge, but was made with reference to the particular case then before their Lordships. If I am right in this view it is open to us, notwithstanding that observation, to consider what the general law is. Reading sections 632 and 638 of the Civil Procedure Code with sections 588 and 591 it seems to me impossible not to hold that the Legislature intended thereby to restrict, and did, in fact, restrict in certain particulars the general right of appeal against the orders of a single Judge given by section 15 of the Letters Patent.

I would, therefore, give an answer in the negative to the reference made to us.

BODDAM, J.—The question to be decided on this reference is—"Does an appeal lie from an order passed by a single Judge "of the High Court under section 622, Code of Civil Procedure?"

Section 622 of the Civil Procedure Code is as follows:—

"The High Court may call for the record of any case in which "no appeal lies to the High Court, if the Court by which the case "was decided appears to have exercised a jurisdiction not vested "in it by law, or to have failed to exercise a jurisdiction so vested, or "to have acted in the exercise of its jurisdiction illegally or with "material irregularity; and may pass such order in the case as the "High Court thinks fit."

The practice under this section has for many years been for one or other of the parties to the proceeding in the Court below who thinks that that Court has acted so as to come within this section to file a Civil Revision Petition before the High Court and this comes on before a single Judge who either acts or declines to act in the matter for the High Court and passes his order accordingly.

(1) L.R., 10 I.A., 4; s.c., I.L.R., 9 Calc., 482.

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It is argued that under section 15 of the amended Letters Patent whatever order the single Judge makes—whether he dismisses the petition or remits the case with an intimation that the Court below has acted wrongly—there is an appeal from that order to a Bench of the High Court and thence possibly to the Privy Council.

If this is so, it appears obvious that there is no case in which there is not an appeal (limited it may be in its extent but still an appeal) and that to the High Court, thence to a Bench of the High Court and thence possibly to the Privy Council. I feel satisfied that this is not the intention.

Here there is no question referred as to whether the particular order amounts to a judgment or not because the reference is as to an "order" alone, nor do I imagine that it was the intention of the Court referring the question that the answer to the reference should amount to nothing more than that it depends upon what the order is (*e.g.*, whether it amounts to a judgment or not and is final or otherwise): for in that case the particular order should have been set out in the reference.

It must, therefore, in the first place be assumed that the question is confined to an order in its limited sense. The argument was that as the Civil Procedure Code did not in so many words repeal any part of clause 15 of the Letters Patent, in every case where a single Judge sat, his decision was appealable to a Bench of two Judges under that clause even when it resulted only in an order and no more as distinct from a judgment. This argument has been carefully and exhaustively refuted by Mr. Justice Benson in his judgment in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami*(1). He says, *inter alia*, and I adopt his words, "section 44 of the Letters Patent expressly contemplates "the Governor-General in Council passing laws which shall have "the effect of amending or altering the provisions of the Letters "Patent, and declares that all the provisions of the Letters Patent "are subject to such laws and may be in all respects amended "and altered thereby. When the Governor-General in Council "enacted the Code of Civil Procedure he deliberately restricted "the right of appeal in regard to certain specified orders, and

(1) I.L.R., 20 Mad., 407.

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"distinctly declared that those restrictions applied to the High "Court, &c."

Chapter XLIII of the Civil Procedure Code (sections 588 to 591 inclusive) deals with appeals from orders. Section 588 sets out the orders that are appealable. It says "an appeal shall lie from "the following orders under this Code and from no other *such* "orders." In the list of orders following, orders under section 622 are not included and section 591 says except as provided in this chapter no appeal shall lie from any order passed by any Court in the exercise of its original or appellate jurisdiction.

Assuming that when an order is passed under section 622 it is passed by a Court in the exercise of its appellate jurisdiction, as was held to be the case in *Queen* v. *Nyn Singh*(1) by two of the Judges, no appeal lies from an order under section 622 unless the order is *ejusdem generis* with the orders specified in section 588.

The words of section 588 are "from no other *such* order" and I have no doubt that it is in reference to these words that their Lordships of the Privy Council in their judgment in *Hurrish Chunder Chowdry* v. *Kali Sundari Debia*(2), say:—"It only remains "to observe that their Lordships do not think that section 588 of "Act X of 1877, which has the effect of restricting certain appeals, "applies to such a case as this, where the appeal is from one of the "Judges of the High Court to the full Court." On this reference I conceive that it is no part of our duty to consider the particular order out of which the reference to the Full Bench is made and without doing so it is in my opinion impossible to say whether the order in question is appealable or not.

The result of this judgment (so far as it applies to the question before us) appears to me to come to this, that if the order made by a single Judge only amounts to an order such as is intended by chapter XLIII of the Code, it is not appealable unless it is within section 588, but if it amounts to more and is a judgment then it is appealable; in other words, that the right given by section 15 of the Letters Patent to appeal from the order of a single Judge is only limited by the Code to such orders as do not amount to a judgment whereby the rights of the parties are concluded, but, where this is the case, the order amounts to a judgment within the meaning

(1) 2 N.W.P.H.C.R., 117.

(2) L.R., 10 I.A., 4; s.c., I.L.R., 9 Calc., 483.

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of section 15 of the Letters Patent (*Desouza* v. *Coles*(1)) and an appeal lies.

If the question before us were whether the particular order passed out of which this reference arose is appealable under section 15 of the Letters Patent (and I was responsible for the order), I should have no hesitation in holding that the answer should be in the affirmative as it amounts to a judgment; but as I have said before that is not the question referred and indeed the vakil supporting the affirmative proposition distinctly stated in answer to a question put to him from the Bench when the question was first argued that he contended that all orders made under section 622 were appealable, so that if the High Court calls for the records of a case or declines to do so in either case, according to this contention, the order is appealable. If this is the question we are required to answer in this reference I should have no hesitation in answering the reference in the negative, for that would be to include as appealable orders within chapter XLIII other than those mentioned in section 588.

Another question has been raised, viz.:—"Whether an order passed under section 622 is an order passed in the exercise of the appellate jurisdiction of the Court or merely under its power of superintendence as distinct from its appellate jurisdiction?" Assuming, however, that orders under section 622 were intended to be passed by the Court under its power of superintendence as distinct from its appellate jurisdiction, it is perfectly clear to my mind that in that case no order could be passed legally by a single Judge, for there is no power to delegate to a single Judge the right to pass orders for the Court under its power of superintendence as distinct from its appellate jurisdiction. Inasmuch, therefore, as this order was made by a single Judge and the reference refers only to orders so passed, it seems to me that such orders in all cases must be illegal and should be set aside even if there is no appeal under section 15 of the Letters Patent. The fact that these applications are placed before a single Judge shows that whether rightly or wrongly it has hitherto been assumed that they come within the appellate jurisdiction of the Court and have been so treated for some time. I do not think, therefore, that we should be serving any useful purpose in determining that which would stultify

(1) 3 M.H.C.R., 384.

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all previous orders so passed and I have therefore refrained from giving any opinion upon the question.

On the whole I am of opinion that it is not possible to answer this reference either in the affirmative or in the negative. I can only say that in some cases there may in my opinion be an appeal and in others there is no appeal. It depends upon the order in question.

MOORE, J.—At the hearing of an appeal preferred from an order of a single Judge of this Court under section 622, Civil Procedure Code, it was urged that under the provisions of section 591, Civil Procedure Code, there was no appeal and the following question has accordingly been referred to the decision of a Full Bench :—"Does "an appeal lie from an order passed by a single Judge of the High "Court under section 622, Civil Procedure Code?"

It is admitted that if an order passed under section 622, Civil Procedure Code, is not a judgment within the meaning of section 15 of the Letters Patent, there can be no appeal from it under the provisions of the Letters. As to what is a judgment under this section, reference may be made to the decision of Mr. Justice Bittleston in *Desouza* v. *Coles*(1) where he observed :—"The word "judgment there (*i.e.*, section 15 of the Letters Patent) used "cannot be limited to a final judgment in a suit, nor indeed to a "judgment in a suit at all, but must be held to have the more "general meaning of any decision or determination affecting the "rights or the interest of any suitor or applicant." (Reference may also be made to the decision of Markby, J., on the point in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company*(2), followed in *In the matter of the Petition of Kally Soondery Dabia* (3)). The question, therefore, to be considered is, whether an order amounting to a judgment having been passed under section 622, an appeal from it lies, no express appeal being provided for from such an order in the Civil Procedure Code in view of the provisions of section 591, Civil Procedure Code, which lays down that no appeal is to lie from any order passed by any Court in the exercise of its original or appellate jurisdiction except as provided for in chapter XLIII of the Civil Procedure Code.

It must be admitted that this Court has not adopted a uniform course in dealing with the question as to whether appeals of the class now under consideration lie or not.

(1) 3 M.H.C.R., 384. (2) 3 B.L.R., 433. (3) I.L.R., 6 Calc., 594 at p. 601.

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In certain reported decisions referred to by my learned colleague and myself in our order of reference to the Full Bench the question as to how far sections 588 and 629 of the Civil Procedure Code control the provisions of section 15 of the Letters Patent has been considered, the view taken being that where those sections expressly direct that orders passed under them are final there can be no appeal under the Letters Patent. In *Vanangamudi* v. *Ramasami*(1) where an appeal under the Letters Patent from an order passed under section 622 of the Civil Procedure Code was considered, the only question adjudicated on in considering as to whether an appeal lay or not was as to whether the order was a judgment. The point now at issue was not raised. In a number of decisions (*Appandai* v. *Srihari Joishi*(2), *Kammathi* v. *Mangappa*(3), *Subbarayadu* v. *Pedda Subbarazu*(4), *Sriramulu* v. *Sobhanadri Appa Rau* (5), *Srinivasa Ayyangar* v. *Seetharamayyar*(6), and *Kaliyanaramayyar* v. *Mustak Shah Saheb*(7)), appeals preferred under section 15 of the Letters Patent Act from orders under section 622 of the Civil Procedure Code were heard and disposed of but in all these cases as far as can be seen from the reports the question as to whether such appeals lay was not discussed. In *Venkata Reddi* v. *Taylor*(8), the question as to whether, when a single Judge of this Court acting under section 25 of the Provincial Small Cause Courts Act (IX of 1887), revises a decree of a Small Cause Court, his order could be appealed against under section 15 of the Letters Patent was considered and it was decided that notwithstanding section 27 of that Act such an appeal lay. It appears to me that it would be difficult to differentiate this case from the one now under consideration. If, in spite of section 27 of the Small Cause Courts Act, an appeal can be preferred from an order passed under section 25 of that Act, it seems to me to follow logically that, notwithstanding section 591 of the Civil Procedure Code, an appeal lies from an order passed by a single Judge under section 622, Civil Procedure Code. I cannot find any definite rulings on this question in the reported decisions of the Calcutta and Bombay High Courts. The very important decision of their Lordships of the Privy Council referred to in the order of reference (*Hurrish Chunder Chowdry* v.

(1) I.L.R., 14 Mad., 406.
(2) I.L.R., 16 Mad., 451.
(3) I.L.R., 16 Mad., 454.
(4) I.L.R., 16 Mad., 476.
(5) I.L.R., 19 Mad., 21.
(6) I.L.R., 19 Mad., 72.
(7) I.L.R., 19 Mad., 395.
(8) I.L.R., 17 Mad., 100.

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Kali Sundari Debia(1)) remains for consideration. The ruling of their Lordships to be found there as to the effect of section 588, Civil Procedure Code, is as follows:—"It only remains to observe that "their Lordships do not think that section 588, Act X of 1877, "which has the effect of restricting certain appeals, applies to "such a case as this where the appeal is from one of the Judges of "the High Court to the Full Bench." This ruling has been recently considered at length by Subramania Ayyar and Benson, JJ., in *Vasudeva Upadyaya* v. *Visvaraja Thirthasami*(2). It has there been held by Mr. Justice Benson (pp. 411 and 412) that the words used by their Lordships as quoted in the present order of reference do not lay down as a general rule that section 588 of the Civil Procedure Code does not apply to any case in which an appeal is sought to be made under section 15 of the Letters Patent from the order of a single Judge. It is pointed out that in the case there under consideration a Judge of the High Court of Calcutta had by an order passed under section 610, Civil Procedure Code, refused to transmit to the Court of First Instance for execution a decree of the Privy Council and Mr. Justice Benson was of opinion (following no doubt the view expressed by Edge, C. J., in *Banno Bibi* v. *Mehdi Husain*(3) and *Muhammad Naim-ul-lah Khan* v. *Ihsan-ul-lah Khan* (4) that although the order made by the Judge was under section 610 of the Civil Procedure Code, yet it was none the less an order determining a question arising between the parties to the suit in which the decree was passed and relating to the execution thereof (section 244, Civil Procedure Code). "It was therefore," Mr. Justice Benson goes on to observe, "an order of the kind expressly "declared by section 2 of the Code to fall within the definition of "'a decree' and, as such it was obviously an order against which "an appeal would lie as against a decree." According to Mr. Justice Benson the language used by their Lordships amounted to nothing more than this. "Section 588, no doubt, has the effect of "restricting appeals in the case of orders which are not decrees, but "it does not apply to such a case as this before us which is an order "in execution and therefore a decree. When therefore such an "order has been made by a single Judge an appeal lies to the Full "Court." With all due deference to my learned colleague I cannot

(1) L.R., 10 I.A., 4; s.c., I.L.R., 9 Calc., 482.
(2) I.L.R., 20 Mad., 407.
(3) I.L.R., 11 All., 375.
(4) I.L.R., 14 All., 226.

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accept the interpretation here put on the clear and unambiguous language of their Lordships. There is nothing to show that they looked upon the order of Mr. Justice Pontifex then under consideration (vide *In the matter of the Petition of Kally Soondery Dabia*(1)) as a decree under section 244, Civil Procedure Code, or that the provisions of that section were in their minds when they made the observation under consideration. If the report is referred to, it will be found at pages 486 and 487 that Counsel for the respondent strongly urged on the consideration of their Lordships that whatever might have been the case before the enactment of section 588 of Act X of 1877 the provisions of that section rendered it clear that there was no appeal. Their Lordships, it is shown, duly considered this argument and overruled it in the observation now under consideration: and this being the view that they have taken of section 588 of the Civil Procedure Code, it can scarcely, I think, be doubted that they would take a similar view of the argument that section 591 takes away an appeal given by section 15 of the Letters Patent if the question came before them for decision. It appears to me to be very difficult to understand why if the Legislature intended by sections 588, 591 and 629 to take away the right of appeal from decisions of single Judges of the High Court granted by section 15 of the Letters Patent this very important change in the law was not made by clear and distinct enactment. It must, I think, in considering this question be borne in mind that no attempt is made in Act XIV of 1882 to provide a complete Code of Procedure for the High Courts in all branches of their civil judicial work. Nothing is said for example, as to whether appeals are to be heard by one Judge or by a Bench of two or more Judges. The power given to the Chief Justice to make rules as to such matters under sections 13 and 14 of 24 and 25 Vict., Cap. 104, is not interfered with. If it was intended that the right of appeal given by section 15 of the Letters Patent from all judgments of a single Judge should be taken away, it is only reasonable to presume that the Code would have gone further and provided as to what judicial acts may be done by a single Judge and what matters should go before a Bench of at least two Judges.

It is further urged that sections 632 and 638, Civil Procedure Code, show that sections 588 and 591 apply to the High Court, and

(1) I.L.R., 6 Calc., 594.

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that if it was intended that the right of appeal given by section 15 of the Letters Patent should not be affected by the provisions of sections 588 and 591, it may be presumed that these two sections would have been included in those mentioned in section 638 as sections which do not apply to the High Court. It is clear, however, that this could not have been done, for the provisions of sections 588 and 591 do, in certain cases, most certainly apply to the High Court. For example, section 588, clause 1, provides that if a District Munsif passes an order under section 20 of the Code, an appeal lies to the District Judge, but that there is no second appeal to the High Court, while if a District Judge passes such an order an appeal can be preferred to the High Court. Whatever view be taken of section 15 of the Letters Patent it would have been impossible to include section 588 among those sections that do not apply to the High Court.

It has further been urged that when a Judge of the High Court acting under section 622 of the Code of Civil Procedure passes a judgment in revision, he has not done so in the exercise of either the original or appellate jurisdiction vested in the High Court (24 and 25 Vict., Cap. 104, section 13) and that there is consequently no appeal from his judgment under section 15 of the Letters Patent. It does not appear to me that this is a valid contention. Under section 8 of 24 and 25 Vict., Cap. 104, it was directed that the Supreme Court and the Court of Sadr Adalat and Fouzdary Adalat in Madras should be abolished and that (section 9) a High Court should be established which should have and exercise all jurisdiction and every power and authority whatsoever vested in any of the Courts thus abolished at the time of their abolition. The extensive powers of revision now exercised under section 622 of the Civil Procedure Code were first given to the Sadr Court in a very restricted form by section 35, Act XXIII of 1861, which received the assent of the Governor-General on the 28th August 1861. The Sadr Court was not abolished and the High Court, which was to take its place, established till the first Letters Patent were issued in 1862. When, therefore, the High Court was established, among the powers vested in it were those of revision given to the Sadr Court under section 35 of the Act of 1861 which is the basis of section 622 of the present Code. The question therefore that arises for consideration is as to whether these powers of revision are included in the matters dealt with in section 13 of 24 and 25 Vict.,

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Cap. 104, or with those treated of in section 15. Such powers are, I am of opinion, certainly not dealt with in section 15 which treats of acts of superintendence over Subordinate Courts, such as, calling for returns, transfer of appeals and suits from one Court to another and the power to issue rules regulating practice and procedure and to prescribe forms, and clearly gives no power such as that exercised under section 622 of setting aside a judgment of a Subordinate Court and passing a revised judgment in lieu thereof. Reference may be made to *Tej Ram* v. *Harsukh*(1) where it is held that section 15 of the Charter Act confers on a High Court administrative authority and not judicial powers and where it is pointed out in a foot-note that this is the view that has been followed by the Calcutta High Court in a long series of cases. The powers of revision now under consideration must, therefore, come under section 13 and as such powers are certainly not exercised by the High Court in its original jurisdiction, it follows, in my opinion, that they come under the appellate jurisdiction of that Court. If this view be correct a judgment under section 622, Civil Procedure Code, is passed pursuant to section 13 of 24 and 25 Vict., Cap. 104, and an appeal accordingly lies from it under section 15 of the Letters Patent.

For the foregoing reasons I am of opinion that it was not the intention of the Legislature that the provisions of section 15 of the Letters Patent should be affected by section 591 of the Civil Procedure Code, that consequently an appeal lies from any order amounting to a judgment passed by a single Judge under section 622 of the Civil Procedure Code, notwithstanding the provisions of section 591 and I would accordingly answer the question referred as follows:—An appeal lies from all orders amounting to judgments passed by a single Judge of the High Court under section 622 of the Civil Procedure Code.

[This appeal next coming on for final disposal before SUBRAMANIA AYYAR and MOORE, JJ., after the expression of the above opinions of the Full Bench, the Court delivered the following judgment:—

JUDGMENT.—The sale with reference to which this dispute has arisen took place in 1875, when the Civil Procedure Code of 1859 was in force. The sale was never set aside on the ground that the judgment-debtor possessed no saleable interest. Consequently the

(1) I.L.R., 1 All., 101.

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respondent was not entitled to claim a refund of the purchase money either by application or by suit before the Code of 1877 came into force. Section 305 of the present Code on which the respondent relies could not be construed retrospectively so as to give the respondent a title to claim a refund under its provisions on the simple ground that the judgment-debtor has been since found to have had no saleable interest. For this reason, without going into the other questions, we set aside the order of the learned Judge and restore that of the District Munsif with costs throughout.]

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Moore.

1898. September 23, 26, 29.

MUTHAYYA CHETTI (PLAINTIFF), APPELLANT,

v.

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

Land Revenue, Madras Town—Act XII of 1851, *ss.* 1, 17—*Act VI of* 1867, *ss.* 4, 31—*Penal assessment—Jurisdiction of Civil Court—Limitation.*

The plaintiff was in occupation of certain land in Madras, and in May 1895 he received a notice from the Collector, stating that the land belonged to the Government and that a penal assessment of Rs. 100 a month was imposed upon him for the current month, and calling upon him to pay that sum within three days, failing which his property would be distrained, and stating that if he did not vacate the land at once a further penal assessment would be imposed and levied every month. In June 1896 a like notice was served upon the plaintiff calling upon him to pay Rs. 1,300, the amount chargeable up to date. The plaintiff having appealed to the Board of Revenue without success, paid under protest the penal assessment in various sums amounting together to Rs. 3,004-1-0. He now sued to recover that amount and prayed for a declaration of his title:

Held by BODDAM, J., that the High Court had jurisdiction to entertain the suit in respect of the claim for money, but that the suit was barred as to so much of it as had been paid more than six months before the institution of the suit:

Held by SHEPHARD, *Offg.* C.J., and MOORE, J. (affirming the judgment of BODDAM, J.) that the land belonged to Government and the plaintiff was in occupation without title; and that it was accordingly competent to Government to impose the assessment.

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* Original Side Appeal No. 23 of 1898.

In order to enable one having paid money under p[illegible] so paid, it is necessary for him to show that the payme[illegible] illegal coercion.

MUTHAYYA CHETTI v. SECRETARY OF STATE FOR INDIA.

APPEAL against the decree of Mr. Justice Boddam in Civil Suit No. 303 of 1897.

The plaintiff was and asserted that he and his predecessors had long been in possession and claimed to be the owner of certain land under a title which was set out in paragraphs Nos. 1 to 9 of the plaint. The plaint proceeded as follows :—

"10. That, on or about the 24th day of May 1895, the plaintiff received a notice from the Deputy Collector of Madras informing him that the land measuring 3 cawnies 10 grounds and 2,230 square feet comprised in Survey Nos. 54 and 56 of Tondiarpett being Government land, a penal assessment of Rs. 100 is imposed upon him by the Collector of Madras for the current month and calling upon the plaintiff to pay the said sum of Rs. 100 within three days from the date of service of the said notice upon him, failing which a warrant would be issued for the realization of the said sum by the distraint and sale of the plaintiff's moveable property and also intimating to the plaintiff that, if he did not vacate the said land at once, a further penal assessment would be imposed and collected from him every month.

"11. That, on or about the 1st day of June 1896, the plaintiff received a notice purporting to be issued by the Collector of Madras under section 4 of Act VI of 1867 calling upon him forthwith to pay the sum of Rs. 1,300 being the amount charged as a penal assessment from May 1895 till the end of May 1896 upon the said land and intimating to the plaintiff that, in default of payment of the said sum of Rs. 1,300, plaintiff's moveable property would be distrained and sold, and that the penal assessment would be recovered every month till the said land is vacated.

"12. That, on or about the 4th day of September 1896, the plaintiff appealed to the Honourable Members of the Board of Revenue at Madras against the illegal imposition of the penal assessment made by the Collector of Madras as aforesaid; but, on or about the 25th day of November 1896, the plaintiff was informed that his said appeal was rejected.

"13. That, in consequence of the said notice of the 1st day of June 1896, the plaintiff paid under protest the said penal assessment of Rs. 100 a month and has paid in all a sum of Rs. 3,004-1-0 up to the filing of this suit.

"16. The plaintiff further charges that the action of the Collector of Madras in imposing a penal assessment of Rs. 100 a month on the said land and in recovering the same from the plaintiff is illegal, and the defendant is liable to repay the said sum of Rs. 3,004-1-0 paid by the plaintiff as aforesaid with interest thereon at the rate of 6 per cent. per annum.

"The plaintiff therefore prays judgment :—

"1. That the land mentioned in the schedule to the plaint mentioned be declared to be the property of the plaintiff.

"2. That the said imposition of penal assessment may be declared to be illegal, and the defendant may be decreed to pay to the plaintiff the said sum of Rs. 3,004-1-0 with interest thereon at the rate of 6 per cent. per annum together with further interest thereon at the rate of 6 per cent. per annum from date of decree to the date of realization."

In the written statement it was alleged that the land in question was the property of Government and the statements in paragraphs Nos. 10, 11, 12 and 13 of the plaint were admitted. The written statement proceeded as follows :—

"6. The defendant states that the Collector of Madras was legally entitled to fix and impose a rent or assessment of Rs. 100 per month on the plaint land, and that the decision in respect of such rent or assessment of the Board of Revenue in appeal referred to in paragraph 12 of the plaint is under law final, and that the Collector of Madras was legally entitled to recover the same from the plaintiff, and that he is not liable to repay the whole or any portion of the sum of Rs. 3,004-1-0 recovered from the plaintiff, and interest thereon at the rate of 6 per cent. per annum as claimed in paragraph 16 of the said plaint.

"7. The defendant states that this Honourable Court has no jurisdiction in respect of the said assessment or rent or concerning any act or acts done in the collection thereof, and that the claim for the recovery of the said sum of Rs. 3,004-1-0 is barred by limitation under section 17 of Act XII of 1851 and section 31 of Madras Act VI of 1867."

The chief issues were the following :—

"*First.*—Is the plaintiff the legal owner of the plaint land as "alleged therein or is the land the property of the Government "as alleged in the written statement ?

"*Second.*—Was the order of the Collector of Madras assessing "the plaint land at Rs. 100 per month illegal ?

"*Fourth.*—Is the plaintiff's claim to recover the Rs. 3,004 "barred as alleged in paragraph 7 of the written statement or at all ?

"*Fifth.*—Has this Court jurisdiction by reason of the facts "stated in paragraphs 6 and 7 of the written statement ?"

BODDAM, J., after consideration of the evidence, held on the first issue that Government and not the plaintiff was the owner of the land in question. The judgment then proceeded as follows :—

"But Mr. Daly raised a contention that even assuming that the land is the land of the Government, nevertheless the plaintiff is entitled to claim and have a decree for the return of the money paid by him under protest as he says. . . . He contended that Act XII of 1851 applied only to land which was private land, and he read the first section which runs as follows :—'All assessable 'lands not the property of the East India Company, within the 'limits of the town of Madras, as defined in section 12, Regulation 'II of 1802 of the Madras Code, of which the rate of assessment 'is not known, or which have not heretofore been assessed, shall 'be assessed at the rates customarily charged upon lands of a 'similar description in the neighbourhood, according as they may 'be situated respectively within or without the walls of Black 'Town.' Mr. Daly says that this section applies to land which is not the property of the East India Company and that when it is the property of a private individual Government can assess only at the rates customarily charged upon land of a similar description in the neighbourhood, and that any excess charged is illegal. He omitted to read further on. Section 7 runs thus :—'If any owner of assessed land or any person holding land subject 'to a rent payable to the East India Company, shall, upon the 'written demand of the Collector, refuse or neglect to pay any 'sum at which the land is assessed, or with which it is charged as 'rent, the Collector may levy the same by distress and sale of the 'goods and chattels, wherever found, of such owner or lessee ; or, 'after written demand upon the tenant or occupier, and on his 'refusal or neglect to pay the sum lawfully demanded, by distress

'and sale of any goods and chattels found upon the land, in the 'manner appointed for regulating distresses for small rents in 'Calcutta by Act VII of 1847, extended to Madras by section 89, 'Act IX of 1850.' Then he refers to the amending Act which is Madras Act VI of 1867 and reads section 4 which he says does not add at all to the power of the Collector to levy, but simply points out the manner in which the levy is to be made. That is true enough. Then he goes on to say that, except section 1 of the first Act and this Act, no other Act enables the Collector to levy the assessment, and therefore the imposition of the assessment is illegal and the plaintiff is entitled to recover his money back. I pause there and assume for the moment that this is the law on the subject. Nevertheless the plaintiff is not entitled to get his money back. The only action he can have will be an action for illegal distress. He has no right to recover back the money paid by him, unless it was paid and received without prejudice. Any payment under protest is a payment nevertheless. This was not a payment under duress nor was this a payment owing to any mistake of fact. It was a payment to enable the plaintiff to remain in possession of the land, and the plaintiff by paying under protest does not alter his position. If the assessment was illegal and the distress was illegal, the plaintiff's proper course was to bring a suit for damages. He cannot sue for the money to be repaid. Therefore for this reason alone his action must fail, the action being that the money paid by him ought to be repaid to him. But that is not the law. The law is that 'any person holding land subject to 'a rent shall, upon the written demand of the Collector, refuse or 'neglect to pay any sum at which the land is assessed (leaving it 'absolutely in the hands of the Collector to assess it at any sum), 'the Collector may levy by distress and sale of the goods and 'chattels of such owner or lessee.' It is not suggested that there was any irregularity in the distress or in the notice. The only objection taken is that the Collector has no power to impose any assessment so great and therefore his act in imposing assessment in this case is illegal. So far with regard to that I find on the law that the Collector has power to levy this assessment, call it penal or by whatever name you like, and that the order of the Collector assessing the plaintiff's land at Rs. 100 a month is not illegal. I find the second issue against the plaintiff.

"The fourth issue is 'is the plaintiff's claim to recover the 'Rs. 3,004 barred as alleged in paragraph 7 of the written state-'ment or at all?' In order to decide this I must again refer to the Act. So far as the bar is concerned that depends entirely upon section 17 of Act XII of 1851 and section 31 of Act VI of 1867. Section 17 is:—'All actions concerning any tres-'pass or injury committed by any Revenue officer, acting 'under colour of this Act, or concerning any claim in respect of 'any goods taken by, or any moneys paid to, any Revenue 'officer under this Act, or concerning any claim of rent or revenue 'on the part of the East India Company under this Act, shall 'be tried and determined in the Civil Courts established by the 'East India Company in the Zillah of Chingleput, notwithstand-'ing the cause of action in respect of which such action is 'brought, arose, or the defendant therein resido, within the limits 'of the town of Madras, and every such action shall be brought 'within six months after the cause of action arose, and not after-'wards.' In the present case the plaintiff brought this suit on the 13th December 1897. So that six months after the cause of action arose would relate back to the 13th May 1897. Since that date only Rs. 1,000 of this sum has been paid. So that with regard to the rest of the claim it would be barred. As regards the Rs. 1,000, the claim would not be barred.

"The next issue is 'has this Court jurisdiction by reason of 'the facts stated in paragraphs 6 and 7 of the written statement?' I am of opinion that the High Court has jurisdiction.

—"The result is that the suit must be dismissed with costs."

The plaintiff preferred this appeal.

Mr. *J. G. Smith* for appellant.

The Advocate-General (Hon. *C. A. White*) and the Government Pleader (Mr. *E. B. Powell*) for respondent.

Mr. *J. G. Smith*.—The plaintiff was not a trespasser; his title is established by the evidence. Moreover, he has shown long possession in himself and his predecessors who had a heritable interest even if it was not shown that they had title when they entered. See *Sundar* v. *Parbati*(1), *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani*(2), *Secretary of State for India* v. *Bavotti Haji*(3), *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti*(4),

(1) I.L.R., 12 All., 51 at p. 54.
(2) I.L.R., 14 Calc., 740 at p. 748.
(3) I.L.R., 16 Mad., 315.
(4) I.L.R., 8 Bom., 215.

and *Asher* v. *Whitlock*(1). Apart from these cases it was not necessary for the plaintiff to prove sixty years' adverse possession with reference to Limitation Act, article 149. See *Secretary of State for India* v. *Barotti Haji*(2) and *The Secretary of State for India* v. *Kota Bapanamma Garu*(3) as Government was defendant in the suit, and the evidence shows at least twelve years' adverse possession. Even if the learned Judge was right in holding that the plaintiff was a trespasser, the decree cannot stand as the Acts in question do not provide for the levy of penal assessment on trespassers. The land was not land paying rent, nor does Government say it was private land. So Act XII of 1851, section 4, does not apply, nor does section 7 apply on the view that the plaintiff was a trespasser, and section 12 is silent as to trespassers. Moreover, Act VI of 1867, section 4, gives to the Government no power to enforce a penal assessment. The money paid under the colorable legal process is consequently recoverable. See *Cadaval* v. *Collins*(4) and *Pitt* v. *Coomes*(5). It is submitted that the observations of the learned Judge as to the effect of payment under protest are not supported by authority. The right to dispute the claim is preserved by such payment. See *Scott* v. *Uxbridge and Rickmansworth Railway Co.*(6), *Green* v. *Duckett*(7), and *Greenwood* v. *Sutcliffe*(8). And the plaintiff's right to recover money so paid is recognized in Limitation Act, schedule II, article 16, and see *Kebul Ram* v. *Government*(9). As to the special rule of limitation held to bar part of the claim, it is inapplicable if the proceedings of Government were, as the plaintiff contends, totally null and void. See *Baijnath Sahu* v. *Lala Sital Prasad*(10), *Venkata* v. *Chengadu* (11), and *Lala Mobaruk Lal* v. *The Secretary of State for India in Council*(12).

The Government Pleader (Mr. *E. B. Powell*) supported the judgment appealed against on the grounds stated therein.

SHEPHARD, OFFG. C.J.—I see no reason whatever to think that Mr. Justice Boddam has come to a wrong conclusion on the facts of the case. The appellant's Counsel has failed to convince me that the learned Judge misappreciated the evidence of title adduced

(1) L.R., 1 Q.B., 1.
(2) I.L.R., 15 Mad., 315.
(3) I.L.R., 19 Mad., 168.
(4) 4 A. & E., 858.
(5) 2 A. & E., 459.
(6) L.R., 1 C.P., 596.
(7) L.R., 11 Q.B.D., 275.
(8) [1892] 1 Ch., 1 at p. 10.
(9) 5 W.R., (C.R.), 47.
(10) 2 B.L.R., (F.B.), 1 at pp. 14, 18, 20.
(11) I.L.R., 13 Mad., 168, 175.
(12) I.L.R., 11 Calc., 200.

on the appellant's behalf or indeed that any fact has been established in his favour except the fact of recent possession. It was argued on behalf of the appellant that, notwithstanding want of proof of title in himself, he is entitled to a declaration, unless it is proved that the land is the property of Government and *Asher* v. *Whitlock*(1) was cited. It was further contended that in any event the appellant was entitled to recover the sums exacted from him by the Revenue authorities under the name of penal assessment.

In order to deal with these arguments, I must first determine whether the Government has made out its title to the land. The learned Judge answered this question in the affirmative, and after a perusal of the evidence I have come to the conclusion that he was justified in that finding. It was admitted by the plaintiff's Counsel at the trial before Mr. Justice Boddam that a search had been made by the Revenue officials for the documents of title relating to this and the neighbouring lands, and that those documents could not be found. This being so, secondary evidence pointing to purchases made by Government was admitted, and this evidence shows that the land in question was bought by Government about 60 years ago. Until quite recently it should be stated, the land was left waste and unenclosed. There is, however, evidence that it was occupied for some time by sepoy lines and more recently as a famine camp. Later again, in 1882, it was included in lands let by Government to the witness Linga Chetti. During his tenancy it appears that the plaintiff, though he had not then acquired the title now set forward, laid claim to the land. No overt act was done by him as far as we can see till he planted a hedge. That must have been between 1888 and 1891: the fact was reported by the karnam to the Tahsildar. It was in 1891 that the protracted inquiry before the Deputy Collector was opened. The ultimate result of this inquiry was that in May 1895 the notice was issued to the appellant charging him with the payment of Rs. 100 a month for the land as long as he remained in occupation. When this period during which the plaintiff's title was *sub judice* is deducted, there remains a very short space of time during which he can claim to have been in possession of the land. No doubt it is incumbent on the respondent even against an occupant who has held for a few years without any title to prove a title to the land.

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

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The Government cannot be placed in a better position because treating the appellant as a trespasser they have exacted from him the payment of impositions which, if they had not considered him a trespasser, they would not have demanded. I think, however, that the Government has made out a *primâ facie* case, and there is certainly no evidence on the other side to rebut it. It follows that the appellant must fail so far as the declaration is concerned.

The question then is whether the monies paid by the appellant in obedience to the notice dated 24th May 1895 and the subsequent notices can be recovered. The appellant charges that the action of the Collector in this matter was illegal and alleges that the monies were paid under protest. He does not allege in the plaint that the payments were made under coercion and with regard to most of the payments there is no evidence that they were made in consequence of the distraint of the appellant's goods or any other form of coercion. In the absence of such evidence and there being no evidence of mistake on the appellant's part, I am unable to understand on what principle he can be entitled to recover the monies though he may have made payments under protest. That circumstance can, in my opinion, make no difference, but it is said that with regard to one or two of the payments it is shown that it was in order to prevent distraint of his goods that the appellant paid the money. And though I doubt whether he is entitled to have the case treated on that footing I will assume that there is such evidence. It is incumbent on the appellant to prove not only that there was coercion, but that the coercion exercised was illegal. It is argued that if the land belongs to Government no revenue could be charged against the occupant and that, therefore, the imposition which is called penal assessment must be illegal. If the Act of 1851 stood by itself and if land revenue only was dealt with in that enactment, there would be some force in the argument, for section 1 deals only with lands which are not the property of the Company and section 3 declares in what manner the rate of assessment is determined. It would be difficult to justify the charge of Rs. 100 a month for the two cawnies or so of land, if land revenue only in the proper sense had to be taken into account. There is in the two Acts relating to the Town of Madras no section corresponding to section 58 of Act II of 1864 precluding the Civil Courts from taking into consideration or deciding as to the rate of revenue. But in the Act of 1851 and more clearly in

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the supplementary Act of 1867 provision is made for the collection of other charges besides land revenue. In this latter Act it is declared to mean "assessment, quit-rent, ground-rent or other "charge upon the land payable to Government." While in the former Act it is assessed or assessable land and land charged with or subject to a rent payable to the Company that is dealt with, in the latter the comprehensive phrase used is "land subject to the "payment of revenue." Since in the present case the Government was the owner of the land and the appellant was an occupant holding without title, it was competent to the Government as to any private landholder to charge rent and to exact payment of it in the manner ordained by law. I do not think it makes any difference that the Revenue officials called the charge by another name. Apart from the special provision made in favour of Government as a revenue collecting authority I think there is a complete answer to the appellant's claim. He has no claim to recover rents voluntarily paid—moneys which he need not have paid had he not chosen to remain in occupation—or to recover moneys paid under pressure of lawful process. As to the greater part of the claim moreover the suit is barred by the six months' rule contained in section 31 of the Act of 1867.

I would dismiss the appeal with costs.

MOORE, J.—I concur.

Grant & Greatorex—attorneys for appellant.

The Government Solicitor for respondent.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

1898. October 28.

SRIRAMULU (PETITIONER), APPELLANT,

v.

RAMASAM AND OTHERS (COUNTER-PETITIONERS), RESPONDENTS.*

Letters Patent, s. 15—Civil Procedure Code—Act XIV of 1882, s. 622—Rejection of petition by a single Judge—Appeal.

No appeal lies under Letters Patent, section 15, against an order made by a single Judge dismissing an application under section 622.

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* Letters Patent Appeal No. 60 of 1898.

SRIRAMULU v. RAMASAM.

APPEAL under Letters Patent, section 15, against the order of Mr. Justice Shephard (Officiating Chief Justice), by which he rejected Civil Revision Petition No. 276 of 1898, which was preferred under Civil Procedure Code, section 622, and prayed the High Court to revise the order of the District Judge of Vizagapatam made on Miscellaneous Petition No. 478 of 1897.

This appeal was preferred by the petitioner as above under Letters Patent, section 15.

Venkatarama Sarma for appellant.

Respondents were not represented.

JUDGMENT.—The order was one declining to exercise the power of revision conferred on this Court by section 622 of the Code of Civil Procedure, which order a single Judge of this Court is authorized to pass under the Rules of this Court (see Rule I, clause 4, of the Rules of the 6th November 1879 *). In our opinion, no appeal lies against such order under the Letters Patent.

We therefore dismiss this petition.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

1898. July 18.

ABDUL AZIZ KHAN SAHIB AND OTHERS (PLAINTIFFS AND LEGAL REPRESENTATIVES OF PLAINTIFF No. 4), APPELLANTS,

v.

APPAYASAMI NAICKAR AND OTHERS (DEFENDANTS), RESPONDENTS.†

Execution sale—Sale of right, title and interest of zamindar—Impartible primogenitary zamindari—Interest taken by purchaser.

In 1873 and 1876, portions of an impartible primogenitary zamindari, which were in the possession of a lessee from the zamindar, were attached and brought to sale in execution of decrees against the zamindar. The purchase money was very inadequate as the price of the full ownership of the property (subject to the lease), but what was sold according to the sale certificate was the right, title and interest of the judgment-debtor without any restriction. The judgment-debtor died in 1881, and the lease having run out, the purchaser now sued in 1893 for possession:

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* See *ante* p. 70.

† Appeal No. 66 of 1895.

Held, that the plaintiff must be taken to have purchased an interest for the life only of the judgment-debtor.

ABDUL AZIZ KHAN SAHIB v. APPAYASAMI NAICKAR.

APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Madura (West), in Original Suit No. 26 of 1893.

The plaintiff sued for possession of certain villages being part of the zamindari of Kannivadi, which was an impartible estate governed by the law of primogeniture. The late zamindar was the brother and predecessor in title of defendant No. 1 and died without issue in February 1881. On the 20th July 1861 the late zamindar had leased the villages now in question for a period of thirty years to one Audimulam Pillai. Subsequently in 1873 and 1876 the remaining interest of the zamindar was attached in execution of certain decrees and brought to sale and purchased by plaintiff No. 1. The order for sale and the sale proclamation and the sale certificates were all in the terms of Act VIII of 1859, section 249. The villages had been attached as the property of the late zamindar and according to the sale certificates what had been sold was his right, title and interest therein. The value of the property was stated in the plaint to be six lacs of rupees, but the aggregate purchase money paid by the plaintiff was Rs. 6,000 only, and it appeared that the plaintiff had not asserted his present claim for long after the death of the late zamindar. The plaintiffs Nos. 2 to 4 were joined as being interested in the property jointly with plaintiff No. 1 under an agreement dated 1892. Defendants Nos. 2 and 3 were the sons of defendant No. 1 and defendant No. 4 was a bank claiming the rights of a mortgagee over the estate. The defendants pleaded, *inter alia*, that the plaintiff under his purchase acquired an interest in the property for the life of the late zamindar only. As to this plea the Subordinate Judge framed the second and sixth issues as follows:—

"2. Whether the sales relied on by the plaintiffs are true, valid "in law and binding as against the first defendant?

"6. Whether what was attached, bargained for, sold and pur- "chased by the first plaintiff is only the life interest of the deceased "Bangaru Appaya Naik?"

His finding on the sixth issue was in the affirmative and consequently he dismissed the suit. In his judgment he referred to the conduct of the plaintiff, and to the current understanding of the law relating to impartible property previous to the decision of

Sartaj Kuari v. *Deoraj Kuari*(1), and he cited, *inter alia*, *Manson* v. *Thacker*(2), *Besley* v. *Besley*(3), *Okill* v. *Whittaker*(4), *Simbhunath Panday* v. *Golab Singh*(5), *Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai*(6), *Pettachi Chettiar* v. *Sangili Veera Pandia Chinnathambiar*(7), Sugden's Vendors and Purchasers, 14th edition, page 743.

The plaintiffs preferred this appeal.

Ramasubba Ayyar, *Pattabhirama Ayyar* and *Ayya Ayyar* for appellants.

Hon. *Bhashyam Ayyangar*, *Bhashyachariar*, *Ranga Ramanujachariar*, *Tiruvenkatachariar* and *Seshachariar* for respondents.

JUDGMENT.—The main question in the appeal is what did the plaintiffs buy when they bought in the years 1873 and 1876, the "right, title and interest" of the late zamindar of Kannivadi in some of the zamindari villages. The appellant's vakil contends that the words are clear and that it is simply a question of law as to what the zamindar's interest was, and that that interest according to the ruling in *Sartaj Kuari* v. *Deoraj Kuari*(1) was an absolute interest. But we are unable to accept this contention, it having been clearly laid down by the Privy Council in more than one recent case that what the courts have to do in such cases as this is to determine "the question of fact whether the thing meant to be "sold and bought was the entirety of the estate or only a share in "it" (*Rai Babu Mahabir Pershad* v. *Rai Markunda Nath Sahai*(6), *Simbhunath Panday* v. *Golab Singh*(5) and *Pettachi Chettiar* v. *Sangili Veera Pandia Chinnathambiar*(7). That being so we have no hesitation in concurring in the conclusion at which the Subordinate Judge has arrived, namely, that the estate sold and bought by the appellants was only the life estate of the late zamindar and determined with his death. The law as then understood gave the zamindar no more than a life estate, and the ridiculously low price given for the property purchased indicates that it was only a limited estate that was sold. The first plaintiff would not venture into the witness-box to swear to the truth of his case, that he understood that he was buying the villages out and out. The plaintiffs' appeal like their suit must therefore fail and it is dismissed with costs. The decree of the Lower Court will however

(1) I.L.R., 10 All., 272. (2) L.R., 7 Ch. D., 620. (3) L.R., 9 Ch. D., 103.
(4) 2 Ph., 338. (5) L.R., 14 I.A., 77.
(6) L.R., 17 I.A., 11 at p. 14. (7) L.R., 14 I.A., 84.

be modified by disallowing the sum of Rs. 1,000 granted as vakil's fee to the fourth defendant in addition to a similar sum granted to the other defendants. The fourth defendant was not entitled to separate costs, as he came in of his own motion, and simply supported the other defendants.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

RAMASAMI AYYAR (PLAINTIFF), APPELLANT,

v.

VENGIDUSAMI AYYAR AND OTHERS (DEFENDANTS NOS. 1, 4, 5, 20, 22 TO 27, 29 TO 38, 40 AND 41), RESPONDENTS.*

1898. July 11, 12, 20.

Hindu Law—Woman's estate—Power of alienation—Gift of land on daughter's marriage.

A Hindu, in whom the whole of the family property had vested, died without issue and his mother took the estate. She subsequently gave a portion of the property to her son-in-law on the occasion of his marriage with her daughter. The gift was not found to be otherwise than reasonable in extent:

Held, that the gift was binding on the reversioner.

SECOND APPEAL against the decree of C. Venkoba Chariar, Subordinate Judge of Tanjore, in Appeal Suit No. 369 of 1895, affirming the decree of the District Munsif of Tiruvalur in Original Suit No. 120 of 1893.

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

The plaintiff preferred this second appeal.

Pattabhirama Ayyar and *Tiagaraja Ayyar* for appellant.

Hon. *Bhashyam Ayyangar* and *Tiruvenkatachariar* for respondents.

SUBRAMANIA AYYAR, J.—One Seshappayyar died in 1859, leaving him surviving a widow, the late Thaiyyu Ammal, a son and a daughter. The son, as the sole surviving male member of the family to which Seshappayyar belonged, took the whole of the joint estate. On his death, a few years afterwards, while remaining unmarried, his mother Thaiyyu Ammal inherited the estate.

* Second Appeal No. 324 of 1897.

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Subsequently, she gave her daughter in marriage, and, at the time of the marriage, made a gift of a portion of the lands inherited by her to her son-in-law. The District Munsif and the Subordinate Judge held that the gift was binding upon the appellant, who, as the heir of the last full owner, has, since the demise of Thaiyyu Ammal, become entitled to succeed to the property. On behalf of the appellant, it was urged that a Hindu qualified owner in the position of Thaiyyu Ammal had no authority to make such a gift, and, even should it be held that she had, the gift in question in the present instance ought, having regard to all the circumstances of the case, to be declared unjustifiable. As to the latter part of this contention, it may at once be observed that I see no grounds for differing from the Lower Courts in their conclusion that the gift cannot, with reference to the extent of the whole estate and the other circumstances bearing on the matter, be taken to be otherwise than fair and reasonable. The question therefore is, had Thaiyyu Ammal authority to make a gift of landed property inherited by her to her son-in-law at the time of her daughter's marriage? No direct ruling on the point was cited before us. Reference was, however, made to certain passages in the Mitakshara(1) and the Smriti Chandrika(2), wherein the texts of Manu, Yajnavalkya and other smriti writers, dealing with the question of allotment to be made by brothers to their maiden sisters at the time of partition, are commented upon. With reference to the true meaning of these texts, commentators are divided. Some of them hold that all that the texts mean is that funds required for the marriage of sisters should be provided out of their father's estate. Other commentators—Vijnaneswara among them—lay down that, inclusive of their marriage expenses, sisters are entitled to a provision not exceeding a fourth of what they would have got had they been males. For the purposes of this case it is not necessary to discuss which of the two views is to be taken as law. Assuming that, as argued for the appellant, the view advocated by Vijnaneswara and his followers is not law, the fact that so high an authority as the author of the Mitakshara propounds a rule thus favourable to maiden daughters, ought to make one hesitate to accept as sound the exceedingly limited construction, which was insisted on on behalf of the appellant and which can scarcely be

(1) Ch. I, Sect. VII, § 6—14. (2) Ch. IV, §§ 20 *et seq.*

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said to be in itself very reasonable; viz., that the texts justify a disbursement out of the estate of only the price of things required in connection with the celebration of the marriage. In my opinion, the better and sounder view is, as contended for the respondents, that the authorities should be understood to empower a qualified owner like Thaiyyu Ammal to do all acts proper and incidental to the marriage of a female according to the general practice of the community to which she belongs. Now, it is well known that at the time a girl belonging to the community with which we are concerned in this case, is handed over in marriage, certain other gifts have to be made to the bridegroom of which one is "bhudanam" or gift of land (Dubois' 'Hindu Manners, Customs and Ceremonies,' Beauchamp's edition, page 225). That, according to the notions of these people, a gift of that kind on such an occasion is indispensable is clear from what is done even in cases in which the family of the bride is not really in a position to give any land. In such cases conformity to the requirements of custom is sought to be secured by giving some little money as and for land. Nor is it difficult to understand how such a practice came to prevail from time immemorial. For apart from its being in reality a provision for the married couple the gift is believed to enhance the merit of the primary act, viz., the giving of a virgin in marriage which, from a religious point of view, is supposed to be productive of considerable benefits to the parents of the virgin. It seems, therefore, but right to conclude that a gift of land to the bridegroom on the occasion of his marriage is an act warranted by the authorities and within the power of a qualified owner like Thaiyyu Ammal, provided, of course, the gift, having regard to the then position of the family and all the other circumstances of the case, is of such a fraction of the estate as would, by reasonable persons, be considered fair and proper.

As already stated, the finding in the present instance is to that effect. I therefore concur with the Lower Courts in upholding the gift and I would dismiss the second appeal with costs.

MOORE, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Moore.

1898. July 29.

BLAKE (PLAINTIFF), APPELLANT,

v.

SAVUNDARATHAMMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Kasavargam tenancy—Right to buildings—Compensation on eviction.

A kasavargam tenant has a proprietary right to his house on the land, and when evicted, he is entitled to compensation for his buildings.

SECOND APPEAL against the decree of F. H. Hamnett, Acting District Judge of Tanjore, in Appeal Suit No. 521 of 1895, affirming the decree of S. Dorasami Ayyar, District Munsif of Tanjore, in Original Suit No. 230 of 1894.

Suit for possession of certain land which had been granted by the late Rajah of Tanjore to the Society for the Propagation of the Gospel, which was represented by the plaintiff. The first defendant's ancestors were kasavargam tenants of the mission and had erected certain buildings on the land. The District Munsif found that the tenancy had been determined in 1895 and he passed a decree for the plaintiff, but decreed that, if the defendants did not elect to remove the buildings on the land, the plaintiff should pay to them the sum of Rs. 1,000 as compensation therefor. The District Judge affirmed this decree.

The plaintiff preferred this second appeal. The second, third and sixth of the grounds stated in the appeal memorandum were as follows:—

"2. The first defendant as a kasavargam tenant is not entitled "to insist on being paid compensation; but is bound to remove "the building when the landlord desires that he should do so.

"3. Even if a kasavargam tenant is entitled to compensation, "the defendant in this case is not entitled to it, because he is "trespasser and denied the plaintiff's title to the property.

"6. Even if defendants are entitled to compensation, they are "not entitled to more than the amount they themselves paid for "the building."

Sundara Ayyar for appellant.

Respondents were not represented.

* Second Appeal No. 834 of 1897.

JUDGMENT.—A kasavargam tenant has according to Wilson (see Glossary) a proprietary right to his house, and the Sadr Court ruled in *Appa Pillai* v. *Gopalaswami Reddi*(1) that, when ejected, the kasavargam tenant was entitled to compensation for his buildings. The Munsif found this was a recognized principle and there was no denial that it was an incident of kasavargam tenancy. The Judge agreed with the Munsif, and, as the decision is supported by express authority of old date, we have no doubt that it is correct in law. The amount granted as compensation is not a question of law. The second appeal therefore fails and is dismissed.

BLAKE *v.* SAVUNDARATHAMMAL.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Davies.

SRINIVASA SWAMI (DEFENDANT), APPELLANT,

1898. August 2.

v.

RAMANUJA CHARIAR AND ANOTHER (PLAINTIFFS NOS. 3 AND 4), RESPONDENTS.*

Religious institution—Suit for ejectment of a jeer as being illegally appointed—Prayer for appointment of a new jeer—Elective office.

The jeer of a mutt died in 1888 and the defendant assumed office as his successor. The plaintiffs, who were disciples of the mutt, asserting in the plaint that the office of the jeer was elective, but without having held an election, brought a suit to eject the defendant and to have a new jeer elected or appointed by the Court and placed in possession of the properties of the institution It was alleged both that the defendant had not been duly appointed to be jeer and also that he was disqualified for that office by immorality and otherwise:

Held, that the suit was not maintainable.

APPEAL against the decree of S. Russell, District Judge of Chingleput, in Original Suit No. 11 of 1891.

The plaintiff sued with the sanction of the Advocate-General under Civil Procedure Code, section 539, on behalf of all the disciples of the Ahobalam mutt for a declaration that the defendant who claimed to be the jeer of the mutt was not the duly appointed successor of the last head of the institution who died in 1888:

(1) Sadr Decisions of 1860, p. 41.

* Appeal No. 62 of 1897.

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and the plaint further prayed that the Court should appoint or cause to be elected a duly qualified disciple to be the jeer, and that the mutt and the property attached to it should be delivered to his possession. Paragraphs 2 and 5 of the plaint were as follows:—

"(2) The usage is for each head of the mutt to appoint as "successor shortly before his death a duly qualified person from "among the disciples of the mutt in consultation with and with "the concurrence of the disciples. And if the head of the mutt "dies without appointing a successor as above stated, the disciples "interested in the mutt meet together and select and appoint a "proper successor.

"(5) The defendant has not legally been appointed the suc- "cessor of the deceased head of the mutt, and he is unfit to "be appointed the head of the mutt by reason of his immoral "character and unworthy conduct and by reason of his not pos- "sessing the requisite qualifications to be a sanyasi and the head of "the mutt. Even after the defendant assumed the position of the "head of the mutt, his conduct had been such as to incapacitate "him from continuing to be the head of the mutt."

The defendant pleaded, *inter alia*, that the suit framed was not sustainable.

The District Judge passed a decree as prayed, directing that a new jeer should be elected by the disciples.

The defendant preferred this appeal.

Mr. *E. Norton*, *Ramachandra Rau Saheb*, *V. Krishnasami Ayyar* and *Seshagiri Ayyar* for appellant.

Pattabhirama Ayyar, *Ramakrishna Ayyar* and *Raghava Ayyangar* for respondent No. 2.

JUDGMENT.—In our opinion the plaintiffs have entirely misconceived their rights. Their case is that no successor has been appointed in place of the deceased jeer. They ask for a declaration that the defendant is not the duly appointed successor; they pray that the Court may be pleased to appoint a successor or cause one to be elected according to usage; and they ask that the property be delivered up to the person so appointed.

In the plaint, it is alleged, that the disciples should, when no successor has been appointed by the jeer before death, meet and select a proper successor, and the defendant agrees that this is the custom.

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No reason is suggested why the disciples, whom the plaintiffs represent, should not have met and made their selection. There was thus no necessity for them to come to the Court to assist them in making the appointment. They might have made an appointment and allowed the appointee to bring a suit for ejectment, if necessary. It is quite clear that the plaintiffs are not entitled to a mere declaration (*Strinivasa Ayyangar* v. *Strinivasa Swami*(1)) and they cannot be the more entitled, because an unnecessary prayer for an appointment by the Court is added.

In the cases cited, we must assume that there were circumstances which made it impracticable for the persons having the right to appoint to exercise that right, and thus entitled them to come to the Court. In those, moreover, the decree was drawn up in such a way as to preclude the possibility of another suit.

In the present case, as the decree stands, it will apparently remain open to the defendant to take objection to the appointment which is made under the decree and thus another suit may be required, whereas, if the suit were brought by a person appointed by the disciples, the whole dispute might be decided in one suit. Nothing has been done on the decree, though it is now nearly two years old, and it is ten years since the vacancy occurred. The reason probably is that the respondents know they cannot obtain a majority.

We reverse the decree and dismiss the suit with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

GROVES AND OTHERS (COUNTER-PETITIONERS NOS. 1 TO 3), APPELLANTS,

v.

ADMINISTRATOR-GENERAL OF MADRAS (PETITIONER), RESPONDENT.*

1898. October 5, 19.

Civil Procedure Code—Act XIV of 1882, *ss.* 234, 298—*Execution—Petition to set aside sale—Death of judgment-debtor after proclamation and before sale—Non-joinder of executors.*

An order for the sale of a debt of Rs. 70,000 (previously attached) owing by H and W to the judgment-debtor was made in execution in two decrees, and

(1) I.L.R., 16 Mad., 31. * Appeal against Order No. 70 of 1898.

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on 4th May 1895 a sale proclamation for 20th idem was issued. On 11th May the judgment-debtor died leaving a will, of which W was one of the executors. W brought these circumstances to the notice of the Court stating that the executors would proceed to apply for probate and asking for an adjournment of the sale. The adjournment was refused and the sale proceeded and the decree-holders, who had previously agreed with H and W to sell the debt to them for the amount of the purchase money, purchased the debt for Rs. 30,000, the estate of the judgment-debtor being unrepresented. The Administrator-General, to whom the administration of the estate of the judgment-debtor was afterwards transferred, applied to be brought onto the record and to have the sale set aside:

Held, that the sale was vitiated by the omission to bring the legal representative of the judgment-debtor onto the record and should be set aside on the application of the Administrator-General, no separate suit being necessary for that purpose.

APPEAL against the order of J. A. DeRozario, Acting Subordinate Judge of Ootacamund, on Miscellaneous Petition No. 78 of 1896, in the matter of Original Suit No. 74 of 1894.

The facts of the case appear sufficiently for the purposes of this report from the judgment of Mr. Justice Boddam.

Mr. *W. Barton* for appellant.—The debt sold being movable property, section 298 of the Civil Procedure Code applies. The irregularity in conducting the sale could have been rectified only by a suit and not on a petition. The Subordinate Judge erred in finding that R. Woolley died prior to the order for sale. The order was made in February 1895 but was stayed, and was then ordered to be proceeded with on 3rd May 1895, whereas Woolley died on 11th May 1895. There is no provision in the Civil Procedure Code requiring notice to be given to the legal representative of a deceased judgment-debtor of the sale of property which had been attached in his life-time; see *Sheo Prasad* v. *Hira Lal*(1) which was followed in *Abdur Rahman* v. *Shankar Dat Dube*(2). The principle laid down in these cases is that where property has been attached during the life-time of a judgment-debtor, it must be considered as in the custody of the law, and for the purpose of selling that property, it is not necessary to implead any one as a legal representative. The case of *Krishnayya* v. *Unnissa Begam*(3) is against me, but the Full Bench decision of the Allahabad High Court does not appear to have been brought to the notice of the Judges. Moreover this decision has been considered and dissented

(1) I.L.R., 12 All., 440. (2) I.L.R., 17 All., 162.
(3) I.L.R., 15 Mad., 399.

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from by the Calcutta High Court in *Net Lall Sahoo* v. *Sheikh Kareem Bux*(1). The Court had jurisdiction to order a sale of the debt in execution of the decree; the purchasers were not bound to inquire into the correctness of such order any more than into the correctness of the judgment upon which execution issued, *Rewa Mahton* v. *Ram Kishen Singh*(2). See also *Narayana Kothan* v. *Kalianasundaram Pillai*(3). Further it has been found that the purchasers acted *bonâ fide*, and that no injury has been occasioned by not bringing the legal representatives on the record, the sale should therefore have been upheld. See *Aba* v. *Dhondu Bai*(4) and *Narayana Kothan* v. *Kalianasundaram Pillai*(3).

Mr. *K. Brown*, for respondents, argued that the sale was void for want of representation of the judgment-debtor, submitting that the question was concluded by the authority of the Madras cases cited, the reasoning of which was unaffected by the authorities cited on the other side: he also contended that the admitted facts disclosed fraud on the part of the purchasers. The cases relied on were those referrred in the judgment.

BODDAM, J.—This is an appeal from an order of the Acting Subordinate Judge of Nilgiris on a petition presented on the 6th July 1896 by the Acting Administrator-General of Madras under section 244, Civil Procedure Code, to set aside a sale in execution which took place on the 8th July 1895.

The facts are as follows:—One Harvey owed Rs. 70,000 to Richard Woolley, and in March 1893 he executed a power of attorney to Richard Woolley authorising him to dispose of his coffee estates and pay himself. In April 1893, however, Harvey took P. W. Woolley, a son of Richard Woolley, into partnership with him. In October 1894 Richard Woolley agreed with Harvey and P. W. Woolley not to exercise his rights under the power of attorney until 1st June 1896, but in the meanwhile they were to pay him 10 per cent. interest instead of 8 per cent. per annum. In November 1894 one Groves, who had commenced an action for a debt of Rs. 17,342 against Richard Woolley (Civil Suit No. 74 of 1894), applied for and obtained an attachment order (exhibit B) before judgment of Harvey's debt, prohibitory orders (exhibits A and H) being issued to Harvey and Richard Woolley on the

(1) I.L.R., 23 Calc., 686. (2) I.L.R., 14 Calc., 18.
(3) I.L.R., 19 Mad., 219. (4) I.L.R., 19 Bom., 276.

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27th November 1894. On the 22nd January 1895 Groves got judgment and on the 26th February 1895 applied for execution of his decree by sale of the debt, and the sale was ordered for the 18th March 1895. In the meanwhile R. G. Carbry and W. Johnson had obtained a decree against R. Woolley in Original Suit No. 13 of 1894 in the District Court of Coimbatore for Rs. 8,059. Their decree was transferred for execution to the Subordinate Judge's Court of Ootacamund and the same debt was attached. The sale ordered for the 18th March was stayed pending the hearing of a petition by R. Woolley to the High Court, but this having been dismissed it was, on the 3rd May 1895, ordered to proceed, and on the 4th May 1895 sale proclamation was issued for the 20th May 1895.

On the 11th May 1895 Richard Woolley, the defendant, died in England, leaving a will and codicil whereby he appointed three executors, one of whom was P. W. Woolley, his son.

On the 20th May 1895 P. W. Woolley presented a petition under section 234 of the Civil Procedure Code, stating that his father was dead, that the executors would soon apply for probate, and asking that the sale should be postponed in order that the executors may be joined. His petition was dismissed. On the same day Messrs. Carbry and Johnson applied for execution of their decree by sale of the same debt. Whether or not any order was made on this petition is by no means clear; nor is it in any way material, for the sale had already been ordered in Original Suit No. 74 of 1894 to take place on this 20th May. The sale commenced and was conducted from the 20th to the 23rd, but no bidders came forward and it was consequently adjourned. On the 7th June 1895 a fresh proclamation was issued fixing the sale for the 8th July 1895, the property to be sold being described as "a debt "of Rs. 70,000 due by H. F. Harvey to the judgment-debtor "and secured by an irrevocable power of attorney and mortgage "of certain estates in Wynaad." In the meanwhile P. W. Woolley and his sister applied for probate of their father's will, and an arrangement was made to transfer the administration to the Administrator-General of Madras after grant of probate. Prior to the sale taking place, the decree-holders in the two suits entered into an agreement with Harvey and P. W. Woolley to bid at the sale and after purchase to assign the same to Harvey and P. W. Woolley for the same amount for which they might purchase

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it. At the sale the decree-holders were the only bidders and purchased the debt for Rs. 30,682-8-0, and this amount was credited to the two decrees and they assigned their interest (in accordance with their previous agreement) to Harvey and P. W. Woolley after having got the Court to issue notices under section 301 of the Civil Procedure Code to Harvey and the Administrator-General to whom the administration of the estate of Richard Woolley had been transferred on the 9th September 1895.

Now it is apparent on this state of facts that the debt of Rs. 70,000 due from Harvey to the estate of Richard Woolley has been sold to Harvey and his partner, P. W. Woolley, for Rs. 30,682, and that the estate of Richard Woolley has lost the balance amounting to nearly Rs. 40,000, the purchasers (the persons benefited) being the debtor and P. W. Woolley, his partner, to whom probate was originally granted.

It is also apparent that the Subordinate Judge has made a mistake in the facts upon which his judgment is based. He states that R. Woolley died prior to the order for sale. This is not so. The order for sale, as is apparent from exhibit L, was made on the 26th February 1895, and though the sale was stayed by the High Court it was on the 3rd May 1895 ordered to proceed and the sale proclamation was issued on the 4th May 1895 for the sale on the 20th May, whereas Richard Woolley did not die till the 11th May 1895, and though the sale on the 20th May 1895 proved abortive and was adjourned till July 1895 no fresh order for sale was made after the 3rd May which was prior to his death.

It was argued before us that the sale was void inasmuch as at the time of the sale the person to whom the debt was due, the judgment-creditor, was dead and there can be no sale of a dead man's rights, that at the time of the sale the property that was of the dead man was vested in his executors, and as they were not brought on the record or made parties no interest which was vested in them at the time of the sale was sold. On the other hand, it was argued that the effect of selling the debt without the executors being joined was merely an irregularity in publishing or conducting the sale and the only remedy was under section 298, Civil Procedure Code, by action.

If the argument of the petitioner is well founded, it is clear that this is not a mere irregularity in publishing or conducting the sale and section 298 does not apply.

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The difficulty in deciding the question lies in adverse decisions which have been come to upon the question. There are cases decided in each of the other High Courts which practically decide the question adversely to the petitioner's contention (though all the cases do not turn upon section 298), whereas the Madras High Court has practically decided the question the other way.

The Subordinate Judge in his judgment says:—"In regard to "the property sold it is not disputed that it was a simple debt due "to the deceased judgment-debtor and secured by an irrevocable "power of attorney and that it was sold as a mere debt." If that is so the only thing that was sold was the right of a dead man to be paid a debt. In *Ramasami* v. *Bagirathi*(1) it was held that where a judgment-debtor died after his land had been attached and the judgment-creditor brought the land to sale without making the representatives of the deceased parties to the proceedings, the sale was illegal and ought to be set aside. Again in *Krishnayya* v. *Unnissa Begam*(2) where a decree-holder attached land of the judgment-debtor in execution of his decree and a sale proclamation was made and the sale proceeded, though the execution-debtor died before the sale his representatives not having been brought on to the record, it was held that the sale was void and must be set aside. This case is absolutely on all fours with the present case and would decide the question; but the Full Bench case of *Sheo Prasad* v. *Hira Lal*(3) was not cited or referred to, and as that case decides exactly the contrary though it does not bind us, we have to determine which is right.

For myself (and I say it with all respect to the Judges who constituted the Court), I think the reasons given for the decision of the Allahabad High Court are wrong. The fact that property attached is in the custody of the law does not vest the property in the Court. The attachment does not effect the legal devolution of the property; it only gives at the best the custody of the property, without affecting the right to the property, to the Court. Where the property is a mere chattel which passes by delivery, possession of the property may be sufficient to pass the property, but where the possession of the property may be rightfully in one person though the title to the property is in another, this does not apply.

(1) I.L.R., 6 Mad., 180. (2) I.L.R., 15 Mad., 399. (3) I.L.R., 12 All., 440.

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In the present case the only thing sold was the right of a dead man which passes no property, as the dead man had no right at the time of the sale, the rights of the dead man being at the time of the sale in his legal representatives and their rights were not sold or in any way affected because they were not on the record.

Section 234 of the Civil Procedure Code says if a judgment-debtor dies before a decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representatives. The Allahabad High Court hold that this does not apply to cases where the judgment-debtor dies after attachment but before sale. I cannot understand why. Take the present case. It cannot be said that the decree had been fully executed until the sale took place, and if the decree has not been fully executed the section applies. If an execution-creditor does not choose to avail himself of this section, he must take the consequences. In the present case if the sale had been postponed, as in fact it was (the first sale having proved abortive) until probate was taken out and the executors (P. W. Woolley and his sister) had been joined, it is more than probable that the attachments would have been satisfied and no sale would have been necessary, the result being that the executors or the Administrator-General acting for them would have had an opportunity of recovering something for the benefit of the estate of R. Woolley, deceased.

In *Narayana Kothan* v. *Kalianasundaram Pillai*(1) the judgment of SUBRAMANIA AYYAR, J., rather supports this view, though the case is under a different section and the judgment-debtor did not die but was declared insane before the sale. Now let me consider what will be the effect if the sale is declared void. The assignees of the purchasers knowing the facts before the sale agreed to buy what was sold for the price bid by the actual purchasers who were the judgment-debtors, and they have paid the judgment-debtors' debts in order to acquire whatever they bought. If they so bought they cannot recover anything from the judgment-debtors, though the actual debtor to the estate may become liable to the Administrator-General for the balance of the debt.

On the merits, therefore, as well as on the law I have come to the conclusion that the sale should be set aside.

DAVIES, J.—I entirely agree with my learned colleague that the legal representatives of the deceased should in such cases be

(1) I.L.R., 19 Mad., 219.

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placed on the record before sale, and that in this case the sale was vitiated by the omission; for if P. W. Woolley had been brought in as the executor of his father's estate, he would not have been able to enter into the arrangement that he did as P. W. Woolley, the debtor to his father's estate, by which he endeavoured to reduce his own liability to his father's estate by some Rs. 40,000.

The appeal is therefore dismissed with costs.

Barclay, Orr & David—solicitors for respondent.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Benson.

1898. October 10, 11, 19.

SUBBA REDDI (DEFENDANT No. 5), APPELLANT,

v.

CHENGALAMMA AND OTHERS (PLAINTIFFS AND DEFENDANT No. 1), RESPONDENTS.*

Hindu Law—Lessee from widow—Quarries worked for purposes of State Railway—Compensation money.

Land inherited by a widow from her husband was leased by her. The authorities of a State Railway worked quarries on part of it and Government paid Rs. 5,000 as compensation to the lessee. The reversionary heirs sued to establish their right to the money:

Held, that the money paid by Government whether regarded as the price of stone bought or compensation for wrong done should be regarded as part of the produce of the estate, and should not be treated as part of the estate itself or as proceeds of the conversion of part of it into money.

The right of a widow to work quarries on land inherited from her husband considered.

APPEAL against the decree of T. M. Saminadha Ayyar, District Judge of Nellore, in Original Suit No. 8 of 1894.

The plaintiffs sued as the reversionary heirs of one Kristappa Nayudu, deceased, who had died without issue leaving a widow. Land forming part of his estate, which was held by defendant No. 5 as lessee and mortgagee from the widow defendant No. 1, was taken up by Government for quarrying purposes at the construction of the Nellore State Railway and Government paid the

* Appeal No. 250 of 1897.

compensation money, viz., Rs. 5,940-4-4 to defendant No. 5. The plaintiffs sought a declaration of their reversionary right to this sum of money and other reliefs. SUBBA REDDI v. CHENGALAMMA.

The District Judge decreed that the amount of Rs. 5,940-4-4 paid into the hands of defendant No. 5 be declared to be available for the benefit of the reversioners (plaintiffs) on the death of defendant No. 1.

The defendant No. 5 preferred this appeal.

Pattabhirama Ayyar and *Nagabhushanam* for appellant.

Hon. *Bhashyam Ayyangar* and *Tiruvenkatachariar* for respondents.

SHEPHARD, OFFG. C.J.—The plaintiffs (respondents) or some of them are admittedly the presumptive heirs of C. Kristappa Nayudu, entitled on the death of his widow Narayanamma. The appellant is the holder under a lease for thirty years executed by the widow on the 30th August 1868 of two villages, part of the property of the late Kristappa Nayudu. It is admitted that, under this lease and a subsequent mortgage, the appellant is entitled to hold the villages during the life-time of the widow and her mother-in-law the second defendant. In the plaint it is alleged that the railway authorities opened quarries in the said two villages and took out stone for which compensation was paid to the amount of Rs. 5,940-4-4. It is charged against the appellant that he improperly represented to the Government, that he was entitled to receive this, and that notwithstanding the objection of the plaintiffs, the money was paid to the appellant. The cause of action is stated to have accrued on the date when the appellant improperly obtained the money from Government, and the plaint concludes with a prayer for a declaration that "for the sum so received with "interest henceforward, the reversionary heirs of the first defend-"ant are the heirs after her death and that the fifth defendant "(appellant) had no right to receive the amount."

This is how the plaint stands as amended. As originally framed there was a further prayer that the money should be brought into Court. The appellant in his written statement denied the plaintiffs' right to have the money brought into Court and insisted on his right as lessee of the two defendants to enjoy the produce of the two villages. He denied any injury to the permanent rights of the reversionary heirs. It may be noted that in the plaint there was no express allegation of such injury or any

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complaint of waste. Several issues were adjudged, but there is no definite finding on any of them and it is somewhat difficult to say on what data the judgment is actually based. In substance, I take it, that the Judge means to find that the removal of the stone was an act which if done by the widow could not have been justified, that the money paid in compensation must be deemed to be the price paid for the stone and that accordingly the money represents a part of the heritage to which ultimately the respondents may become entitled. The evidence adduced by the plaintiffs was directed to showing the nature of the ground before the quarrying took place, the extent and the results of the quarrying. There appears to be no doubt that the thirteen acres in question were grazing ground; there is some evidence that quarrying had been begun on part of the land or on neighbouring land before the operations of the railway officials began. As to the extent of these operations, the evidence of the witnesses is exceedingly vague. They say that the quarrying went on for three or four years; they are indefinite about the depth of the pits and do not venture to give an estimate of the amount of stone carried away. The only measure of it which we have is the sum awarded in compensation.

As to the result of the quarrying, the plaintiffs' witnesses say that most of the stone has been removed and that the land is no longer fit for grazing and is practically of no value. What it would cost to fill up the pits and level the ground they do not say. The Judge refers to the appellant's letter to the Collector, and considers that to afford proof that the land has become 'spoiled.' The letter does not say anything of the sort, and, even if it did, I do not think it would be safe to attach much weight to the terms used in such a letter of complaint. The evidence of the defendants' witnesses is of much the same character as that of the plaintiffs'. The former say the pits are much less deep than the plaintiffs' witnesses assert and that at a small cost per acre they might be filled and the land rendered fit for cultivation.

On the evidence I think it is impossible to find as a fact that the land has been ruined or rendered valueless by the operations which have been carried on, nor do I think it proved that the quarrying has been conducted in such a way or to such an extent as to exhaust the resources of the land. It was argued on behalf of the respondents that the widow and her lessee must be taken to have acquiesced in the operations conducted by the railway

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authorities on the land and to have consented to a conversion of part of the soil—that is part of the heritage—into money. The money received in exchange for the stone removed must, it is argued, form part of the heritage. This argument is based on the supposition that systematic quarrying on the part of a widow is an act in excess of her powers, and therefore one which may be designated as waste and may entitle the reversionary heirs to an injunction. That the reversionary heirs are entitled to have the widow restrained from working destruction of the property, there can be no doubt (*Hurrydoss Dutt* v. *Rungunmoney*(1), *Gobindmani Dasi* v. *Shamlal Bysak*(2)). The question in this case is whether the quarrying, if it had been conducted by the widow, would have been a lawful act on her part. Although it does not follow that the plaintiffs are entitled to a decree against the appellant if this question is answered in the negative, it seems clear that an affirmative answer must lead to the conclusion that no suit lies against the widow or against her lessee. We were referred to some English cases on the law of waste, and we were invited to treat the widow as if she were in the position of a tenant for life according to English law. That is not, however, the position assigned to the widow in the cases above cited (see too *Katama Natchiar* v. *The Rajah of Shivagunga*(3)). Nor is there any case which goes the length of deciding that a widow may not open new mines or cut down timber or that, if she does so, she must account for the proceeds. The widow is certainly not in the position of a trustee accountable for her management to the heirs of her husband. If English cases are to be cited, it appears to me that the cases most nearly in point are those in which a Court of Equity has restrained tenants not impeachable for waste from doing acts which amount to a spoliation or destruction of the estate (see White and Tudor's notes to *Garth* v. *Cotton*(4), and *Bowles'* case(5). In the present case, as it appears to me, the evidence falls far short of proving such a case as that. It may be that quarrying, except for domestic purposes, had not taken place on the estate before the railway works were opened. There was probably little or no quarrying because there was no market for

(1) 2 Sev., 657. (2) B.L.R., Sup. Vol., 48 at p. 53.
(3) 9 M.I.A., 543 at p. 604.
(4) 3 Atk., 751; s.c., I White & Tud., p. 697.
(5) Tudor's Leading Cases on Real Property, p. 115.

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the stone. The mere novelty of the operation does not show that it was an improper act on the part of the widow or that it was an act destructive of the estate. The extent of the quarrying might perhaps be material to show that spoliation and not fair use of the estate was intended. But as I have already observed it is not shown what amount of stone was taken nor what remains. All that we know is that in the course of three or four years a considerable amount of stone was taken. There is little doubt that this particular mode of enjoying the property is the most profitable, and I think the Courts ought to be slow to hold that a Hindu widow is not at liberty to use her land to her own advantage in the manner and for the purposes to which it is naturally best suited.

Holding that the plaintiffs have failed to prove a case against the widow, on the assumption that she is responsible for the acts of the railway authorities, I do not find it necessary to embark on the further question whether any case for a declaratory decree has been established against the appellant. In my opinion the money paid to the appellant, whether it is regarded as the price of stone bought or compensation for wrong done, is part of the produce of the estate and cannot be treated as part of the estate itself. Accordingly I reverse the decree of the District Judge and dismiss the suit with all costs.

BENSON, J.—We are asked to uphold the decision of the District Judge on the ground that there has been a virtual conversion of a part of the corpus of the estate—that is of the heritage—from land into money, and that the plaintiffs are therefore entitled to regard that money as part of the estate and to protect the ultimate interests of the reversioners therein by obtaining the declaration sought for in the plaint. I do not think that there is any sound basis for this contention. It is true that stone has been quarried and sold as a source of profit off part of the estate, but I think it is impossible to hold that this amounts to a destruction of the land where the quarries were worked. At most it is but the removal of a portion of the surface of the ground. There can be no doubt but that by a moderate expenditure, not, perhaps, by the expenditure of so small a sum as Rs. 5 per acre, as some of the witnesses say, but still by a moderate expenditure the ground could be made fit for cultivation or at least for grazing—the purpose to which it was formerly applied. It is also certain that the quarries are not really exhausted, but could still be worked, though at a greater depth and therefore with less profit than heretofore. In these circumstances I am of opinion that it would be pushing the rights of reversioners to an undue length to say that they are entitled to claim that the money realized by the widow or her lessees by working the quarries should be set apart as a fund for their ultimate benefit. No authority in the Hindu law or in reported cases in India has been cited in support of such a claim, and I doubt whether we could properly apply to a Hindu widow all the restrictions which the English law has imposed on a tenant for life in regard to mines, quarries and the like. I think that, in the facts of the present case, the compensation paid to the widow's lessees should be regarded as profits from the lawful use of the land rather than as the proceeds of the conversion of part of the landed heritage into money. I therefore agree with my learned colleague in holding that the appeal must be allowed and the suit dismissed with costs throughout.

SUBBA REDDI v. CHENGALAMMA.

APPELLATE CIVIL.

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

VIBHUDAPRIYA THIRTHASAMI (PETITIONER AND DEFENDANT No. 4), APPELLANT,

1898. August 23.

v.

VIDIANIDHI THIRTHASAMI (COUNTER-PETITIONER AND PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 244—Application by sanctioned defendant.

A defendant, against whom no decree has been passed, but whose rights are invaded in execution, is entitled to come in under Civil Procedure Code, section 244, and to appeal against an order made in such proceedings.

APPEAL against the order of H. G. Joseph, District Judge of South Canara, on Civil Miscellaneous Appeal No. 49 of 1897, affirming the order of J. F. D'Souza, District Munsif of Udipi, on Miscellaneous Petition No. 98 of 1897.

In Original Suit No. 277 of 1893, the plaintiff obtained a decree by consent against defendants Nos. 1 and 2 for possession of certain

* Appeal against Appellate Order Nos. 107 to 110 of 1897.

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land which he now sought to execute. Part of the land in question in that suit was in the possession of defendant No. 3, who put in the present application under Civil Procedure Code, section 244, clause (*c*), praying that possession should not be given to the plaintiff. The material averments in the petition were as follows:—

"2. The plaintiff is not entitled to recover the plaint property under section 263 of the Civil Procedure Code, on the strength of the decree by consent passed against the first and second defendants.

"3. There is no provision in the appeal decree that the plaintiff should recover possession of the suit property. The provision therein that the first and second defendants should surrender the property to the plaintiff means that they should surrender the property, if any, in their possession. It should not be caused to be surrendered according to section 263 of the Civil Procedure Code.

"4. The plaintiff's claim against the third and fourth defendants has been dismissed. Against those defendants, the plaintiff cannot get relief in this execution case, as if there is a decree against them."

The District Munsif dismissed the petition observing that the petitioner had at present no *locus standi* and the District Judge affirmed his decision.

The petitioner preferred this appeal.

Pattabhirama Ayyar for appellant.

K. Narayana Rau for respondent.

JUDGMENT.—It is contended by the respondent that no appeal lies in this case, and we are referred to *Nagamuthu* v. *Savarimuthu*(1) and *Vasudeva Upadyaya* v. *Viswaraja Thirthasami*(2). We think the present case is distinguishable from these, inasmuch as the questions for decision in those cases did not relate to the execution of a decree, and could not, under any circumstances, become the subject of investigation under section 244, Civil Procedure Code. Here, however, the question will really be one relating to the execution of the decree, inasmuch as the property, delivery of which is sought in execution, includes property in the possession of the appellant. Though no decree as against him in respect of this property was passed, yet a decree was given against other defendants for lands which included those in possession of the appellant. *Kuriyali* v. *Mayan*(3) is an authority for holding that a defendant,

(1) I.L.R., 15 Mad., 226. (2) I.L.R., 20 Mad., 407. (3) I.L.R., 7 Mad., 255.

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against whom no decree is given, will be entitled to take proceedings under section 244, Civil Procedure Code, in the event of his rights being invaded in execution professedly taken against other defendants. If such invasion had taken place in the present case, the appellant would have been entitled to come in under section 244, and would be entitled to appeal against any order passed in such proceedings; but as yet no such invasion has taken place, and we understand the lower Courts have dismissed the appellant's application on the ground that it is premature. In this view we concur and dismiss the appeal with costs.

APPELLATE CIVIL.

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

NARAYANA REDDI (COUNTER-PETITIONER), APPELLANT,

v.

PAPAYYA (PETITIONER), RESPONDENT.*

1898. August 23.

Transfer of Property Act—Act IV of 1882, *s.* 87 *— Decree for foreclosure—Mortgagor's application for extension of time.*

In a suit on a mortgage a decree for foreclosure was passed, a period of three months being fixed for the discharge of the mortgage-debt. The mortgagor having made default, the decree-holder applied for and was placed in possession of the property. The mortgagor, to whom no notice had been given of the decree-holder's application, then applied for and obtained an extension of time for payment, and he made the payment and recovered possession:

Held, (1) that the mortgagee was entitled to appeal against the order;

(2) that the order was right since no order absolute of foreclosure had been made after notice to the mortgagor.

APPEAL against the order of S. Gopala Chariar, Acting District Judge of Cuddapah, on Civil Miscellaneous Appeal No. 331 of 1895, affirming the order of the District Munsif of Proddatur, on Civil Miscellaneous Petition No. 758 of 1895.

On the 1st of February 1895 the following decree was passed in a suit brought by a mortgagee on his mortgage:—"That the "defendant do pay on or before 1st May 1895 to the plaintiff the "sum of Rs. 272-10-8 and also the sum of Rs. 33-7-7 for his taxed

* Appeal against Appellate Order No. 100 of 1897.

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"costs making together the sum of Rs. 306-2-3 with interest at "8 per cent. per annum from this date until satisfaction; that in "default of the defendant paying into Court or to plaintiff such "principal, interest and costs as aforesaid by the time aforesaid, "that this Court doth further order and decree that the plaintiff "will become entitled to recover the mortgaged property as abso-"lutely sold under the decree amount." On the 23rd of June the decree-holder applied to the District Munsif under Civil Procedure Code, section 235, for delivery of possession of the property under section 263. The District Munsif without issuing notice to the judgment-debtor granted the application and the decree-holder was placed in possession on the 27th of June. On the following day the judgment-debtor presented a petition under Civil Procedure Code, section 244, praying that the order delivering possession be cancelled, and the time for payment of money extended. This application was opposed by the decree-holder, but the District Munsif made an order on the 1st August 1895, giving two days' further time to the judgment-debtor for payment of the amount due under the decree. The judgment-debtor accordingly paid the amount and obtained an order for possession, and the property was re-delivered to him on the 21st August 1895. On the 6th January 1896, the decree-holder drew the money from Court under protest. The decree-holder preferred an appeal to the District Court which was dismissed on the ground that no appeal lay. A second appeal was then preferred to the High Court on which the following judgment was delivered:—"It is admitted that the District Judge "is wrong. The order is reversed and the District Judge directed "to hear the appeal. Costs to be provided for in the revised "order."

The Acting District Judge, before whom the case came for disposal after the remand, affirmed the order appealed against. He said.—"Section 87 of the Transfer of Property Act does not, like "section 89, use the words 'on the day fixed as aforesaid.' This "has, however, been held to be immaterial—see *Vallabha Valiya* "*Rajah* v. *Vedapuratti*(1). In this case unlike the case in *Elaya-*"*dath* v. *Krishna*(2) which arose under section 92 of the Transfer "of Property Act something of the import of the last clause of "section 86 has been used, and though the plaintiff did not make

(1) I.L.R., 10 Mad., 40. (2) I.L.R., 13 Mad., 267.

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"a formal application under the first portion of paragraph 2 of section "87, he yet asked for possession as provided in the second portion "of the said paragraph and obtained it. But before the order as "to possession was passed no notice was given to defendant. It "has been held by the Allahabad High Court—(see *Oudh Behari* "*Lal* v. *Nageshar Lal*(1)) that an application for execution is a good "application under section 89 of the Act. That decision may be "applied to this case. The defendant's only opportunity to claim "the benefit of the proviso to section 87 was not given to him. He "came in immediately afterwards and claimed it. The Court had "then, it seems to me, simply to consider whether a proper cause "for extending time was shown or not. Of course, if no good "cause were shown, defendant's prayer need not be granted—"see *Ram Lal* v. *Tulsa Kuar*(2). Here, the facts that the decree "inserted only three months' time, while section 86 required six "months' time, and that defendant came in within the six months "were good reasons for following the procedure prescribed in the "proviso to section 87; see also *Poresh Nath Mojumdar* v. *Ramjodu* "*Mojumdar*(3), which has not been dissented from by the Madras "High Court as regards section 87, if the holder of a foreclosure "decree should have started the proceedings after decree."

The mortgagee preferred this appeal.

Sundara Ayyar for appellant:—*Vallabha Valiya Rajah* v. *Vedapuratti*(4) limits the case of *Kanara Kurup* v. *Govinda Kurup*(5). [SUBRAMANIA AYYAR, J.—The question is, whether, notice not having been issued, the defendant is bound by it.] Enlargement of time can only be granted where the relation of mortgagor and mortgagee subsists; that relationship had terminated in this case. The defendant should have got the *ex parte* order set aside by review. There were no grounds for extending the time. The defendant cannot apply for extension after the order absolute has been made. The order appealed against is wrong both because the time had expired and the final order had been made before the application for the extension of the time was made.

Etiraja Mudaliar for respondent:—No application under section 87 of the Transfer of Property Act having been made my right to extension of time is not taken away. If there be an application

(1) I.L.R., 13 All., 278. (2) I.L.R., 19 All., 180. (3) I.L.R., 16 Calc., 246.
(4) I.L.R., 19 Mad., 40. (5) I.L.R., 16 Mad., 214.

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under section 87, I am clearly entitled to receive notice and to apply for extension of time. See *Tara Prosad Roy* v. *Bhobodeb Roy*(1) and *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar*(2). The decree is to be considered a decree *nisi*, and an order absolute has to be made before property can be sold. An order absolute in this case was necessary; and for such order to be binding, notice should have been issued.

JUDGMENT.—In a case like this a second order or order absolute on application by the mortgagee was imperative under the Transfer of Property Act to enable the plaintiff to obtain possession of the property. On such an application being made by the mortgagee, the mortgagor (defendant) is entitled, under the proviso to section 87 of the Act, to obtain an extension of time for payment of the money on showing good cause. We cannot agree with the appellant's contention before us that the mortgagor cannot apply for such extension after the expiry of the time fixed for payment in the first order inasmuch as the mortgagee himself could apply for an order absolute only after the expiry of such time.

It is next contended by the appellant that even if the mortgagor could ask for an extension after the expiry of the time fixed for payment in the first order he could not do so after the passing of the final order, and that such final order was in fact passed in the present case. That order was, however, passed without notice to the mortgagor (defendant) who, therefore, had no opportunity of availing himself of the provision made for his benefit in the latter part of section 87 by showing cause and obtaining an extension of time before the final order was passed, and we think that as the mortgagor, as soon as he became aware of the *ex parte* order, applied to have it set aside, and the order was thereupon set aside, it was competent to the Court to extend the time for payment.

The order of the District Judge was, therefore, right, and we dismiss this appeal with costs.

(1) I.L.R., 22 Calc., 931. (2) I.L.R., 16 Calc., 246.

APPELLATE CIVIL.

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

PERIANNAN CHETTI (PLAINTIFF) PETITIONER,

v.

SOUTH INDIAN RAILWAY COMPANY (DEFENDANT), RESPONDENT.*

1898. August 26.

Railways Act—Act IX of 1890, *ss.* 77, 140—*Notice to Railway administration—Service on traffic manager.*

In a suit against the South Indian Railway Company to recover the value of a parcel delivered to the defendant company for carriage, it appeared that the plaintiff had within two months of the delivery given notice of the suit to the traffic manager of the defendant company at Trichinopoly.

Held, that the notice was a good notice, if it in fact reached the Agent of the defendant company within the period of six months.

PETITION under Provincial Small Cause Courts Act, section 25, praying the High Court to revise the proceedings of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in Small Cause Suit No. 1117 of 1897.

The plaintiff sued for the value of a parcel delivered by him to the defendant company of Madras to be carried to Negapatam. The defendant pleaded that the suit was not maintainable for want of notice given under the Railways Act, 1890, sections 77 and 140. The plaintiff had given notice to the Traffic Manager at Trichinopoly less than five weeks after the consignment of the parcel. The provisions of the Railways Act IX of 1890, sections 77 and 140, are as follows:—

"77. A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway.

Notification of claims to refunds of overcharges and to compensation for losses.

* Civil Revision Petition No. 25 of 1898.

"140. Any notice or other document required or authorized by this Act to be served on a railway administration may be served, in the case of a railway administered by the Government or a Native State, on the Manager, and, in the case of a railway administered by a railway company, on the Agent in India of the railway company—

Service of notices on railway administrations.

"(*a*) by delivering the notice or other document to the Manager or Agent, or

"(*b*) by leaving it at his office, or

"(*c*) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act, 1866."

The Subordinate Judge held that the notice was bad and dismissed the suit.

The plaintiff preferred this petition.

Kumarasami Sastri for petitioner.

Mr. *J. G. Smith* and Mr. *R. F. Grant* for respondent.

JUDGMENT.—The question in this case is whether the suit was rightly dismissed on the ground that the notice required by law was not given to the railway company.

The obligation to give notice as a condition precedent to the recovery of compensation is imposed by section 77 of the Indian Railways Act, 1890, and all that that section requires is that the claim must be preferred in writing and within a limited time to the "railway administration," that is in the present case, to the railway company (section 3, clause (6)). In dismissing the suit the Subordinate Judge did not find that, in fact, no notice such as section 77 requires, was given to the railway company itself or to its Agent in India.

He dismissed the suit on the ground that the notice given by the plaintiff was served on the Traffic Manager at Trichinopoly, whereas it ought, under section 140 of the Act, to have been served on the Agent in India of the company in one of the modes prescribed in that section. In other words, the Subordinate Judge has held that a notice, served in any manner other than that prescribed in section 140, is invalid. This view, we think, is clearly wrong, for it is impossible to hold that service on the railway company itself at its head office in England would not be in conformity with section 77.

It seems to us that section 140 was enacted in order to save parties from the inconvenience of being obliged to serve the company itself, by rendering service on the Agent in India equivalent to service on the principal, and further by providing that service on the Agent, though not personal, would be sufficient if effected in either of the modes pointed out in clauses (*b*) and (*c*) of the section.

We do not think that section 140 precludes a claimant from showing that the notice required by section 77 did, in fact, reach the Agent, within the time limited, though not in one of the modes prescribed in section 140.

The case of *The Secretary of State for India in Council* v. *Dip Chand Poddar*(1) to which the learned counsel for the company has drawn our attention in connection with another point, supports the view that we have taken as to the construction to be placed on section 140.

We must, therefore, set aside the decree of the Subordinate Judge, and direct that the suit be restored to his file in order that the plaintiff may show, if he is in a position to do so, that the notice of claim addressed by him to the traffic manager did, in fact, reach the Agent within the time prescribed by section 77. If this point is found in favour of plaintiff, the Subordinate Judge will then proceed to dispose of the suit on the merits; if it is not so found he will dismiss the suit. Costs in this Court will be costs in the suit.

APPELLATE CIVIL.

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

SABJU SAHIB (PLAINTIFF), APPELLANT,

v.

NOORDIN SAHIB AND OTHERS (DEFENDANTS), RESPONDENTS.*

1898. October 19, 28. November 4, 10.

Succession Certificate Act—Act VII of 1889, *s.* 4 (1), (*a*)—*Debt—Suit for account of share of deceased partner.*

A Muhammadan, being the son of a deceased member of a firm, brought a suit, as his legal representative, against the surviving partners praying for an

(1) I.L.R., 24 Calc., 306.

* Original Side Appeal No. 17 of 1898.

SARJU SAHIB v. NOORDIN SAHIB.

account of the partnership assets and for payment to him of the amount which might be found due to the share of the deceased. The plaintiff had neither letters of administration nor a succession certificate:

Held, that the plaintiff's claim, being unliquidated, was not a debt within the meaning of Succession Certificate Act, 1889, section 4 (1), (a).

APPEAL against the decree of Mr. Justice Boddam sitting on the Original Side of the High Court in Civil Suit No. 160 of 1895.

The father of the plaintiff carried on business in partnership with defendants Nos. 1 and 2, until his death in June 1895. The plaintiff brought this suit joining the widow and daughters of his deceased father as third to eighth defendants, for an account of the capital and profits of the partnership and for payment of the share of the deceased partner. The plaintiff had not taken out letters of administration or a succession certificate.

An issue was raised "whether the plaintiff is entitled to main-"tain this suit without having taken out letters of administration "or a succession certificate."

The learned Judge decided this issue against the plaintiff with reference to Succession Certificate Act, 1889, section 4. But finding that the plaintiff's case was otherwise established (except that the share of the deceased in the partnership assets was held to be less than was claimed) he said:—

"It is so much for the interest of the plaintiff's family and "of the defendants that the business of the firm should be wound "up and all accounts taken that I have made up my mind not to "dismiss the suit, though I am of opinion that until the plaintiff "has satisfied the requirements of section 4 of Act VII of 1889 "he has no case. I therefore direct that the first defendant do file "an account of the firm's dealings from the 17th May 1894 to the "30th June 1895 showing the profits or losses of the firm up to "that date, and also an account of the dealings of the firm from "July 1st, 1895, to the date of his appointment as a receiver "within fourteen days and give liberty to the plaintiff, if he shall "have then taken out letters of administration to his father but "not otherwise within seven days from the filing of the account "to file objections, and I order the case to be adjourned into "Chamber to be heard on the first Chamber day after the 26th "February next."

The plaintiff preferred this appeal.

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Mr. *K. Brown* (with him Hon. *O. A. White*, Advocate-General) for appellant contended that it was not necessary for the plaintiff to be furnished with letters of administration or a succession certificate.

Mr. *E. Norton*, *Kumarasami Sastri* and *Venkataramayya Chetti* for respondents.

This appeal came on for hearing before SHEPHARD, OFFG. C.J., and BENSON, J., who delivered the following judgments:—

SHEPHARD, OFFG. C.J.—This case illustrates the peculiarities of the statutory law relating to succession. The parties are Muhammadans, and therefore no obligation is cast upon the plaintiff to take out letters of administration before he can establish his right to the property of the intestate. Section 190 of the Indian Succession Act has not been embodied in the Probate and Administration Act. So far as that Act is concerned, it remains optional to a Muhammadan to apply for letters of administration. But under another Act a person in the plaintiff's position is precluded from obtaining a decree for a debt due to the intestate, unless he has first obtained letters of administration or one of the certificates there mentioned. So it is provided in section 4 of the Succession Certificate Act, which, otherwise, does not apply to Presidency towns. The question, then, is whether the claim which the plaintiff is prosecuting is a debt within the meaning of that Act. There is no reason for supposing that the term 'debt' was used in any but the ordinary sense, except perhaps that it may be said that persons chargeable in respect of claims other than debts in the proper sense have no less need of protection than persons who are strictly debtors of the deceased. The present claim is to have an account taken of the partnership business that was carried on between the deceased and others and to have the share of the deceased partner paid over to the plaintiff as his representative. It is quite clear that this is not a debt, for there was at the time of the death no present obligation to pay a liquidated sum of money. The claim is one about which there is no certainty; it may turn out that there is nothing due to the plaintiff. I think that, in construing the section, regard must be had to the state of things at the time of the intestate's death and not at the time when the decree is passed. On the decree being passed, there is in every case where the claim is for money a judgment debt created. Different language would have been used, if it had been intended

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to bring all such cases within the operation of section 4. In so far then as the direction to take out letters was founded on the nature of the plaintiff's claim, I do not think it can be supported. But in his plaint, the plaintiff himself expressed his willingness to take out letters, and it is not improbable that advances may have been made by the intestate to the other members of the firm which would constitute a debt.

Under these circumstances, I think it would be sufficient to modify the decree by providing that, if the plaintiff, when the account has been completely taken, satisfies the Court that there is no debt owing by the defendants to the deceased, he shall be relieved from the obligation to take out letters of administration.

On the merits the appeal was not argued. The appellant must, therefore, pay the costs of the first and second defendants of this appeal.

BENSON, J.—Notwithstanding the observations in the case of *Narayan Bhau Bartake* v. *Tatia Ganpatrao Deshmukh*(1) I do not think that the word 'debt' in section 4 of the Succession Certificate Act, 1889, can be restricted, as the appellant contends, to a liquidated sum of money actually due and payable to the deceased at the time of his death. To so construe it would, I think, frustrate, to a large extent, the policy of the Act, the main purpose of which (apart from its fiscal aspect) is to enable persons claiming to be the representatives of deceased persons, but whose title is disputed, to collect debts due to the estate of the deceased before they become barred, and to afford protection to parties owing money to such estate and willing to pay but uncertain to whom as representative of the deceased payment should be made.

I think the word 'debt' must be understood as including not only debts due to the deceased at the time of his death, but also debts accruing due to his estate or ascertained to be due to his estate after his death up to the day on which the inclusion of the debt in the certificate is applied for, just as the amount of a debt includes interest due thereon, up to that day (note 1, section 13). The provisions of the Act with regard to securities enable the representative of a deceased person to collect the interest on Government promissory notes, dividends on shares and other sums accruing to the estate of the deceased after his death. Is there any reason

(1) I.L.R., 15 Bom., 580.

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why these should be included as within the scope of the Act, while other debts falling due, or ascertained to be due, to the estate, should be excluded? I should say no, yet this is the result if the word 'debt' is used in the restricted sense contended for by the appellant. In the present case, the plaintiff prayed that an account might be taken of what is due to the estate of his late father on account of his partnership with the defendants and he also prayed that the sum so ascertained might be decreed to be paid to him by the defendants on his taking out letters of administration. The learned Judge has ordered the accounts to be taken. When this has been done the Court will have ascertained the sum, if any, due to the estate of the deceased by the defendants, and that sum will, I think, be 'a debt due to the deceased' within the meaning of the Act. Before, however, a final decree for payment of the amount to plaintiff can be made, I think the Court is bound by section 4 to require the plaintiff to take out letters of administration or a succession certificate with the debt specified therein. I would therefore modify the decree accordingly. The appellant has not argued on the merits, and the modification I propose in the decree is very slight. He must, therefore, pay the costs of the first and second defendants in this appeal.

In consequence of the difference of opinion between their Lordships, the case was referred to SUBRAMANIA AYYAR, J., and re-argued before him, the parties being represented as before.

SUBRAMANIA AYYAR, J.—The point, as to which my learned colleagues did not agree, is whether the amount, which may be found due on taking the accounts connected with the partnership to which this suit relates, is a 'debt' within the meaning of the Succession Certificate Act. Now the obligation, enforced in this case, is the implied one that every partner is accountable to the other partners with reference to the principle that each must share the profits and the losses proportionately. The liability arising from this obligation cannot be held to be a debt in the accepted ordinary legal sense of the term, for the obvious reason that the liability is not in respect of a liquidated sum. If authority were required for this conclusion I would refer to *Johnson* v. *Diamond*(1) where Parke, Platt and Martin, BB., held that the liability arising from a contract by C to pay D such costs as the latter should

(1) 11 Exch. Rep., 73.

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become answerable to J in an action carried on by D at the request of C, was not a liability to pay a liquidated sum and therefore not a 'debt.' It was urged there, as has been urged here, that there was a 'debt' as a judgment would be signed for the amount in question. But that argument was rejected with the observation by Platt, B, that such an argument would be applicable to all cases where a sum of money is ultimately recoverable and Martin, B, added :—" It is an abuse of language to call such liability a debt." As in the Succession Certificate Act there is absolutely nothing to warrant the construction of the term 'debt' in any other than its ordinary legal sense, it follows that any sum which may be found due here when the accounts are taken, is not a debt within the meaning of the said Act. This view is not inconsistent with the decision in *Penta Reddi* v. *Anki Reddi*(1) to which my attention was drawn by Mr. Norton, as the sum, in question there, was a liquidated sum repayable under an agreement implied by law for which even the technical 'action of debt' lay. .(Stephen's Pleading, 7th Ed., p. 11). I concur, therefore, in the conclusion

(1) Civil Revision Petition No. 45 of 1891 (unreported). The judgment of SUBRAMANIA AYYAR, J., on this petition was delivered on 4th January 1892, as follows :—

The question argued before me is whether the dismissal of the suit for want of a certificate under Act VII of 1889 is right. The contention for the plaintiffs is that the suit is one for the recovery of unliquidated damages for breach of contract. If this be correct, no certificate was necessary, as even the amount of a verdict in an action for unliquidated damages was held not to be a debt until judgment (*Jones* v. *Thompson* (27 L.J., (Q.B.), 234)). The claim here, however, is for the refund of the price alleged to have been paid for goods sold but not delivered. To determine the amount of damages in these cases, it is, no doubt, necessary to know what the contract price was; but the payment of the price has nothing to do with the matter, as a vendee would be entitled to recover damages from the vendor who has broken the contract, whether the price agreed has been paid by the vendee to the vendor or not. When property is sold and the vendor cannot perform his part of the contract, the ground on which the vendee is held entitled to recover the price paid, is that there has been a total failure of consideration (*Want* v. *Stallibrass* (L.R., 8 Ex., 175 at p. 183) and *Hanuman Kamut* v. *Hanuman Mandar* (L.R., 18 I.A., 158)). The payment of the price in such a case is decreed clearly by way of restitution, and not by way of compensation for the breach of contract (see section 65 of the Indian Contract Act and illustration (*d*)). I cannot, therefore, accept the view that this is a claim for damages as alleged. The suit is for a liquidated sum of money. To constitute such a sum in the hands of a person a debt, it is sufficient that in some way or other he can be compelled to pay it (per COLERIDGE, C.J., in *Booth* v. *Trail*, 12 Q.B.D., 8 at p. 10; see also the observations of LINDLEY, L.J., in *Webb* v. *Stenton*, 11 Q.B.D., 518 at p. 526). The District Judge's decision is right and the petition must be dismissed with costs.

SABJU SAHIB v. NOORDIN SAHIB.

arrived at by the Officiating Chief Justice and accordingly direct that the decree appealed against be modified by providing that, if the plaintiff, when the account has been completely taken, satisfies the Court that there is no debt, in the proper sense of the term, owing by the defendants to the deceased on account of advances made to them by him or otherwise, the plaintiff shall be relieved from the obligation to take out letters of administration. The appeal is otherwise dismissed. The appellant must pay the costs of the first and second defendants of this appeal.

Short—attorney for plaintiff.

Branson & Branson—attorneys for defendant No. 1.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Subramania Ayyar.

HAMMICK (APPELLANT)

1898. July 26, 28.

v.

PRESIDENT, MADRAS MUNICIPAL COMMISSION (RESPONDENT).*

City of Madras Municipal Act (Madras)—Act I of 1884, s. 190—Profession tax.

The Inspector-General of Police, whose official place of business with the main body of clerks is in Madras, went on tour, and during his absence the Assistant Inspector-General in Madras signed letters for him :

Held, that the Inspector-General was not assessable to profession tax under the City of Madras Municipal Act in respect of the period when he was absent on tour.

CASE stated under the City of Madras Municipal Act, section 193, by the Presidency Magistrates, Black Town, Madras, in Calendar No. 5761 of 1898.

The case was stated as follows :—

" An appeal was preferred by Mr. Murray Hammick, Inspector-General of Police, Madras, under section 192 of the City of Madras Municipal Act I of 1884, from the decision of the President of the Madras Municipal Commission passed on the 24th February

* Referred Case No. 15 of 1898.

HAMMICK v. PRESIDENT, MADRAS MUNICIPAL COMMISSION.

1898 under section 190, assessing him to the payment of a tax of Rs. 75 for the second half of the year 1897-98 under class 2 of schedule A.

"The appeal was heard by us on the 21st March 1898 and we delivered judgment on the 28th idem confirming the decision of the President. After the adjudication of the appeal, the appellant, on the 2nd April 1898, through Messrs. Wilson & King, intimated his desire in writing that a case should be stated to the High Court, Madras, under section 193 of the City of Madras Municipal Act.

"We therefore beg to submit, for the decision of the Honourable Judges of the High Court, Madras, the following point which was raised at the hearing of the appeal before us:—Whether the appellant held his office or appointment of Inspector-General of Police within the City of Madras on those days on which he was absent in the districts on tour as Inspector-General of Police, regard being had to the following admitted facts:—

"(*a*) The appellant's office (*i.e.*, his official place of business with the main body of clerks) is in Madras City.

"(*b*) A gazetted officer, an Assistant Inspector-General of Police, is in charge of the said office and signs 'for Inspector-General of Police' during the appellant's absence on tour.

"(*c*) Every letter addressed to the Inspector-General of Police goes first to the office at Madras. Every reply issues from the office at Madras.

"It is admitted by the respondent that the appellant has not held his office or appointment within the city for sixty days, unless the days spent by him on tour are taken into account."

Mr. *K. Brown* for appellant.

Mr. *E. Norton* for respondent.

JUDGMENT.—The question referred to us is whether, upon the facts stated, Mr. Hammick did, within the City of Madras, hold the office of the Inspector-General of Police for more than sixty days in the half year. The question is, in our opinion, really concluded by the decision in the Ongole case (*Chairman, Ongole Municipality* v. *Mounsey*(1)), but it was sought to found a distinction on the admission made in this case to the effect that the office of the Inspector-General is a permanent one in Madras, and that there

(1) I.L.R., 17 Mad., 453.

HAMMICK v. PRESIDENT, MADRAS MUNICIPAL COMMISSION.

is one Assistant Inspector-General in charge, who signs letters for the Inspector-General of Police during the latter's absence on tour. We are of opinion that these circumstances make no difference. The person liable to pay under section 103 of the Act (I of 1884) is the person who, within the city, exercises an art, profession or trade or holds an office. There are officers inseparably connected with Madras, the duties of which cannot be discharged elsewhere. The office of Inspector-General of Police is not of that character, for it appears to be part of the Inspector-General's duty to make tours. When he is absent from Madras on a tour it is suggested that nevertheless he is still holding an office in Madras because another officer signs letters on his behalf. If this were the correct view, it must follow that Mr. Hammick can be said to hold office at two places at the same time. But the real answer to the argument is that the Assistant Inspector-General does not perform the functions of the Inspector-General. The Assistant Inspector-General discharges his own functions including the duty of signing letters, and presumably he has to pay a tax in respect of the office he holds. So far as the language of the schedule to which we were referred has any bearing on the case, it is against the claim of the municipality, because it shows that the gumastah on the spot and not the absent principal is to be taxed.

Construing the words of the Act according to their ordinary acceptation and following the decision in the Ongole case (*Chairman, Ongole Municipality* v. *Mounsey*(1)), we decide the question referred in the negative.

Barclay, Orr & David—attorneys for respondent.

(1) I.L.R., 17 Mad., 453.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

1898. August 4.

QUEEN-EMPRESS

v.

FELIX AND OTHERS.*

Criminal Procedure Code—Act X of 1882, s. 191 (c)—Act V of 1898, ss. 190, 191.

A Magistrate, when a valid objection is taken under Criminal Procedure Code, section 191, that he cannot try a case, is not bound to transfer it, but may elect to commit the case to a Court of Session.

CASE referred for the orders of the High Court, under Criminal Procedure Code, section 438, by T. M. Saminadha Ayyar, Acting Sessions Judge of Nellore, in Calendar Case No. 19 of 1898, on the file of the Head Assistant Magistrate, Nellore.

The case was stated as follows :—

"The complaint, under sections 327, 330, 342, 347, 348, 384, 385, 226, 376, 509, 511 and 354, Indian Penal Code, against the accused, appears to have been taken up by the Magistrate for enquiry under section 191 (*c*) of the Criminal Procedure Code.

"The accused moved before the Magistrate for a transfer of the case to some other Magistrate, and the Head Assistant Magistrate, after hearing the arguments of the pleader, seems to have agreed with him and written an endorsement asking the District Magistrate to transfer it to the file of another first-class Magistrate. But he scored out the order subsequently since he thought that, the charge being triable by this Court, there was no necessity to transfer it from his own file, and he held that he had the discretion to refuse the request made by the accused.

"The section does not seem to give any discretion to the Magistrate in the matter, and, if the accused chooses to request a transfer of the case to any other Magistrate's file, the prayer should be complied with—*vide* also the ruling in *Queen-Empress* v. *Hawthorne*(1)."

Counsel were not instructed.

JUDGMENT.—We are inclined to think that, though the Magistrate was at first under the impression that the case came under

* Criminal Revision Case No. 251 of 1898. (1) I.L.R., 13 All., 345.

clause (*c*) of section 191, Criminal Procedure Code (Act X of 1882), yet, as suggested in the explanation, the case was in reality taken cognizance of on complaint. Even if it were not so, the right view appears to be, as the Magistrate says, that the accused are only entitled to object to a trial by the Magistrate. On objection being raised to a trial by the particular Magistrate, he is not bound to transfer the case; he may elect to commit the case to the Court of Session. QUEEN-EMPRESS v. FELIX.

The order passed by the Head Assistant Magistrate was perfectly legal under section 191 of the old Criminal Procedure Code as it would be under sections 190 and 191 of the present Act (Act V of 1898).

We therefore decline to interfere.

APPELLATE CIVIL.

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

1898. August 22.

VIRA PILLAI (PLAINTIFF)

v.

RANGASAMI PILLAI (DEFENDANT).*

Provincial Small Cause Courts Act—Act IX of 1887, sched. II, art. 7—Suit for damages for use and occupation of land.

A suit for damages for use and occupation of land is cognizable by a Court of Small Causes.

CASE referred for the opinion of the High Court, under Civil Procedure Code, section 646B, by F. H. Hamnett, Acting District Judge of Tanjore, in Small Cause Suit No. 1307 of 1896, on the file of the Subordinate Court of Negapatam.

The case was stated as follows :—

"The plaintiff's case is that the defendant obtained on lease certain land belonging to a temple under a lease-deed, dated 20th January 1891, for a period of three years at a monthly rent of Rs. 1-2-0; that the defendant continued to hold possession after the expiry of the term fixed; that on the 31st March 1894, plaintiff obtained a lease of the same land for a period of twenty years under

* Referred Case No. 21 of 1898.

VIRA PILLAI v. RANGASAMI PILLAI.

a deed registered, dated 31st March 1894; that on the 23rd April 1894, plaintiff gave notice to defendant through the post, informing him of his lease and calling upon him to settle terms with plaintiff as to the rate of rent and to execute a rent deed to him and that in case of failure to comply with this requisition, defendant would be held liable to pay rent at the rate of Rs. 3 a month, and that the defendant refused to accept notice and also failed to quit.

"The plaintiff claims to be entitled to rent at the rate of Rs. 3 per month from the date of his lease, viz., 31st March 1894, and sues to recover Rs. 87.

"The plaint was first presented, on the Small Cause side, to the Subordinate Judge of Negapatam, who held on the authority of the ruling in *Manisha Eradi* v. *Siyali Koya*(1) that the case was not cognizable by a Court of Small Causes, as no contract existed between the parties. He also held that as plaintiff claims enhanced rate of rent, the suit is exempt from the jurisdiction of a Court of Small Causes under article 7 of the second schedule of Act IX of 1887, and returned the plaint for presentation to the Court having jurisdiction to entertain a suit for possession of the property under section 109 of the Transfer of Property Act.

"The plaint was then presented, on the Original Side, before the District Munsif of Negapatam, who held that the suit was cognizable by a Court of Small Causes.

"The plaintiff contends that the Subordinate Judge, by reason of erroneously holding that the suit was not cognizable by a Court of Small Causes, failed to exercise a jurisdiction vested in him by law.

"I agree with the view expressed by the District Munsif."

Srinivasa Ayyangar for plaintiff.

The defendant was not represented.

JUDGMENT.—We agree with the District Judge and the District Munsif that the suit is cognizable by a Court of Small Causes. It appears to be a suit for damages for use and occupation of land, and such a suit is not excluded from the jurisdiction of the Small Cause Court by any article of schedule II of the present Provincial Small Cause Courts Act (*Makhan Lall Datta* v. *Goribullah Sardar*(2)).

(1) I.L.R., 11 Mad., 220. (2) I.L.R., 17 Calc., 511.

Article 7 of schedule II of Act IX of 1887 relied on by the Subordinate Judge has no application to a suit of this kind; and the case (*Manisha Eradi* v. *Siyali Koya*(1)) referred to by him is also inapplicable, as it was decided with reference to the provisions of the former Act which were quite different from those of the present Act.

VIRA PILLAI v. RANGASAMI PILLAI.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Benson.

QUEEN-EMPRESS

v.

OBAYYA AND OTHERS.*

1898. September 13.

Penal Code—Act XLV of 1860, ss. 206, 397, 424—Harvesting crops under attachment.

A judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force and was convicted of theft:

Held, that the accused was *not* guilty of *theft*, but of the offence of dishonestly removing the property under Penal Code, section 424.

Per BENSON, J.—The offence was also criminal misappropriation within the meaning of Indian Penal Code, section 403.

APPEAL on behalf of Government under Criminal Procedure Code, section 417, against the judgment of T. Ranga Rao, Deputy Magistrate of Cuddapah, in Criminal Appeal No. 10 of 1898, reversing the conviction of three persons by Muhammad Jaffir Hussain, Sub-Magistrate of Kamalapuram, in Calendar Case No. 21 of 1898.

The accused was charged with theft, and it appeared that, on 19th December 1897 in execution of a money decree against the first accused, his cholam and gram crops were attached by the Court Amin, and an agent of the decree-holder was appointed to watch the field till the harvest. On the night of the 31st of December 1897 the accused cut the cholam. The Sub-Magistrate convicted the accused of theft. On appeal the Deputy Magistrate held that the offence fell under Penal Code, section 206, and constituted the offence of removing property from being taken in

(1) I.L.R., 11 Mad., 220.

* Criminal Appeal No. 370 of 1898.

QUEEN-EMPRESS v. ORAYYA.

execution of a decree or order which had been made by a Court of Justice in a civil suit, and he discharged the accused, holding that the Magistrate had no jurisdiction to try the case, no sanction having been given under Criminal Procedure Code, section 195.

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

Srinivasa Ayyangar for accused No. 1.

Accused Nos. 2 and 3 were not represented.

BENSON, J.—The Deputy Magistrate was, in my opinion, right in holding that the alleged act of the accused in cutting and removing the standing crops which had been attached by the Civil Court did not amount to theft. In order to constitute theft there must be a moving of movable property with the intention of taking it dishonestly out of the possession of another person. Standing crops are, for the purposes of the Indian Penal Code, immovable property, and when such crops are attached under section 274 of the Civil Procedure Code, possession of them is not transferred to the Court. Possession remains with the owner, but he is forbidden to alienate or charge the crops.

When the crops are cut they become movable property, but it would, I think, be difficult to conclude that possession of them is transferred to the Court or its officer by the act of cutting. The cutting, however, cannot put an end to the attachment once properly effected. The crops must be regarded as movable property under attachment, but in the possession as before of the judgment-debtor. I am not unmindful of the views of this Court in *Queen-Empress* v. *Periyannan*(1) and *Queen-Empress* v. *Dadala Atchigadu*(2), in the former of which it was assumed, and in the latter of which it was held, that theft could be committed by the owner of a crop under attachment removing it. In both of these cases, however, the attachment was by distraint made by a Revenue Court and the mode and effect of attachment by a Civil Court as regards possession was not considered. No doubt, when in the present case, the crop was cut the Court or its officer had the right to at once take possession of it, but the right to possession is not the same thing as actual possession. The actual possession remained with the judgment-debtor, and when he removed the crop he did not take it out of possession of the Court or its officer

(1) Weir's Criminal Rulings, 3rd ed., p. 245.
(2) Weir's Criminal Rulings, 3rd ed., p. 240.

QUEEN-EMPRESS v. ORAYYA.

or any other person. The offence committed was, therefore, not theft, but it was criminal misappropriation within the meaning of section 403, Indian Penal Code, inasmuch as the judgment-debtor thereby dishonestly converted the property to his own use. The act was also an offence punishable under section 424, Indian Penal Code, viz., dishonest removal of property even when such property belongs to the person removing it, and the accused might properly have been convicted of these offences by the Sub-Magistrate, or by the Deputy Magistrate, when the case came before him in appeal. I would, therefore, set aside the order of acquittal made by the Deputy Magistrate, and direct the Deputy Magistrate to restore the appeal to his file and dispose of it on the merits and with reference to the above observations.

DAVIES, J.—I agree to the order proposed on the ground that the case was not one of theft, but fell under section 424 of the Penal Code.

APPELLATE CRIMINAL.

Before Mr. Justice Moore.

1898. September 29.

QUEEN-EMPRESS

v.

TANGAVELU CHETTI AND ANOTHER.*

Criminal Procedure Code—Act X of 1882, *s.* 423 (*d*)—*Court Fees Act—Act VII of* 1870, *s.* 31.

An Assistant Magistrate having convicted the accused persons sentenced them to pay a fine, out of which Rs. 2 was to be paid to the complainant for his expenses; the Deputy Magistrate, on appeal having confirmed the conviction, passed an order under Court Fees Act, section 31, directing the accused to pay a further sum to the complainant:

Held, that the order was illegal and should be set aside.

CASE referred for the orders of the High Court under Criminal Procedure Code, section 438, by E. A. Elwin, Acting District Magistrate of Bellary, in Criminal Revision No. 18 of 1898.

The case was stated as follows:—

"Gandla Mattappa Chetti of Bellary complained against (1) Gandla Tangavelu Chetti, (2) Nilgara Siddappa, (3) Chinna

* Criminal Revision Case No. 332 of 1898.

QUEEN-EMPRESS v. TANGAVELU CHETTI.

Kondayya, and (4) Achamma, all of Bellary, for having caused him hurt, an offence under section 323, Indian Penal Code, for which the Police cannot arrest without warrant. He cited seven witnesses to prove his case and deposited Rs. 1-10-0 in the shape of Court Fee stamps being the process fees as under:

"Annas 4 to the first accused, As. 6 to the other three accused at 2 annas each, As. 4 to the first witness, As. 12 to the other six witnesses at 2 annas each—all of them being the residents of Bellary within six miles from the Court house. Besides this he had attached half a rupee stamp to the complaint petition. In the course of the trial he dispensed with one of the witnesses. The Assistant Magistrate convicted the accused Nos. 1 and 2, fining them Rs. 40 and Rs. 20 respectively and discharged the other two accused. He directed further that, out of the fine or fines paid, Rs. 2 should be paid to the complainant after the appeal time, being the amount of expenses incurred by him. As will be seen above the complainant had incurred an expenditure of Rs. 2-2-0, of which Rs. 1-10-0 was for process fees and As. 8 for the complaint petition. The Assistant Magistrate ordered only Rs. 2 to be paid as one of the witnesses, for whom As. 2 was collected towards the process fees, was not examined. He has not quoted the section under which he ordered this payment, but he however states now that it was under section 31 of the Court Fees Act. On appeal the Deputy Magistrate confirmed the conviction and sentence and passed, with reference to section 423 (*d*), Criminal Procedure Code an order under section 31 of the Court Fees Act, directing the accused to pay Rs. 2-2-0 to the complainant and observing that the Assistant Magistrate had failed to pass an order under that section; the Deputy Magistrate should have ascertained under what section the Assistant Magistrate had ordered the payment of Rs. 2 on account of expense before passing an order under section 31 of the Court Fees Act. Now the question is whether the amount ordered by the Deputy Magistrate should be collected or not. Section 31 of the Court Fees Act directs that the repayment of the process fees and stamp should be in addition to the penalty imposed for the offence. But the Assistant Magistrate's order is that it should be out of the fine collected. The Deputy Magistrate's order thus appears indirectly to enhance the sentence.

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"Again the Deputy Magistrate is not correct in fixing the amount at Rs. 2-2-0. Since two of the four accused had been discharged, the process fees collected on their account could not be ordered to be repaid. Deducting As. 4 on that account, the correct amount would be only Rs. 1-14-0. It is observed that the Appellate Court's record contains only one appeal petition and only one copy of the order appealed against, though there are two appellants who were not in Jail. It seems to be necessary that there should be separate petitions, each accompanied by a copy of the order appealed against."

Counsel were not instructed.

JUDGMENT.—The Deputy Magistrate has, under section 31 of the Court Fees Act, directed the two accused persons (appellants before him) to pay each Rs. 1-1-0 in addition to the fines already imposed on them in the Court of First Instance as being the expenses incurred by them and for process fees. An order to pay a fee under section 31 is an integral part of the sentence and such fee must be treated as a fine imposed by the Court, (Proceedings of the Madras High Court, dated 20th July 1870 (1)). The Deputy Magistrate has therefore enhanced the sentence inflicted by the Assistant Magistrate. Such enhancement is illegal and the order inflicting an additional fine is accordingly set aside and the amount Rs. 2-2-0 ordered to be refunded, if it has been paid.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

ZAMINDAR OF TUNI (PLAINTIFF), APPELLANT,

v.

BENNAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1898. October 6, 7, 20.

Civil Procedure Code—Act XIV of 1882, s. 543—Memorandum of appeal—Scandalous matter therein—Duty of the Appellate Court.

A memorandum of appeal presented to a District Court alleged, *inter alia*, actual partiality against the Judge whose decree was in question. The

(1) 5 M.H.C.R., App., 28.

* Second Appeal No. 1655 of 1897.

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memorandum was returned for amendment on the ground that it contained language disrespectful to the Court of first instance. The appellant's pleader presented the appeal memorandum unamended stating that he wished to rely in the appeal on the passages objected to, and asking that the Court would, if necessary, strike them out. The District Judge thereupon rejected the memorandum of appeal under Civil Procedure Code, section 543. It appeared that the objectionable portions of the memorandum were separable from the rest:

Held, that an appeal lay to the High Court against the order rejecting the appeal to the District Court.

Per SUBRAMANIA AYYAR, J.—The District Judge should have ordered the objectionable matter to be expunged and then to have admitted the appeal.

Per MOORE, J.—(Holding that the statement which accompanied the memorandum of appeal on its re-presentation contained expressions amounting to contempt of Court), the District Judge should have returned the appeal memorandum and have refused to receive it until the objectionable remarks had been expunged.

Per SUBRAMANIA AYYAR, J.—"It is open to an appellant to set up any circumstance showing that a Judge whose decision is appealed against was disqualified from trying and deciding the case . . . When a Judge is shown . . . to stand in such a position that he might be reasonably suspected of being biased he must be held to have been disqualified . . . In cases where any bias can be presumed the party is entitled to show the grounds which raise that presumption . . . But where there is no such presumption the party must not be allowed to question the impartiality of the Judge."

SECOND APPEAL against the order of E. C. Rawson, District Judge of Vizagapatam, dismissing an appeal petition, as it contained language disrespectful to the Lower Court, presented against the decree of the District Munsif of Yellamanchili, in Original Suit No. 621 of 1895.

The objectionable matter was contained in paragraphs 1, 3 and 12 of the memorandum of appeal, which were as follows:—

"1. The judgment of the Lower Court is based on unwarrantable conclusions drawn on the overwhelming evidence produced for plaintiff, oral and documentary, and the Lower Court's judgment is on its face one-sided and biased against the plaintiff. Your Honourable Court was moved for a transfer of this case from the file of this Munsif with four others on account of personal spite existing between them, but your honour transferred the others and not this, and the Munsif hearing this grudge decided the case against the plaintiff perverting every point proved as against him.

"3. The Commissioner appointed by the Court actually examined the places and made a report which thoroughly supports the truth of the plaintiff's case, and the Munsif's failure to give due weight to it is, independent of other facts, enough to show

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that the Munsif's judgment is the production more of spite than a real desire to give sustainable justice.

"12. The Munsif's remarks in paragraph 17 are enough to show his extreme partiality to defendants and against plaintiff. The defendants have not at all rebutted the plaintiff's case."

The plaintiff preferred this second appeal.

Vydianadha Ayyar for appellant.

The Government Pleader (Mr. *E. B. Powell*) for respondent No. 7.

Respondents Nos. 1 to 6 were not represented.

SUBRAMANIA AYYAR, J.—The appellant before us was the appellant in the Lower Appellate Court also. The memorandum of appeal, presented by him there, was returned to him for amendment on the ground that it contained language disrespectful to the Court of first instance. It was, however, re-presented without amendment accompanied by a statement or petition to the effect that the imputations made in the paragraphs Nos. 1, 3 and 12 of the memorandum which were objected to, were borne out by the record and therefore they ought to be allowed to remain so as to entitle the appellant to rely upon them at the hearing; but that, if the Court still thought otherwise, the Court itself may direct them to be scored out.

The Lower Appellate Court thereupon rejected the memorandum under section 543 of the Code of Civil Procedure.

The first point for determination is whether an appeal lies against the order of rejection. Now, section 543 referred to is apparently limited to cases in which the memorandum of appeal is not drawn up in accordance with the second paragraph of section 541 which runs thus:—"Such memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed against without any argument or narrative; and such grounds shall be numbered consecutively" (see *Gulab Rai* v. *Mangli Lal*(1)). The objection here, however, is that the memorandum contains scandalous matter and as the paragraph just quoted cannot be said to lay down any rule with reference to such a breach of the rules governing the frame of pleadings, section 543 would seem to be inapplicable to a case like this. However this may be, the order appealed against must, following *Ayyanna* v. *Nagabhooshanam*(2) be held to be a decree within the meaning

(1) I.L.R., 7 All., 42. (2) I.L.R., 16 Mad., 285.

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of the Civil Procedure Code. The objection that no appeal lies, therefore, fails.

The next point for decision is whether, assuming that the memorandum of appeal is open to the objection taken by the District Judge, he had power to reject the appeal. No doubt the Code of Civil Procedure does not make any provision as to how Courts should deal with memoranda of appeal containing scandalous matter. But clearly Courts possess inherent power to stop such an abuse of its records. For, as pointed out by Story, "Scandal is "calculated to do great and permanent injury to all persons whom "it affects, by making the records of the Court the means of per- "petuating libellous and malignant slanders; and the Court, in aid "of public morals, is bound to interfere to suppress such indecen- "cies" (Equity Pleadings, section 270). There can be no doubt, therefore, that it was perfectly competent to the Lower Appellate Court to have caused the objectionable passages, if any, in the memorandum to be expunged. But had the Court power to reject the appeal altogether? No such power is given to the Courts by any statutory provision. And, on general principles, it is not possible to hold that Courts have such power, at all events, in cases in which the objectionable matter is separable from what is unobjectionable. It seems to me that all that a Court is entitled to do in such cases is to cause the portions open to objection to be expunged. For even taking that an appellant, by refusing to comply with an order for amendment such as that passed in the present instance by the District Judge, is guilty of a contempt, still it cannot be said that until the contempt is purged the party cannot be heard and is debarred from claiming that the appeal be proceeded with. *Ricketts* v. *Mornington*(1), *Wilson* v. *Bates*(2) and *Haldane* v. *Eckford*(3) in my opinion support the above view. In the last-mentioned case the defendant was held entitled to take any step required for the purposes of his defence, although the contempts committed by him were of the most flagrant kind. I am, therefore, of opinion that, assuming that the memorandum of appeal in question does contain scandalous matter, still it was not open to the Lower Appellate Court to reject the appeal, the alleged objectionable portions of the memorandum being quite separate from the rest.

(1) 7 Sim., 200. (2) 3 My. & Cr., 197. (3) L.R., 7 Eq., 425.

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The third and last point for consideration is whether the memorandum does contain scandalous matter. In dealing with a question like this two rules have to be borne in mind, viz., that, as urged for the appellant, what is relevant cannot be scandalous and that Courts ought not to dictate to parties how they should frame their cases, provided, of course, the rules of pleading are not contravened in the frame of their cases—the latter a rule, which Bowen, L.J., said, should be kept sacred, *Knowles* v. *Roberts*(1). In the light of these rules the only paragraphs which, in my opinion, call for notice in connection with the point under consideration are 1, 3 and 12. In the first of these the District Munsif is charged with having decided the case against the appellant in consequence of a grudge entertained by that officer against the appellant arising from the latter having applied for a transfer of the case from the file of the Munsif's Court. In paragraph 3 the judgment of the District Munsif is stigmatised as given from "more of spite than a "real desire to give substantial justice" and in the twelfth paragraph the Munsif is charged with "extreme partiality to the "defendants and against the plaintiff."

There can be but one opinion as to the character of these imputations. It is no doubt open to an appellant to set up any circumstance showing that the Judge whose decision is appealed against was disqualified from trying and deciding the case. It is also quite true that, when a Judge is shown, in the language of Lord Esher, M.R., to stand in such a position that he might be reasonably suspected of being biased, he must be held to have been disqualified (*Allinson* v. *General Council of Medical Education and Registration*(2)). But is an appellant at liberty to show that in the particular case the Judge was biased in fact? It may seem at first sight that he would *a fortiori* be entitled. No doubt anything which tends to impeach the impartiality of a Judge ought to render him incompetent to decide the case, in order that the administration of justice may not be brought into discredit. And hence in cases where any bias can be presumed, the party is entitled to show the grounds which raise that presumption. These grounds may generally be definable beforehand. But where there is no such presumption the party must not be allowed to question the impartiality of the Judge, for that would mean an enquiry into the

(1) L.R., 38 Ch.D., 263 at p. 270. (2) [1894] 1 Q.B., 750 at p. 758.

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motives operating in the mind of the Judge after the cause has been decided—a thing which is well nigh impossible, and even if possible will be too vague to afford a guiding principle. This might have been probably in the mind of the Master of the Rolls when he said in the case referred to "the question is not whether "he (the person whose decision was in question there) was or was "not biased. The Court cannot inquire into that." (*Allinson v. General Council of Medical Education and Registration*(1)). If in a case like this it is open to an unsuccessful party to prove actual bias, it is not easy to see why in a case where a decision is pronounced by a person who is disqualified from interest or otherwise from giving such a decision, the successful party should not be entitled to support the decision by showing that the Judge was not biased in fact. That, of course, for obvious reasons, he is not permitted to do, and it seems to be equally reasonable that in a case like the present, averment or proof of the existence of actual bias should be disallowed. The appellant was, therefore, not entitled to make the imputation of actual partiality contained in the paragraphs of the memorandum, referred to above which consequently must of course be held to be scandalous. In reversal of the Lower Appellate Court's order, I would direct that the objectionable passages in question be expunged and the memorandum of appeal be admitted and proceeded with according to law. In the circumstances of the case, I would make the appellant bear his own costs and those of the seventh respondent up to this date irrespective of the result of the case.

MOORE, J.—I agree with my learned colleague in considering that there is an appeal against the order of the District Judge inasmuch as it amounts to a decree. I feel, however, some doubt as to whether it can be held that when the District Judge returned for amendment the appeal petition presented by the vakil on the ground that it contained scandalous imputations against the District Munsif who had tried the case and when the vakil refused to amend, it was not open to the Court to reject the appeal absolutely. The facts of the case were briefly as follows:—The vakil stated in the appeal petition that the judgment of the District Munsif appealed against was a "production more of spite "than a real desire to give substantial justice," and that his remarks

(1) [1894] 1 Q.B., 750 at p. 758

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in it showed "his extreme partiality to defendants and against "plaintiff." This petition was returned for amendment, as it was couched in language disrespectful to the Court and as the District Judge was of opinion that "such pleadings could not be entertained under No. 6 of the Civil Rules of Practice relating to "Pleadings" (page 134). The vakil, however, re-presented the petition in its original form, refused to amend it, and in his further petition stated that if he had not urged the grounds of appeal objected to by the District Judge, *i.e.*, those suggesting personal spite and extreme partiality, he would have been found fault with by the District Court at the hearing of the appeal and also by the High Court in second appeal for not having raised such pleas. In making these observations, the vakil was, in my opinion, guilty of contempt in a most aggravated form. On receiving this petition the District Judge rejected the appeal. He should, in my opinion, have returned the appeal petition and refused to receive it till the objectionable remarks to be found in it had been expunged. This was what was done in *In re Clive Durant*(1), and is, I presume, the course that this Court, by the Rule of Practice above mentioned, intended that subordinate courts should adopt in such cases. It is, in my opinion, no part of the duty of a judicial officer to revise petitions presented to it containing scandalous and offensive matter and purge them of such objectionable phrases as may be found in them. Petitioners should be obliged to perform this task themselves, and if they neglect to do so within the time prescribed for the presentation of their appeal or petition, should suffer by the same being rejected as being out of time. I, however, do not object to the order proposed by my learned colleague in the present case being passed; as, if the appeal petition now under consideration was again returned to the vakil, so that the District Judge's order of the 18th February 1897 might be obeyed, he would be prevented by the law of limitation from representing his appeal petition after it had been purged. It would be unjust to allow the client to suffer so severely for the fault of his vakil.

(1) I.L.R., 15 Bom., 438.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice).

1898. October 31.

REFERENCE UNDER COURT FEES ACT, s. 5.*

Court Fees Act—Act VII of 1870—Appeal under Agency Rules, No. 22, under Act XXIV of 1839—Court fee.

An appeal preferred to His Excellency the Governor in Council under Rule No. 22 of the Agency Rules framed under Act XXIV of 1839 against the decision of the Governor's Agent at Vizagapatam and referred by Government to the High Court for disposal is not chargeable under the Court Fees Act.

CASE referred by the Registrar of the High Court under Court Fees Act, 1870, section 5, in Stamp Register No. 8109 of 1898.

The case was stated as follows:—

"The suit in this case was brought by the Maharajah of Jayapore for the recovery of a village with mesne profits and it was decided against him by the Agent to the Governor at Vizagapatam. He therefore appealed to Government under Rule No. 22 of the Agency Rules framed by Government under Act XXIV of 1839.

"The Government have referred the appeal to the High Court for disposal under the rule above referred to.

"The petition of appeal to Government was engrossed on plain paper, and there is nothing in the Court Fees Act relating to appeals coming up to the High Court under the Agency Rules.

"In a similar case (Appeal No. 103 of 1889) PARKER, J., directed that the appeal should be 'filed as a regular appeal and posted for hearing.' Under this order the appellants' Vakil was called upon to state the valuation of the subject-matter of the appeal and pay Court fee thereon. He accordingly valued the appeal at Rs. 4,20,000 and paid without objection a Court fee of Rs. 3,000, being the maximum fee prescribed in schedule I of the Act for any sum exceeding Rs. 4,10,000.

"In Appeal No. 92 of 1898, which was also a similar case, the question whether Court fees should be paid on the appeal memorandum was again raised and under verbal orders of COLLINS, C.J., it was ordered that the precedent should be followed (*vide* order, dated 15th March 1898 and 30th March 1898, on the said note). The appellants' Vakil was then called upon to state the

* Referred Case No. 26 of 1898.

REFERENCE UNDER COURT FEES ACT, s. 5.

value of the appeal and pay Court fee thereon. He paid a Court fee of Rs. 815 on the valuation of Rs. 21,383-11-4, but under protest on the grounds:—(1) that no appeal from the Agent's decision lies to the High Court, but only to Government; (2) that the decision of the High Court could not be carried into execution without the order of Government; (3) that the provisions of the Court Fees Act do not apply to appeals to the Government from the Agent's decisions; and (4) that the High Court cannot treat an appeal referred by Government as an appeal presented to itself and levy stamp duty under the provisions of the Court Fees Act (*vide* Vakil's reply of the 17th March 1898 to the Deputy Regsitrar's endorsement of the 16th idem). The Vakil having stated therein that he expressly reserved his contention that no stamp duty was leviable, the appeal was admitted in the ordinary course.

"In the present case which has been registered as Appeal No. 179 of 1898 the same Vakil has paid a Court fee of Rs. 335 on the valuation of Rs. 6,000 in accordance with the Deputy Registrar's endorsement of the 11th August 1898, but he protests on the same grounds as were urged in the former appeal (No. 92 of 1898). He further asks for a reference to the Chief Justice under section 5 of the Court Fees Act as the question has arisen more than once and is one of general importance.

"Another appeal has since been received and as in other cases no Court fee has yet been paid.

"The question is therefore referred for decision of the Chief Justice. The only provision of the Court Fees Act, which seems to have a bearing on the matter, is section 4, paragraph 5. If the High Court be regarded as a Court of Reference it is submitted that the appeal is chargeable with an *ad valorem* fee under article 1, schedule I."

The Officiating Chief Justice directed that a notice should be given to the Government Solicitor intimating that, unless an appearance is entered on behalf of Government on or before the 13th September 1898, the matter will be disposed of in his absence.

The reference having come on for consideration and no appearance having been entered on behalf of Government, the Officiating Chief Justice delivered the following opinion:—

JUDGMENT.—No Court fee is necessary.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Shephard (Officiating Chief Justice), Mr. Justice Subramania Ayyar and Mr. Justice Moore.

REFERENCE UNDER STAMP ACT, s. 46.*

1898. September 18. November 4.

Stamp Act—Act I of 1879, sched. I, art. 44 (a)—Mortgage—Consideration.

A kanom deed is liable to a stamp duty as a mortgage only, and in calculating the consideration, the ascertained amount of compensation for improvements paid at the landlord's request by the incoming to the outgoing tenant must be included.

CASE referred by the Board of Revenue for the opinion of the High Court, Madras, under Stamp Act, section 46.

Paragraphs Nos. 2 and 3 of the letter of reference were as follows:—

"2. The documents in question are kanom deeds of jenmam land; rent is stated as well as the kanom amount; and in the first there is an acknowledgment of the receipt by the lessor from the lessee of the value of the improvements, and in the second a statement that the lessee had deposited that value in Court, repayment being promised to the lessee in both. The Board hold that the documents were to be construed as mortgages with possession and as sales, and should pay the aggregate of the duties on the two transactions.

"3. The District Judge of Malabar takes exception to this ruling and requests re-consideration as the matter is of most serious importance to the district. His view is that the provision in the documents relating to the receipt of the sum found due by the Civil Courts as compensation for improvements does not amount to a sale, because the tenant in Malabar is not the legal owner of the improvements made by him, but is bound on the termination of his holding to transfer them to his lessor for compensation paid and that transfer is effected by the decree of the Court and not by the documents under consideration."

The documents were as follows:—

Document A:—"Kanom deed executed by Nilakantan Nambudri. . . in favour of Chekkunni Haji. . . Whereas I have this day demised to you on kanom tenure for a consideration

* Referred Case No. 20 of 1898.

of Rs. 175 kanom and on a rental of 55 cheppan paras of paddy, the para being equivalent to 12½ seers and of Rs. 9 deducting natukur and 25 pairs of cadjan leaves worth As. 2, which rental after deducting interest on the kanom amount becomes 43 paras of paddy, Rs. 4 and 25 pairs of cadjan leaves, the six items of property which are my jenmam, which I have come into possession of under decree of the Chernad District Munsif's Court No. 486 of 1895 and which are described in the schedule below, you will from this date possess and enjoy the said items of property on kanom lease, and deducting interest on the said kanom of Rs. 175 pay me in Kanni and Makaram from and after the year 1072, 43 paras of paddy worth As. 12 a para as also annually Rs. 4, 25 couples of cadjan leaves, 4 cocoanuts worth one anna and one rupee for the onam gift of plantains and take receipt from me for the same; if you allow the rent to fall in arrears you will pay interest for it at the usual rate; and you will also pay me along with the rent, any enhancement made in the assessment or other dues on the property. As I have received from you Rs. 224-9-3, the amount paid into the Court as price of the improvements as estimated by the Commissioner in the suit above mentioned, I shall pay you for the said improvements as also for the improvements other than wild trees that you may duly raise in future at the rates obtaining in the country."

REFERENCE UNDER STAMP ACT, s. 46.

Document B:—"Deed executed by H. H. Manavikrama Zamorin Maharajah Bahadur of Calicut in favour of Kallingal Peroo, son of Choyi, Nagaram amshom, Calicut taluk. Whereas the two items of property, jenmam of our Tali devasom, described in the schedule attached below, obtained possession of on the execution of decree No. 634 of 1884 of the Chernad District Munsif's Court and yielding an annual rental of 18 fanams, are leased out to you; you are required to hold and cultivate the same and remit to the devasom 11 fanams annually (deducting from the gross rental, the interest of 2 fanams and 12 visams on 55 fanams amounting to Rs. 13-12-0, being the original kanom amount in lieu of the value of improvements according to the above decree and municipal assessment) along with 1 fanam for lamp-oil, 6 cocoanuts for Ganapati worship and 25 twisted cocoa leaves and assessments, &c., that may be levied in future. As you have been made to deposit in Court Rs. 1,048-8-11, the value of improvements according to the above decree, you will be paid the value of such

REFERENCE UNDER STAMP ACT, s. 46.

improvements and of those that may be effected in future, at the rates then current, at the time of eviction."

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

The parties to the documents were not represented.

JUDGMENT.—In our opinion the instrument is simply a mortgage and must be stamped under article 44 (*a*) of schedule I of the Indian Stamp Act.

The matter came on again for consideration on the 4th November 1898.

The Advocate-General (Hon. *O. A. White*) for the Crown.

The parties to the documents were not represented.

JUDGMENT.—In calculating the consideration, the ascertained amount of compensation for improvements which is expressly named in the instrument and has been paid at the landlord's request by the incoming to the outgoing tenant must be included.

APPELLATE CIVIL.

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

1898. November 11, 23.

CHALAMAYYA (PLAINTIFF), APPELLANT,

v.

VARADAYYA AND OTHERS (DEFENDANTS Nos. 1, 2, 4 to 7), RESPONDENTS.*

Hindu Law—Debt incurred by managing members of a joint family—Personal liability of other members.

Three brothers, being the *managing members* of their joint Hindu family, borrowed money from the plaintiff for a family purpose. The plaintiff now sued the survivor of the brothers and the sons of all three to recover the amount of the debt, and he obtained a decree that the debt was recoverable from the family estate and also personally from the survivor of the three borrowers:

Held, on appeal, that the plaintiff was not entitled to a personal decree against the other defendants.

SECOND APPEAL against the decree of A. Butterworth, Acting District Judge of Godavari, in Appeal Suit No. 246 of 1896, affirming the decree of S. Pereira, District Munsif of Ellore, in Original Suit No. 306 of 1895.

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* Second Appeal No. 2002 of 1897.

CHALAMAYYA v. VARADAYYA.

The plaintiff sued to recover a sum of money lent by him to defendant No. 3 and his two undivided brothers since deceased. The loan was contracted for the purposes of the family trade carried on by the brothers. The plaintiff sought a decree which should bind the family estate and be otherwise enforceable personally against defendant No. 3 and also the other defendants who were his son and nephews.

The District Munsif held that the family property was liable, but that none of the defendants, with the exception of the third, was liable personally for the debt, and he passed a decree accordingly. The District Judge affirmed that decree and the plaintiff preferred this second appeal.

Kuppusami Ayyar for appellant.

Ramachandra Rao Sahib for respondents Nos. 3 to 6.

Respondents Nos. 1 and 2 were not represented.

SUBRAMANIA AYYAR, J.—The plaintiff (appellant) sue for a sum of money borrowed from him by three undivided brothers, two of whom are now dead. The first and the second defendants are the sons of the eldest of the brothers. The third is the surviving brother and the fourth, the fifth and the sixth defendants are his sons and the seventh defendant is the son of the third brother. All but the first, the third, the fourth and the seventh are minors. The District Judge found that the debt (which was contracted originally in 1876 when even the first and the fourth and the seventh defendants were minors) was incurred for a family purpose, and therefore recoverable from the whole of the family estate; but he declined to grant a decree making the defendants other than the third personally liable so as to entitle the plaintiff to proceed against the self-acquired or other separate property, if any, which they possess.

The question for determination is whether the Judge is right in refusing to make such a decree. Upon the facts appearing in this case there can be no question that the Judge is right. No doubt, where it is shown that the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other coparceners are actual *contracting parties* either because they had agreed, before the contract was entered into, to be personally bound thereby, or because they, being in existence at the date of the contract and competent to enter into it, have subsequently duly ratified and adopted it, in that case unquestionably

every such coparcener is absolutely responsible. Equally he would be responsible though he did not assent to the particular contract if there had been such acquiescence on his part in the course of dealings, in which the particular contract was entered, as to warrant his being treated in the matter as a contracting party. When however such is not the case, but the contract is of a character such as, under the law, to entitle the manager to enter into, independently of the consent of the other members of the family, so as to bind them thereby, then it is clear that the scope of the manager's power is restricted to, and does not extend beyond, the family property. As regards the other property in the hands of a coparcener no other coparcener, whether he be the manager or not, has any title whatsoever. The legal individuality of a coparcener is not merged in the manager, so far as the coparcener's self-acquired or other separate property is concerned. Even when, under the Hindu Law according to the smritis, the family was paramount, it did not entirely absorb the legal individuality of the members of whom it consisted. This will be clear if we turn to the rules laid down with regard to sureties. While prohibiting coparceners from entering into transactions with each other or becoming sureties for each other in respect of their undivided property, the law permitted them to enter into contracts with each other in respect of their self acquired property even before partition, thereby indicating that outside the family property the coparceners were in the position of strangers (see Narada quoted in Colebrooke's Jagannadha's Digest, volume I, page 163, Higginbotham's edition). It follows, therefore, that the liability of the other coparceners must be limited to their interest in the joint estate. This conclusion is strengthened by the law laid down in the analogous case of a son's liability to pay his father's personal debts. When notwithstanding the pious duty of a son, so strongly inculcated, to pay his father's debts independently of assets, the son's liability has been restricted to the joint assets, it would be inconsistent to hold that a coparcener's liability which never stood on an equal—much less a higher—footing, should be extended beyond the joint property. As in the one case joint property is the limit of the son's liability, so also in the other it marks the limit of the coparcener's liability.

As under a decree for money lent to a manager alone for a family purpose "the creditor," in the words of the Officiating

Chief Justice in the recent Full Bench case of *Ramasami Nadan* v. *Ulaganatha Goundan*(1), "is seeking to do through the Court "what the manager who has incurred the debt could lawfully do "for himself," it follows that Courts have no authority to seize and sell in execution of such a decree the self-acquired or other separate property of coparceners other than the manager. To hold otherwise would involve the unsustainable admission that a manager can be allowed to bring about indirectly what he cannot do directly.

The authorities to some of which our attention was drawn may now be noticed briefly. In *Ramlal Thakursidas* v. *Lakhmichand Muniram*(2) it was no doubt held that a minor member of a family, interested in ancestral trade carried on on behalf of the family in copartnership with a stranger, is bound by the acts of the manager necessary with reference to carrying on such trade. But nothing more was decided there. The observations in paragraph 3 in page 72 of the report as well as the tenor of other parts of the judgment of Sausse, C.J., show that the rule laid down in the case is treated as an exceptional rule not to be pushed beyond its strict limits. This case was no doubt relied on in *Johurra Bibee* v. *Sreegopal Misser*(3) by Pontifex, J., but only as warranting the proposition "that debts honestly incurred in carrying on such "(family) business must override the rights of all the members of "the joint family in property acquired with funds derived from the "joint business." The same case was cited in *Bemola Dossee* v. *Mohun Dossee*(4) also by Garth, C.J., and Pontifex, J. But it was cited as supporting the conclusion that a manager can, in connection with joint family business, make an equitable pledge of the joint family property. And in *Miller* v. *Runga Nath Moulick*(5), the main proposition which Mitter, J., after reviewing a number of cases including the Bombay decision referred to above, laid down is "an alienation by a managing member of a "joint family cannot be binding upon his adult co-sharers, unless "it is shown that it is made with their consent, either express or "implied." Great stress was laid by the appellant's vakil upon an observation in two of the cases considered above, *i.e.*, *Ram Lal Thakursidas* v. *Lakshmichand Muniram*(2) and *Johurra Bibee* v. *Sreegopal Misser*(3) to the effect that persons carrying on a family

(1) See *ante*, p. 40.
(2) 1 Bom. H.C.R., App., 51.
(3) I.L.R., 1 Calc., 470 at p. 475.
(4) I.L.R., 5 Calc., 782 at p. 806.
(5) I.L.R., 12 Calc., 389 at p. 399.

CHALAMAYYA v. VARADAYYA.

business, in the profits of which all the members of the family would participate, must have authority to pledge the joint family credit. But clearly that refers to the credit of the family in its *quasi* corporate character, not to the credit of each member in his individual and separate capacity. Be this as it may, in all the cases, noticed above, the transaction impeached had reference to joint property only. And no question was raised or considered in any of them as to the liability of the separate property of the coparceners who sought to repudiate their liability in regard to such transactions. *Samalbhai Nathubhai* v. *Someshvar*(1) and *In the matter of Haroon Mahomed*(2) are distinguishable from the present case on the ground that the persons, who were held liable there, were considered to have by their conduct constituted themselves partners, which is not so here. These cases do not decide that every member of a trading family is necessarily liable as a partner. In the former of the two cases Melvill, J., guarded himself with the observation "whether a Hindu, who becomes "entitled by inheritance, to a share in a trading business, is, *ipso* "*facto*, and without his consent, involved in all the liabilities of a "partner, it is not necessary for us to determine," and in the latter case Sargent, C.J., admitted that it was open to the party there held liable to show that he did not become a partner. It is thus evident that none of the abovementioned cases lends support to the appellant's contention. And the decision of Garth, C.J., and Markby and Mitter, JJ., in *Joykisto Cowar* v. *Nittyanund Nundy*(3) is, so far as it goes, a decisive authority against the contention, inasmuch as that decision necessarily implies that as regards minors, whose guardian continues on their behalf an ancestral trade, their liability does not extend to their separate property.

Manu, chapter VIII, section 166, was also much relied on on behalf of the appellant. What, however, was intended to be emphasised by that text is merely that members, who are united at the time a loan for a family purpose is incurred, are not absolved from their liability by the fact that they subsequently became divided. This will be seen from pages 283–4 of volume XXV, Sacred Books of the East, where Dr. Bühler says:—"The meaning

(1) I.L.R., 5 Bom., 38 at p. 40. (2) I.L.R., 14 Bom., 160 at p. 194.
(3) I.L.R., 3 Calc., 738.

CHALAMAYYA v. VARADAYYA.

"(of the text in question) is, as Nand points out, that if a debt "was contracted for the benefit of a united family, it must be "repaid by the members of the family, though they may have "separated afterwards." The term swathaha in the original text which is rendered by the translators "their own property," is no doubt interpreted in that way by all the commentators including Kullaka. But none of them suggests that the term includes property which has vested in the divided members otherwise than by partition. In Dr. Burnell and Hopkins' Ordinances of Manu, the concluding part of the text in question is rendered "out of "their own (property) even if they (have lived with property) "divided," and in a note it is added 'divided' means having a divided property (page 205).

The tenor of the texts on the point in other smritis, *e.g.*, Vishnu (Sacred Books of the East, volume VII, paragraph 39, page 45), Yagnyavalkaya (Mandlik's Hindu Law, paragraph 45, page 205) and Narada (Sacred Books of the East, volume XXXIII, paragraph 13, page 45), is such as to make one hesitate to interpret the term swathaha in the text in question to include property in the hands of a member which did not form part of the joint family property and to take the law laid down by Manu to be in reality different from, and in advance of, that laid down by the later smritis. And considering that in the dharma sutras the law regarding separate acquisitions is seen in its first germs only (Jolly's Hindu Law, page 94) it is highly probable that the writer of the text under consideration had, in using the term swathaha, in contemplation what becomes the divided parcener's own property under a division but not any other property. It must therefore be taken that the appellant's contention is, as already explained, not only opposed to principle but is also unsupported by authority.

The second appeal fails and must be dismissed except to the extent that the decree, which is at variance with the judgment of the Lower Appellate Court, will be brought into conformity with it. The appellant must pay the respondents' costs of this appeal.

BENSON, J.—I concur.

APPELLATE CIVIL.

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

1898. rember 25.

KRISHNAN CHETTI (PLAINTIFF No. 5), APPELLANT,

v.

MUTHU PALANDI VACHA MAKALI TEVAR (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *ss.* 522, 562—"*Preliminary point*"—*Order determining validity of an award—Decree in accordance with an award—Appeal.*

Objection was unsuccessfully taken before a District Munsif to the validity of an award on the ground of the arbitrator being interested, and a decree was passed in accordance with the award. The defendant appealed and the Subordinate Judge held that the objection was well founded and should prevail; and, setting aside the award, he remanded the case for trial. The plaintiff appealed to the High Court:

Held, (1) that the appeal to the High Court was maintainable:

(2) that no appeal lay to the Subordinate Court as to the validity of the award and that the decree of the District Munsif should be restored.

APPEAL against the order of V. Srinivasa Charlu, Subordinate Judge of Madura (West), in Appeal Suit No. 344 of 1897 presented against the decree of N. Sambasiva Ayyar, District Munsif of Sivaganga, in Original Suit No. 394 of 1896.

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

Hon. *Bhashyam Ayyangar*, *V. Krishnasami Ayyar*, *Ranga Ramanujachariar* and *Subbayya Mudaliar* for appellant.

Desikachariar and *Sundara Ayyar* for respondent.

JUDGMENT.—In this case the matter in dispute was referred to an arbitrator who gave an award. Objection to the award was taken before the District Munsif on the ground that the arbitrator was interested in the matter referred for his decision. The District Munsif decided that he had no such interest as disqualified him from being an arbitrator. On appeal to the Subordinate Judge the latter decided that the arbitrator had such an interest, and

* Appeal against Order No. 50 of 1898.

setting aside the award, remanded the suit to the District Munsif for trial by him on the merits. Against this order of remand the appellant now appeals.

The respondent urges, as a preliminary objection, that no appeal lies to this Court, inasmuch as the District Munsif did not dispose of the case on a preliminary point, but in accordance with an award which was before him, and that, therefore, the remand order was not made under section 562, Civil Procedure Code.

We do not think that this objection is valid. "Preliminary point" in section 562 means a matter preliminary to the general determination of the suit which the parties bring before the Court for decision. In this case the preliminary point which the District Munsif had to decide was whether there was a valid award which decided the matter in dispute. He found that there was such award and that he could not, therefore, go into the merits of the dispute. That finding by the District Munsif was a decision on a preliminary point within the meaning of section 562 (*Ramachandra Joishi* v. *Hazi Kassim*(1), and if the Court of appeal had jurisdiction to entertain an appeal on the matter and found that the decision on the point was wrong, it was open to it to remand the suit for determination on the merits, and this it did. The preliminary objection, therefore, fails.

As to the appeal, the appellant urges that the Lower Appellate Court had no jurisdiction to entertain the appeal, the last clause of section 522, Civil Procedure Code, forbidding any appeal, except in so far as the decree is in excess of, or is not in accordance with, the award.

It is urged that this objection was not taken in the Lower Appellate Court, but as it is an objection to the jurisdiction of the Court the appellant is not precluded from now for the first time urging it (*Minakshi* v. *Subramanya*(2)). The objection itself is, we think, well founded. The recent case of *Kombi Achen* v. *Pangi Achen*(3) is exactly on all fours with the present case and expressly decides the point in favour of the appellant. We are bound by that decision unless it is in conflict with other decisions of this Court. It is urged that it is in conflict with the decision in *Venkayya* v. *Venkatappayya*(4), but we do not think that it is.

(1) I.L.R., 16 Mad., 207.
(2) I.L.R., 11 Mad., 26.
(3) I.L.R., 21 Mad., 405.
(4) I.L.R., 15 Mad., 348.

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The point now before us was not decided, or even discussed, in that case, and we cannot take it as an authority in conflict with the decision in *Kombi Achen* v. *Pangi Achen*(1). Nor is this latter decision in any way opposed to the grounds of the decision of the Full Bench in *Husananna* v. *Linganna*(2). The question there was whether an appeal lay against a decree based on an award, when the objection was that there was no submission to arbitration, or when the genuineness of the award was denied. The Court held that in such a case an appeal would lie, because such an objection went to the very root of the jurisdiction of the Court to proceed under sections 525 and 526 of the Court. The Court, however, in that case held that an objection like the present, which is based on one of the matters enumerated in sections 520 and 521, Civil Procedure Code, would not form the basis of an appeal, and that the last clause of section 522 was expressly intended to exclude such grounds of appeal. After reviewing the authorities, Mr. Justice Subramania Ayyar puts the matter clearly, in these words:—

"The principle on which these cases proceed seems to be that "the finality contemplated by section 522 is confined to a determina- "tion by the Court of certain specific matters, such as are enumer- "ated in sections 520 and 521, which do not include denial of "submission or the genuineness of the award or other like circum- "stances. That there is an undoubted distinction between an "adjudication on these latter questions and an adjudication upon the "other matters referred to above cannot be denied. The distinc- "tion is that, whereas a decision as to the truth of the submission "or the genuineness of the award is a determination which goes to "the very root of the jurisdiction of the Court to proceed under "sections 525 and 526, the orders of the Court passed under sections "520 and 521 are merely more or less ancillary to the enforcement "of an award given under a reference made through the interven- "tion of a Court about the *factum* of which reference or award there "can generally be little ground for dispute. This distinction was "lost sight of in *Micharaya Guruvu* v. *Sadasiva Parama Guruvu*(3), "which was, in my opinion, consequently wrongly decided."

No doubt the Calcutta case to which the Subordinate Judge refers is in conflict with the decision in *Kombi Achen* v. *Pangi*

(1) I.L.R., 21 Mad., 405. (2) I.L.R., 18 Mad., 422. (3) I.L.R., 4 Mad., 319.

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Achen(1), but it should not be followed in this Presidency when there is a direct authority of this Court in support of the contrary view. Following the decision in *Kombi Achen* v. *Pangi Achen*(1), we must hold that no appeal lay to the Subordinate Judge as regards the validity of the award.

The respondent, however, took a minor objection to the District Munsif's decree on the ground that it was in excess of the award and that to correct it the words "the said amount of Rs. 136-4-4 and" should be struck out. The Subordinate Judge did not deal with this objection, but the appellant before us agrees that the decree should be corrected accordingly. The result is that we set aside the order of the Subordinate Judge and we modify the decree of the District Munsif by striking these words out.

The appellant must have his costs in this Court. Each party will bear his own costs in the Lower Appellate Court.

APPELLATE CIVIL.

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

BANGARU AMMAL (PLAINTIFF), APPELLANT,

v.

VIJAYAMACHI REDDIAR (DEFENDANT), RESPONDENT.*

1898. November 28. 1899. January 5.

Hindu law—Widow's second suit for maintenance—Enhancement of rate of maintenance—Res judicata.

A Hindu widow in 1867 obtained a decree for maintenance against her husband's coparceners, but the decree created no charge on the land. The family estate having passed to a collateral relative the widow now sued him for maintenance at an increased rate with arrears, and asked for a charge on the estate alleging that prices had risen and that in other respects also circumstances had changed:

Held, that the decree in the suit of 1867 was not a bar to the present suit.

APPEAL against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Original Suit No. 36 of 1895.

(1) I.L.R., 21 Mad., 405.

* Appeal No. 106 of 1898.

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The plaintiff's husband died without issue leaving him surviving his father and one brother. In 1867 the plaintiff brought a suit against them for maintenance and obtained a decree (which created no charge on the estate) for maintenance at the rate of Rs. 39 per annum. The father died next and then the brother died leaving a widow and no issue. On the death of the widow the estate, worth Rs. 25,000, passed to the present defendant as reversionary heir.

The plaintiff, alleging that the rate of maintenance was insufficient and stating that, at the time of the previous suit, she had failed to adduce evidence in respect of the status and property of the family, now sued for maintenance at the rate of Rs. 188 per annum with three years arrears, and she asked that the maintenance should be charged on the estate.

The defendant pleaded, *inter alia*, that the suit was barred by the previous suit.

The District Judge upheld this plea and dismissed the suit, and the plaintiff preferred this appeal.

Mr. *J. G. Smith* for appellant.

Hon. *Sankaran Nayar* for respondent.

JUDGMENT.—In this case the plaintiff (appellant) is a Hindu widow. In Original Suit No. 93 of 1867 she obtained a decree against her father-in-law and brother-in-law for maintenance at the rate of Rs. 3 per mensem and Rs. 3 per annum for a cloth. The decree in that suit has not been filed, but the parties are agreed that it may be taken to have been a personal decree only against the then defendants, and that the maintenance was not charged on the family property.

Both the then defendants have since died and the property has passed to the present defendant as reversioner.

The plaintiff brought the present suit for an increased rate of maintenance, alleging that prices have risen and that in other respects also circumstances have changed. She also claimed arrears at the increased rate and asked to have her maintenance charged on the property. The District Judge dismissed the suit on the ground that there was no authority for such a suit and that it was barred by the decree in Original Suit No. 93 of 1867. The plaintiff therefore appeals. We think that the view of the District Judge is erroneous.

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In the case of *Ruka Bai* v. *Ganda Bai*(1), the Allahabad High Court held that a diminution of the estate of the person who was liable to pay the maintenance was a sufficient cause for an action to reduce the maintenance formerly decreed, the Court very properly observing that "it would be unreasonable to hold that "even if the income of the estate should come to an end altogether, "that allowance should still continue." The same view was taken by this Court in the case of *Venkanna* v. *Aitamma*(2), where this court observed :—"It is true that the decree in a maintenance suit "is not final in the sense, that the rate fixed can never be altered. "If there is a change in the circumstances of the family and the "persons obliged by the decree, it may be that they are entitled to "have the rate of maintenance reduced." We do not doubt that these cases enunciate a correct principle, and if altered circumstances may justify a suit for reduction of maintenance they may equally justify a suit for its increase. Indeed there is direct authority for this proposition in the case of *Sreeram Buttacharjee* v. *Puddomookhee Debia*(3), where the Court held that "there is "nothing in the law to prevent an increase of the amount as there "is nothing to prevent a decrease, should sufficient cause be shown." The same view was assumed to be correct by the Bombay High Court in the case of *Sidlingapa* v. *Sidava*(4), where Sir M. R. Westropp, C.J., while declaring that suits brought on continuing decrees for maintenance merely for the purpose of enforcing such decrees, were "not only unnecessary but unsustainable," yet observed that either party might by suit or otherwise bring to the notice of the Court that circumstances rendered it equitable that the rate should be enhanced or reduced, and he enumerated some of the circumstances that would justify such a suit.

We think, then, that such a suit as the present may be justified both on principle and authority. No doubt the Courts would require clear proof of materially altered circumstances and would not allow the rule which prohibits the re-agitation of *res judicata* to be disregarded by a mere allegation of altered circumstances, but where the maintenance is fixed in money and is very small as in this case, compared with the property from which it is to be paid, and where, as in this case also, the interval between the two

(1) I.L.R., 1 All., 594.
(2) I.L.R., 12 Mad., 183.
(3) 9 W.R., (C.R.), 152.
(4) I.L.R., 2 Bom., 624 at p. 630.

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suits is great, it may well be that the circumstances have altered sufficiently to justify a change in the rate.

In this connection we would point out that it is not necessary, as the District Judge seems to think, that the plaint should allege that the income has increased in order to justify an increase of rate. It is only one of many elements to be considered, (Mayne's Hindu Law, section 417, 5th edition). A material increase in the cost of living which renders the money allowance insufficient to give the widow the means of maintenance suitable to her degree and the circumstances of the family may well be sufficient to justify an increase of the money allowance.

We must hold then, that the District Judge was wrong in his view that the decree in the former suit is a necessary bar to the present suit, so far as it is a suit for an increased rate of maintenance. If it is found on trial that circumstances have altered so as to justify this suit, then there is no legal obligation to making the maintenance a charge on the property inherited by the defendant as reversioner. If, however, the fresh suit is not justified by altered circumstances, the plaintiff can only recover maintenance from the defendant by executing the decree in Original Suit No. 93 of 1867 against the defendant as the legal representative of the defendants in the suit to the extent of the assets which he has inherited, (*Karpakambal* v. *Subbayyan*(1)), but it cannot be charged on the property by a fresh suit, (*Rangamma* v. *Vohalayya*(2)). With these remarks we set aside the decree of the District Judge and remand the suit for disposal in accordance with law.

Appellant must have her costs in this appeal. Costs in the Lower Court already incurred will be provided for in the fresh decree.

(1) I.L.R., 5 Mad., 234.

(2) I.L.R., 11 Mad., 127.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

SAMBASIVA CHARI (PLAINTIFF), APPELLANT,

v.

RAMASAMI REDDI (DEFENDANT), RESPONDENT.*

1896. September 27.

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 15, 18, 51—Summary suit to set aside distraint—"Within thirty days"—Sunday—General Clauses Act—Act X of 1897, s. 10 (1)—General Clauses Act (Madras)—Act I of 1891, s. 11.

Suits to set aside a distraint under section 15 of the Rent Recovery Act (Madras), 1865, were filed on the thirty-first day after the distraint complained of, the thirtieth day being a Sunday, and the Court closed. On objection being taken that the suits were barred under sections 18 and 51 of the Act:

Held, (1) that the suits were filed in time;

(2) that the provisions of the Limitation Act do not extend the period of thirty days limited by sections 18 and 51 of the Rent Recovery Act (Madras), 1865, for bringing a summary suit to set aside a distraint; neither does section 10 of the General Clauses Act, nor section 11 of the General Clauses Act (Madras), inasmuch as the latter Acts are not retrospective; and

(3) that there is a generally recognised principle of law under which parties who are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the Court itself, are entitled to do it at the first subsequent opportunity.

SECOND APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in Appeal Suit No. 241 of 1896, reversing the decision of E. L. R. Thornton, Acting Head Assistant Collector of North Arcot, in Summary Suit No. 194 of 1895.

Suits to set aside a distraint under section 15 of the Rent Recovery Act (Madras), 1865, on the ground that no proper patta had been tendered by defendant. Defendant set up, among other defences, that the suits were barred by limitation. The suits were in fact filed on the thirty-first day after the distraint, the reason being that the thirtieth day was a Sunday, when the Court was closed in accordance with the Rules of the Court. In the Acting Head Assistant Collector's Court the objection was overruled and the suits admitted, the distrained property being ordered to be released. Defendant appealed on the ground, among others, that the lower court "erred in finding that the plaintiff's suit was not "barred by limitation,—the suit not having been filed within the "thirty days allowed by the Rent Recovery Act, and there being

* Second Appeals Nos. 1399 to 1403 of 1897.

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"no provision in the General Clauses Act for excluding holidays "from the period of limitation." The District Judge, holding that the suit was barred, delivered the following judgment :—

"These were suits under section 18 of Act VIII of 1865 to set "aside a distraint. It was urged, among other things, that they "were barred because the suits were filed on the thirty-first day "after the distraint (the thirtieth being Sunday).

"The Head Assistant Collector found that the suits were not "barred because of section 7 of the General Clauses Act. But "the General Clauses Act (Act I of 1887) was passed in January "1887 and by section 2 only applies to acts made by the Governor-"General in Council and after the passing of that Act. Act VIII "of 1865 is not an Act made by the Governor-General in Council "nor is it subsequent to 1887.

"The first Madras Act (Act I of 1867) is also not retro-"spective ('in any future Act' section 1), and contains no pro-"vision corresponding to section 7 of Act I of 1887. Act I of "1891 is not retrospective (sections 1 (*b*) and 4).

"The Rent Recovery Act being an Act dealing exhaustively "with a branch of legislation, the Limitation Act cannot be held "to be applicable to it.

"I am of opinion that as the suits were not filed 'within thirty "'days of the distraint' they were barred by sections 18 and 51 "of Act VIII of 1865."

The plaintiff preferred this second appeal on the ground that the District Judge was in error in holding that the appeal was barred by the law of limitation, in view of the fact that the last day for filing the appeal was a holiday, and the appeal was filed the next day.

Krishnamachariar for appellant.—This suit under the Rent Recovery Act (Madras), 1865, was brought on the thirty-first day after the cause of action arose, the thirtieth day being a Sunday. The Head Assistant Collector admitted the case ; but the District Judge threw it out as barred under sections 18 and 51 of the Act referred to. Inasmuch as the Court was not open to receive the plaint on the Sunday, the thirtieth day, plaintiff was entitled to file it the day following. The effect of the Court's refusal is to give twenty-nine days only. The Court has no power to curtail the period allowed by statute. [DAVIES, J.—If a bill falls due on Sunday, it has to be paid the day before.] Yes, because there is a special provision to that effect in the Negotiable Instruments Act. [DAVIES, J.—The Limitation Act will not help you. Act VIII of 1865 prescribes a definite period, and is an Act complete in itself. The General Clauses Act I of 1887, section 7 (2) does not apply, because it is not retrospective.] I rely on general principles. If the delay is caused, not through any act of the party, but by some act of the Court itself, such as the closing of the Court I am entitled to file the plaint on the first open day (*Shooshee Bhusan Rudro* v. *Gobind Chunder Roy*(1)). That was a very similar case under the Bengal Tenancy Act. I also rely on *Peary Mohun Aich* v. *Anunda Charan Biswas*(2), and *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar*(3).

Desikachariar for respondent.—If appellant is entitled to exemption of the thirtieth day because it is a Sunday, then he is entitled to deduct all the four Sundays within the thirty days. The matter is already concluded by authority, (*Veeramma* v. *Abbiah*(4)). *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*(5) was a case in point under the Rent Recovery Act. [BENSON, J.—In that case appellant claimed deduction of time required for obtaining copies of the judgment of the Head Assistant Collector; it was held that it was not necessary to file the judgment with the appeal.] *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi*(6) is strongly in my favour. Time expired on a day when the Court was closed, and a suit was filed on the day it opened, but it was held to be barred. The Registration Act is an Act complete in itself and so is Act VIII of 1865 (Madras). [DAVIES, J.—We have no control over Registration officers, but we have over officers adjudicating in rent recovery suits. According to High Court rules of 1887, Sunday is a *dies non*, and no judicial act can be done on that day and the Sheristadar could not have received the plaint.]

JUDGMENT.—We are clearly of opinion that the provisions of the Limitation Act do not apply to extend the time of thirty days limited by sections 18 and 51 of Act VIII of 1865 for bringing a summary suit to set aside a distraint. The cases (*Veeramma* v. *Abbiah*(4), *Appa Rau Sanayi Aswa Rau* v. *Krishnamurthi* (6) and

(1) I.L.R., 18 Calc., 231.
(2) I.L.R., 18 Calc., 631 at p. 634.
(3) I.L.R., 22 Calc., 176.
(4) I.L.R., 18 Mad., 99.
(5) I.L.R., 20 Mad., 476.
(6) I.L.R., 20 Mad., 249.

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Kumara Akkappa Nayanim Bahadur v. *Sithala Naidu*(1)) place the matter beyond all doubt. Nor is section 10 of the General Clauses Act nor section 11 of the Madras General Clauses Act applicable inasmuch as they do not refer back to Acts of the year 1865. But there is a general principle of law which has been recognised in two recent cases by the High Court of Calcutta (*Shooshee Bhusan Rudro* v. *Gobind Chunder Roy*(2) and *Peary Mohun Aich* v. *Anunda Charan Biswas*(3) that "where parties are prevented from "doing a thing in Court on a particular day not by any act of "their own, but by the act of the Court itself they are entitled to "do it at the first subsequent opportunity," (*Peary Mohun Aich* v. *Anunda Charan Biswas*(3)). We see no reason why this principle should not be followed in cases like the present when it has been adopted as a rule of law in cases to which the Limitation Act and General Clauses Act apply. We, therefore, rule that the plaint in this case, which was filed on the thirty-first day after the distraint, was filed in time, the thirtieth day being a Sunday on which the Court was closed in accordance with the Rules of this Court. The decree of the Lower Appellate Court is accordingly reversed, and the appeal remanded for disposal on the merits. The plaintiff's costs in this Court will be paid by the defendant and the costs incurred in the Lower Courts will abide and follow the result of the further trial ordered.

APPELLATE CIVIL.

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

1898. April 22. May 14.

SANKARAN NAMBIAR (PETITIONER), APPELLANT,

v.

KANARA KURUP (COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *ss.* 244, 258—*Execution of decrees—Money decree—Limitation Act—Act XV of* 1877, *sched. II, art.* 173A.

Section 258, Civil Procedure Code, refers only to the execution of decrees under which money is payable, and is not applicable to decrees for possession of immoveable property.

(1) I.L.R., 20 Mad., 476.
(2) I.L.R., 18 Calc., 231.
(3) I.L.R., 18 Calc., 631 at p. 634.

* Appeal against Appellate Order No. 98 of 1897.

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APPEAL against the order of A. Thompson, District Judge of North Malabar, in Civil Miscellaneous Appeal No. 21 of 1897, affirming the decree of V. Kelu Eradi, District Munsif of Tellicherry, in Miscellaneous Petition No. 1189 of 1896, in the matter of Original Suit No. 168 of 1893.

A decree was obtained for the surrender of land by the plaintiff in Original Suit No. 168 of 1893. On 3rd September 1896, defendant No. 2 in the suit presented an application under section 244 of the Civil Procedure Code (Miscellaneous Petition No. 1189 of 1896), asking the Court to pass an order that the lands ordered to be surrendered under the decree were surrendered by defendant to plaintiff in March 1894. The District Munsif found on the evidence that the petitioner had surrendered the lands to the decree-holder and duly recorded that finding. The decree-holder appealed and the District Judge, observing that the application was made under section 258 of the Civil Procedure Code, held, following *Baba Mohamed* v. *Webb*(1), that section 258 applies to the adjustment of any decree, and not merely of a money decree, and that by the Limitation Act, schedule II, article 173A, the application should, in consequence, have been made within ninety days. He therefore set aside the order and dismissed the petition.

The petitioner preferred this appeal.

Mr. *C. Krishnan* for appellant.

Ryru Nambiar for respondent.

JUDGMENT.—The plaintiff obtained a decree for the surrender of land in Original Suit No. 168 of 1893.

On the 3rd September 1896 the second defendant, alleging that defendants had surrendered the land to plaintiff in March 1894, asked the District Munsif to record an order stating that the decree-holder had obtained possession of the land.

The District Munsif after enquiry recorded a finding that the lands had been surrendered. The District Judge on appeal observed that the application was one made under section 258, Code of Civil Procedure, and that under article 173A of schedule II of the Limitation Act such an application must be made within ninety days of the delivery of possession. He, therefore, dismissed the application as barred by limitation.

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(1) I.L.R., 6 Calc., 766.

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The second defendant appeals on the ground that section 258 applies only to cases in which the decree is for money, not for land as in the present case; and the questions for decision are whether section 258, Code of Civil Procedure, refers only to decrees for money, or is applicable also to decrees for possession of immoveable property, and if the former, whether the District Munsif had any power in execution to hold the enquiry and make the order which he did on the second defendant's petition.

It seems to us that the language of section 258 and its position in the Code indicate that it refers only to the execution of decrees for money. Under the general heading "of the mode of executing "decrees" the Code deals separately with the various kinds of decrees that have to be executed. It begins with decrees for money and deals with them in sections 254 to 258. It then deals (section 259) with decrees for specific moveables and recovery of wives, then (section 260) with decrees for specific performance and restitution of conjugal rights, then (sections 261–2) with decrees for execution of conveyances and endorsement of negotiable instruments, and lastly (sections 263–5) with decrees for immoveable property.

Section 257 enacts that "All money payable under a decree shall "be paid as follows, namely :—

"(*a*) into the Court whose duty it is to execute the decree; or

"(*b*) out of Court to the decree-holder; or

"(*c*) otherwise as the Court which made the decree directs."

Then section 257A lays down that an agreement to give time for the satisfaction of a judgment-debt shall be void, unless made for consideration, &c.

Then follows section 258 which runs thus :—

"If any money payable under a decree is paid out of Court, "or the decree is otherwise adjusted in whole or in part to the "satisfaction of the decree-holder, or if any payment is made in "pursuance of an agreement of the nature mentioned in section "257A, the decree-holder shall certify such payment or adjustment "to the Court whose duty it is to execute the decree.

"The judgment-debtor also may inform the Court of such pay-"ment or adjustment, and apply to the Court to issue a notice to the "decree-holder to show cause, on a day to be fixed by the Court, "why such payment or adjustment should not be recorded as certi-"fied; and if, after due service of such notice, the decree-holder

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"fails to appear on the day fixed, or, having appeared, fails to show "cause why the payment or adjustment shall not be recorded as "certified, the Court shall record the same accordingly.

"Unless such a payment or adjustment has been certified as "aforesaid it shall not be recognized as a payment or adjustment "of the decree by any Court executing the decree."

The opening words of the section, "If any money payable "under a decree is paid out of Court," evidently refer back to section 257, clause (*b*); and the next words of section 258 "or the decree "is otherwise adjusted in whole or in part" &c., *refer back to the* other clauses of section 257 and to 257A. But sections 257 and 257A deal only with the decrees for money. Moreover in the second line of section 258 the words "the decree" clearly refer to the decree mentioned in the preceding line which is a decree under which money is payable.

Thus the language of the section appears to us to be applicable only to decrees under which money is payable and the position of the section in the Code supports the same view.

The District Judge held that section 258 was applicable to the present application and relied on *Baba Mohamed* v. *Webb*(1), but the decision in that case was based on the words of section 258 of Act X of 1877 which the learned Judges considered to correspond in all material respects with and to convey the same meaning as section 206 of the prior Civil Procedure Code (Act VIII of 1859) which, in their opinion, manifestly dealt with the adjustment of any decree.

No doubt the words in section 206 of Act VIII of 1859 are very wide. They are "no adjustment of a decree in part or in whole "shall be recognised by the Court unless," &c.

In the Act of 1877 however the chapter on the execution of decrees was greatly expanded and in some respects altered, and the language of section 258 was again altered when the present Code was passed; and we do not think that any decision as to the meaning of section 206 of the Code of 1859 can give much guidance in construing the very different words of section 258 of the present Code.

It is suggested that section 258 must apply to cases like the present, since there is no other section of the Code which lays down

(1) I.L.R., 6 Calc., 736.

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any corresponding procedure for certifying the satisfaction of decrees for immoveable property, specific moveables, and so forth. We do not think that this argument is conclusive. Immoveable property is so different in its nature from money, and the difficulty of tracing, and of proving or disproving an alleged payment of money is so much greater than the difficulty of proving an alleged delivery of immoveable property, that the Legislature may well have made a special provision in the case of money which was *thought* unnecessary in the case of immoveable property. If it was intended that section 258 should apply to decrees of all kinds, we should certainly have expected its language to be general instead of being so strictly limited as it is. We think, then, that section 258 was inapplicable to the present case, and therefore the limitation of ninety days prescribed in article 173A of the Limitation Act in regard to that section had no application.

It is, however, admitted that if section 258 is inapplicable, there is no other section which expressly authorizes the Court to deal with such an application as that made by the defendant in this case. We do not, however, think that the absence of express authority in the Code is any proof that the District Munsif had no jurisdiction to deal with the application. The Code does not contain an exhaustive statement of every act which may be done by the Courts. No doubt where the Code provides a specified procedure in any matter the Courts are bound to follow the Code, but in matters not dealt with by special provisions of the Code the Court may act under the general provisions of the Code. Under section 244 the Court has a general authority to make orders determining any questions which arise between the parties to the suit and relating to the satisfaction of the decree. We think that the District Munsif had authority under that section to deal with the question raised by the defendant.

We must therefore set aside the order of the District Judge with costs in this and in the Lower Appellate Court, and remand the appeal to the District Judge for decision on the merits.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Benson.

VENKATA CHANDRASEKHARA RAZ AND OTHERS (DEFENDANTS NOS. 2 TO 4), APPELLANTS,

v.

ALAKARAJAMBA MAHARANI AND OTHERS (PLAINTIFF AND HER LEGAL REPRESENTATIVES), RESPONDENTS.*

1898. October 4.

Minors—Guardian ad litem—Civil Procedure Code—Act XIV of 1882, s. 582—Appeal by a person other than guardian.

Two defendants in a suit, being minors, were represented by a properly appointed guardian *ad litem*. Upon a decree being passed in favour of the plaintiff, an appeal was filed on behalf of the minors, by their mother, without any order obtained by her constituting her guardian, and without any previous removal of the properly appointed guardian *ad litem*:

Held, (1) that the appeal could not be heard; and

(2) that the appointment of guardian in a Court of first instance enures not only for the term of the proceeding in that Court, but also for purposes of appeal.

APPEAL against the decree of E. C. Rawson, District Judge of Vizagapatam, in Original Suit No. 34 of 1894.

In a suit to recover certain villages with mesne profits, two of the defendants, being minors, were represented by the sheristadar, who was appointed guardian *ad litem*. The District Judge having passed a decree in favour of the plaintiff, this appeal was now filed on behalf of the minors by their mother without any order obtained by her constituting her guardian, and without any previous removal of the former guardian.

Sankaran Nayar and *Tiruvenkatachariar* for appellants.

Mr. *J. G. Smith*, Hon. *Bhashyam Ayyangar* and *Rangachariar* for respondents.

JUDGMENT.—In this case the two minor defendants were represented in the Court below by the sheristadar who was appointed guardian *ad litem*. A decree was passed against them and the present appeal is now filed on their behalf by their mother without any order obtained by her constituting her guardian and without

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* Appeal No. 239 of 1897.

any previous removal of the former guardian. It is objected on behalf of the respondent that the appeal cannot be heard inasmuch as it is not presented by the properly constituted guardian of the defendants. In support of the appeal it is contended that a minor defendant when he appeals is in the position of a plaintiff and no longer in that of a defendant and that accordingly no order appointing a guardian is required for the purpose of an appeal. The language of the Code does not support this view. Chapter XXXI of the Code of Civil Procedure, which is the chapter relating to the appointment of guardian *ad litem* and next friend, is not one of the chapters mentioned in section 582 of the Code, and the omission is a strong argument against the view that defendant and plaintiff when appearing in an appeal are to be taken to mean appellant and respondent. To justify the procedure adopted the appellants are bound to contend that the appointment of guardian in the Court of first instance comes to an end when the decree is passed by that Court or at any rate does not continue for the purpose of an appeal. The case cited (*Jwala Dei* v. *Pirbhu*(1)) is an authority against that view and the inconveniences and absurdities attending it are manifest. Conceivably the guardian *ad litem* properly appointed might be applying for execution of the decree whilst another self-constituted guardian, calling himself next friend, was appealing against some part of the decree. If the guardian *ad litem* continues as such through the subsequent stages of the litigation the absence of any special provision regarding minors in connection with appeals is explained. In the case of a minor plaintiff succeeding in the first Court, but having his suit dismissed in the Court of appeal, there can be no doubt that the next friend would be personally liable for the costs and this can be so only on the supposition that he retains the position of next friend. It must be the same in the case of a defendant's guardian *ad litem*.

We are asked to adjourn the case in order to allow an application to be made to discharge the old guardian and appoint a new one. But any such adjournment would be useless unless the appellants were in a position to explain and justify the mistake which has been made. In the absence of any explanation the inference which we are disposed to draw is that the guardian

(1) I.L.R., 14 All., 35.

ad litem did not think it advisable in the interests of the minor to carry on the litigation any further. We must therefore dismiss the appeal as regards the minor defendants.

[The remainder of the judgment dealt with the appeal in relation to the fourth defendant only.]

The appellant, that is to say, the minors, must therefore pay the respondents' costs of this appeal.

APPELLATE CIVIL.

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

SRI SADAGOPA RAMANUJA PEDDA JIYANGARLU (DEFENDANT), APPELLANT,

1898. April 19. May 4.

v.

SRI MAHANT RAMA KISORE DOSSJEE (PLAINTIFF), RESPONDENT.*

Injunction—Specific Relief Act—Act I of 1877, ss. 42, 54—Property in word—Use of word to which special meaning has become attached—Dharmakarta.

The vicharanakarta of a number of temples held a sanad from Government in which two of such temples were named and the others included in the word "vagaira,"—(meaning literally "et cetera," or "and others"). The dharmakarta of the said two temples and of three minor ones only, having limited rights and duties, and being in many respects subordinate to the vicharanakarta, had, in pursuance of immemorial custom, used a seal in connection with his office, which had never borne more than a single figure, without legend. He had now made and used in the conduct of temple affairs a new seal, bearing the same figure, but with the legend "Tirumalai, Tirupati vagaira devastanam dharmakarta" added to it. On the vicharanakarta suing for a declaration and for a perpetual injunction to restrain the use of a seal containing such words:

Held, that although the legend might in a sense be accurate in representing what the defendant actually was, and the vicharanakarta had no property in the word "vagaira," yet the defendant should be restrained from using it upon the seal, since, from the manner in which that word had been used in the sanad of plaintiff's appointment to cover the thirty minor temples connected with the two main temples, a special meaning had become attached thereto when used in connection with the two principal temples; and since the object of the dharmakarta in using it was to assert an extension of his rights and to claim a position co-extensive with that of the vicharanakarta, which, in fact, he did not possess.

* Second Appeals Nos. 416 and 742 of 1897.

SRI SADAGOPA RAMANUJA PEDDA JIYANGARLU v. SRI MAHANT RAMA KISORE DOSSJEE.

SECOND APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in Appeal Suit No. 66 of 1896, affirming the decree of V. Subramanyam, District Munsif of Tirupati, in Original Suit No. 485 of 1894.

Plaintiff held a sanad commencing in the following terms: "You "have been appointed vicharanakarta for the purpose of managing "the affairs of Tirumalai . . . . Tirupati . . . . vagaira "devastanams as per Minutes of Consultation of Governor, dated "21st April 1843 . . . ." The temples so entrusted were some thirty in number. Defendant was the dharmakarta of the Tirumalai and Tirupati temples and of three minor temples attached thereto; and by virtue of such office and in order to indicate his status used, in pursuance of immemorial custom, a seal, with the figure of Hanuman and no more, engraved upon it. In July 1891 this seal had been replaced by a new one, upon which was engraved not only the figure of Hanuman, but also the words "Tirumalai, "Tirupati vagaira devastanam dharmakarta." Plaintiff claimed that defendant was not a trustee of the said temples within the meaning of Act XX of 1863 and that to engrave a title as dharmakarta on the seal was therefore prejudicial to plaintiff's rights as trustee or vicharanakarta; and that the new seal had been fraudulently prepared with a view to exaggerate defendant's new and assumed titles, and to prejudice plaintiff's title: and he prayed for a declaration that defendant was not entitled to the status of "Tirumalai, Tirupati vagaira devastanam dharmakarta" or to use a seal with an inscription to that effect; and for a perpetual injunction restraining defendant from using the new seal in his capacity as a servant of Tirumalai and Tirupati temples. Defendant claimed the right to change the seal, and to use one bearing the words complained of. The District Munsif declared that the defendant was not dharmakarta of any other devastanams under the management of the plaintiff than the Tirumalai, Tirupati and three minor temples, and that "plaintiff being generally known "by the title of 'vicharanakarta of Tirumalai vagaira devastanams,' "whereas defendant is styled only 'Tirumalai, Tirupati devastanam "'dharmakarta,' the insertion of the word "et cetera" in the "engraving of defendant's title on his seal recently is prejudicial to "plaintiff's right and is evidently intended to invade or threaten "to invade plaintiff's powers over the temples, and to exaggerate "defendant's rights," and he directed "that the defendant do drop

SRI SADAGOPA RAMANUJA PEDDA JIYANGARLU v. SRI MAHANT RAMA KISORE DOSSJEE.

"the said word in the said engraving on his seal and be restrained "perpetually from inserting it again" thereon. But he further decided that plaintiff had no right to restrain defendant from having his usual title, omitting the word "vagaira" engraved on his seal. He cited *Karyan* v. *Doddali*(1), where it was said:—"The "obvious effect of the defendants' acts was to make evidence to "support a right in the defendants adverse to the plaintiff's title, "which would be seriously prejudicial to the plaintiff's recovery of "the property if the defendants at any time got possession of it, or "chose to set up a false case of possession," and it was held "that "the plaintiff was clearly entitled to bring the suit" for a declaration of title. He also referred to *Kali Kishen Tagore* v. *Golam Ali*(2), and to the Specific Relief Act, section 42.

The District Judge, on appeal, found that the conduct of defendant showed that he intended to claim plaintiff's office and to indicate his claim by the addition of the word "vagaira" (or "et cetera,") and inasmuch as he was found not to be entitled to the same offices as plaintiff, he might well be restrained from using on his seal the very same title as the plaintiff used to indicate the offices which he held; and that the declaration and injunction were proper remedies to grant.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Hon. *Bhashyam Ayyangar*, *Sadagopachariar* and *Gopalasami Ayyangar* for respondent.

JUDGMENT.—The plaintiff is the vicharanakarta of the Tirumalai and Tirupati temples and of some thirty other temples connected therewith, and he holds a sanad from Government in which the two former temples are named and the thirty other temples are included in the word "vagaira," which literally means "et cetera" or "and others." The defendant is the dharmakarta of the Tirumalai and Tirupati temples and of three minor temples attached to them. His rights and duties as such dharmakarta are not so wide as those which often appertain to the office of dharmakarta in other temples, and which appertain to the defendant himself as dharmakarta of the temple of Tinnanore. His rights and duties are of a limited character, and he is, in many respects, subordinate to the plaintiff, but by immemorial practice he

(1) 6 M.H.C.R., 307 at p. 309. (2) I.L.R., 13 Calc., 8.

SRI SADAGOPA RAMANUJA PEDDA JIYANGARLU v. SRI MAHANT RAMA KISORE DOSSJEE.

has the title of dharmakarta of the Tirumalai and Tirupati devastanams. By immemorial custom he has also the right, as dharmakarta, to use a seal in making remittances and doing certain other acts as dharmakarta of those temples. The seal has from time immemorial been one with a figure of the monkey god (Hanuman) on it, but without any legend or other figures. In 1891 the defendant alleged that this seal was lost, and he then made and used, in the conduct of temple affairs, another seal with the figure of Hanuman, and with the legend "Tirumalai, Tirupati vagaira devastanam dharmakarta" also on it. The plaintiff objected to this change and the Courts below found that it was prejudicial to the interests of the plaintiff and was intended to invade and threaten the plaintiff's rights and authority in the temples of which he was vicharanakarta, and to exaggerate the defendant's rights. They, therefore, gave the plaintiff a declaration that the defendant was not dharmakarta of any of the devastanams of which plaintiff was vicharanakarta, save the five temples above stated, and that defendant should erase the word "vagaira" from the new seal, but might use the legend "Tirumalai, Tirupati devastanam dharmakarta," since those words were a correct description of his position and did not invade or threaten the plaintiff's rights.

Against this decree the plaintiff appeals on the ground that any change in the seal is unauthorized since defendant's right to use the seal rests on custom alone, and therefore the right must be exercised strictly in accordance with custom.

The defendant also appeals against the decree on the ground that he is entitled to use the word "vagaira" in the legend on the seal since the plaintiff has no property in the word or legend, and it correctly describes the defendant's position.

We think that the decision of the Courts below is right. No doubt the seal is found to be the private seal of the defendant, and in the ordinary literal sense the legend "Tirumalai, Tirupati vagaira devastanam dharmakarta" means no more than "dharmakarta of Tirumalai, Tirupati and other temples" which, in a certain sense, the defendant actually is. But owing to the manner in which the word "vagaira" is used in the sanad of plaintiff's appointment to cover the thirty minor temples connected with the two main temples, the temple servants and others connected therewith attach a special meaning to it when used in connection with the Tirumalai and Tirupati devastanams. That the matter is of real,

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not merely fanciful, importance, is shown by the fact, that when the defendant's predecessor in 1834 attempted to use the word in describing his position, the attempt was at once forbidden by the then Collector (exhibits L_1 and L_2), and again when an attempt was made in 1884 to use the word on the belts and badges of the defendant's peons, the Magistrate at once took objection to it. The defendant's object in using the word is to indicate and assert that his position as dharmakarta is co-extensive with the plaintiff's position as vicharanakarta; in other words that the defendant is dharmakarta of all the thirty minor temples, whereas, in fact, he is dharmakarta of only three of them, and the use of the word, if permitted, unchecked, would, it has been found, and in our opinion rightly found, go far in future litigation to show that the defendant's claim was well founded. The defendant attempts even to go further (exhibit VIII) and to claim that by the use of the word he includes his position as dharmakarta of Tinnanore temple, a temple in which his position as dharmakarta is of a different and more independent character than it is in the temples of which plaintiff is vicharanakarta. This is important merely as indicating the real purpose for which the defendant seeks to add the words to the seal. It is, of course, true that the plaintiff has no property in the word "vagaira," and the word would not necessarily convey a false impression to persons unconnected with the Tirumalai and Tirupati temples and the respective positions of the plaintiff and defendant therein, and there can, of course, be no objection to the defendant using the words on his private seal in matters unconnected with the temples, but we think that the case is different when the defendant uses it in connection with his duties in the temple. There it undoubtedly connotes an extension of the defendant's rights as dharmakarta to which he has no title, and it, in an equal degree, invades, or threatens to invade, the plaintiff's rights as dharmakarta of these minor temples of which the defendant claims to be, but is not, dharmakarta.

There is no standard by which we might ascertain the damage likely to be caused by the threatened invasion of the plaintiff's rights, and the case is therefore one in which the Court may, in the exercise of its discretion, properly grant a perpetual injunction. No real injury or inconvenience is caused to the defendant by the injunction granted. We had some doubt at first whether we ought to allow the defendant to use any seal save one as nearly as

SRI SARAGOPA RAMANUJA PADDA JIYANGARLU v. SRI MAHANT RAMA KISORE DOSSJEE.

possible the same as that which has been used from time immemorial, *i.e.*, one with the figure of the god Hanuman alone on it, but we observe that there is no evidence that that seal was prescribed by the plaintiff or by any other authority. The original seal having been, it is alleged, lost, it may well be desirable to make some change in the new seal in order to check the facilities for fraud which might arise if the original seal should fall into unscrupulous hands, and the legend which the Courts below have allowed the defendant to use does not invade or threaten to invade the plaintiff's rights, nor is it open to any other reasonable objection. There is, therefore, no reason why we should restrain the defendant from using it if he desires to do so. The result is that we confirm the decrees of the Lower Appellate Court and dismiss both the appeals with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Benson.

1898. October 28.

VENKATARANGAYAN CHETTI (PETITIONER), APPELLANT,

v.

KRISHNASAMI AYYANGAR AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 234—*Execution of decree against deceased judgment-debtor—Probate and Administration Act—Act V of* 1881, *s.* 104—*Equal and rateable distribution.*

The right of a decree-holder, under section 234 of the Civil Procedure Code, to have his decree executed against the legal representative of a deceased judgment-debtor, is not affected by section 104 of the Probate and Administration Act, which directs debts to be paid equally and rateably out of the assets.

APPEAL against the order of L. C. Miller, Acting District Judge of Trichinopoly, in Appeal Suit No. 209 of 1897, affirming the order of A. David Pillai, District Munsif of Srirangam, in Execution Petition No. 113 of 1897, in the matter of Original Suit No. 194 of 1895, on the file of the District Munsif of Trichinopoly.

* Appeal against Appellate Order No. 49 of 1898.

VENKATA-RANGAYAN CHETTI v. KRISHNASAMI AYYANGAR.

The creditor of a deceased person applied under section 234 of the Civil Procedure Code to have a decree held by him executed against the moveables of the deceased in the hands of an executor. The application was dismissed by both the lower Courts, the Acting District Judge holding that it would in effect be giving to one creditor the priority prohibited by section 104 of the Probate and Administration Act, 1881, if the decree-holder were to be allowed to execute his decree without reference to the debts due to others. The decree-holder appealed on the ground, among others, that the Probate and Administration Act does not affect the execution of decrees.

Rangachariar for appellant.

Mr. *N. Subramanyam* for respondents.

JUDGMENT.—We understand that this is an application under section 234, Civil Procedure Code, and that the intention was to proceed against the executor as the legal representative of the deceased. The application is wrong in form, for it never refers to the executor at all, and on the contrary names the sons as defendants. The executor, however, happens to be guardian, and appears to have treated the proceeding as against himself in the capacity of executor. No objection having been taken in either of the Courts below, we do not think the appellant ought to suffer for the blunder of his Vakil now. But the application must be amended by striking out the sons and leaving the executor only as representative.

The manner in which the District Judge has disposed of the case is unsatisfactory. The executor does not say that there are no assets. Practically what he does is to ask for time, not for the purpose of paying just debts, but in order to make other dispositions of the estate, which clearly could not be justified.

Although there are certainly difficulties in construing section 104 of the Probate and Administration Act, we think that the languge of the section is so far similar to that of the corresponding section in the Indian Succession Act, that we must follow the ruling in *Nilkomul Shaw* v. *Reed*(1).

Under section 234 of the Code of Civil Procedure the decree-holder is entitled to have his debt paid out of the assets of the deceased in the hands of the legal representative which have not

(1) 12 B.L.R., 287.

VENKATA-RANGAYAN CHETTI v. KRISHNASAMI AYYANGAR.

yet been duly disposed of. This right is not affected by the provisions of section 104 of the Probate and Administration Act.

We must reverse the orders of the Lower Courts and direct the District Munsif to proceed according to law.

Owing to the mistake made by the appellant which has helped to confuse matters, we direct each party to bear his own costs.

APPELLATE CIVIL.

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

1898. September 6.

SESHAGIRI AYYAR (PLAINTIFF), APPELLANT,

v.

MARAKATHAMMAL (DEFENDANT), RESPONDENT.*

Provincial Small Cause Courts' Act—Act IX of 1887, sched. II, art. 31—Jurisdiction—Suit for mesne profits under Rs. 500—Civil Procedure Code—Act XIV of 1882, s. 586—Second appeal.

A suit for mesne profits is cognizable in Courts of Small Causes where the value of the subject-matter in dispute is less than Rs. 500, and article 31 of schedule II of the Provincial Small Cause Courts' Act does not apply thereto. Such a suit falls within the provisions of section 586 of the Civil Procedure Code, and no second appeal lies from a decision in it.

SECOND APPEAL against the decree of W. J. Tate, District Judge of Salem, in Appeal Suit No. 44 of 1896, reversing the decree of J. M. Nallasami Pillai, District Munsif of Tirupatur, in Original Suit No. 990 of 1895.

In a suit for mesne profits amounting to Rs. 106-3-6 the District Munsif gave judgment for the plaintiff for Rs. 13-8-0. On appeal by plaintiff to the District Judge, a memorandum of cross-appeal was filed, the appeal being allowed, and the judgment of the Lower Court reversed.

The plaintiff preferred this second appeal.

Sivasami Ayyar for appellant.

Sundara Ayyar for respondent.

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* Second Appeal No. 1287 of 1897.

SESHAGIRI AYYAR v. MARAKATHAMMAL

JUDGMENT.—No second appeal lies in this suit for mesne profits. See *Kunjo Behary Singh* v. *Madhub Chundra Ghose*(1), which has been followed in *Lingayya Ayyavaru* v. *Mallikarjuna Ayyavaru*(2). The second appeal is dismissed with costs. The memorandum of objections is also dismissed.

APPELLATE CIVIL.

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

1898. September 13.

MOYI (LEGAL REPRESENTATIVE OF DEFENDANT No. 1), APPELLANT,

v.

AVUTHRAMAN AND OTHERS (PLAINTIFF AND REMAINING LEGAL REPRESENTATIVES OF DEFENDANT No. 1), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 3, 43, 144—Res judicata—Trespass on land—Conversion of moveables lying on land—Grounds of attack.

Defendants having forcibly taken possession of plaintiff's land upon which was (1) standing timber and (2) logs of timber lying stored on the ground, plaintiff had, in a prior suit, recovered possession and damages. Subsequently to the institution of such prior suit defendants (1) cut and removed certain standing

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(1) I.L.R., 23 Calc., 884.

(2) Civil Revision Petition No. 271 of 1897 (unreported). This was a small cause suit to recover the sum of Rs. 486-3-6 as damages for defendants' obstruction to plaintiff's possession of the plaint land. Defendants objected that the suit fell under article 31 of schedule II of the Provincial Small Cause Courts' Act, and was therefore not maintainable. The Subordinate Judge overruled the objection, the suit being not for an account, but to recover the amount which plaintiff would have obtained if he had been in possession; and he followed *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (I.L.R., 23 Calc., 884), and awarded the plaintiff Rs. 252. The sixth defendant presented this Civil Revision Petition, under section 25 of the Provincial Small Cause Courts' Act, against the said judgment and decree on the ground, among others, that the suit was not maintainable in a Small Cause Court. The Court (COLLINS, C.J., and BENSON, J.) delivered the following JUDGMENT:—"We agree with the majority of the Judges "in the Full Bench case of *Kunjo Behary Singh* v. *Madhub Chundra Ghose* (I.L.R., "23 Calc., 884). For the reasons there stated, article 31 of schedule II of the "Provincial Small Cause Courts' Act does not apply to a suit such as this, and "it is therefore cognizable by a Court of Small Causes. We dismiss the petition "with costs."

* Second Appeal No. 1065 of 1897.

MOTI v. RUTHNAMAN.

trees and (2) removed the logs which lay stored on the ground. Upon plaintiff bringing a second suit to recover damages on both grounds, objection was raised (1) as to the standing timber, that plaintiff's remedy was under section 244 of the Civil Procedure Code, and (2) as to the logs, that a claim for their value might have been included in the former suit, since their conversion was effected when the plaintiff was dispossessed of the land upon which they lay and that, under section 43, no claim could now be made in respect of them:

Held, (1) that the proceeds obtained from cutting and removing saleable timber on the land were in the nature of mesne profits, and these having been taken since the institution of the previous suit, plaintiff could recover;

(2) that a trespass on a piece of land is by itself no proof of any conversion of moveables lying upon the land at the time that the trespass takes place; that, notwithstanding plaintiff's eviction from the land, possession of the timber lying stored upon it should be presumed to have continued in him in the absence of proof of any act on the part of the defendant with special reference to such timber and showing unequivocally that the plaintiff was entirely deprived of the use of them; and that conversion of the logs was not effected by the trespass, but only by their removal subsequently to the institution of the previous suit; and

(3) that the causes of action now relied on were therefore different from those relied on before, and the previous suit did not operate as a bar to the present claim under section 43 of the Civil Procedure Code.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of South Malabar, in Appeal Suit No. 659 of 1896, reversing the decree of J. A. deRozario, Acting Principal District Munsif of Calicut, in Original Suit No. 205 of 1895.

Suit to recover damages sustained by reason of timber having been unlawfully felled and removed by defendants from plaintiff's land. Plaintiff alleged that defendants had trespassed on a certain hill, in consequence of which he had instituted Original Suit No. 507 of 1893 against them for the recovery of the property with damages; that he had obtained a decree in that suit and had taken delivery of the property; but that defendants had felled and removed trees to the value now sued for since the date of the institution of the said suit. The first defendant denied having felled or removed any trees since Original Suit No. 507 of 1893, and denied having committed any damage; he further set up that the present suit was barred by section 43 of the Civil Procedure Code; that it was *res judicata* by the decree in Original Suit No. 507 of 1893; and that it was barred by section 244 of the Civil Procedure Code. The plaintiff's claim consisted of two portions, viz., (1) for the value of trees felled and removed by defendants since the trespass and (2) for the value of certain logs of timber lying stored on the hill at the date of the trespass

MOTI v. AYUTHRAMAN.

and since appropriated by defendants. The District Munsif held that the first portion of the claim was barred by section 244 of the Civil Procedure Code, the decree for surrender of the hill, in his opinion, having included the surrender of the trees alleged to have been cut, and plaintiff's remedy being by execution of that decree. As to the second portion of the claim he held that it was barred by sections 13 and 43 of the Civil Procedure Code, inasmuch as the original trespass by defendant, which resulted in the institution of Original Suit No. 507 of 1893, was a trespass in respect of the forest land, or hill, and everything upon it, and inasmuch as the logs were lying on the hill at the time, the taking forcible possession of the hill included a taking forcible possession of the logs as well. Plaintiff should, therefore, have included the value of the logs in the previous suit, and hence the matter was one which might and ought to have been made ground of attack in it under explanation II to section 13 of the Code of Civil Procedure; and he held that the omission to do so, whether intentional or not, was a bar under section 43 to the present suit in respect of the claim so omitted or relinquished; he referred to *Moonshee Buxloor Ruheem v. Shumsoonnissa Begum*(1). The District Judge, on appeal, reversed this decision holding that plaintiff was suing in respect of fresh acts of trespass committed after his former suit had been filed, and that such fresh acts gave rise to distinct causes of action.

The first defendant's legal representative preferred this second appeal.

Subramania Sastri for appellant.

Sunkaran Nayar and *Govindan Nambiar* for respondents.

SUBRAMANIA AYYAR, J.—The question in the case is whether the suit is wholly or to any extent barred because the items of damages claimed here had not been included by the respondent in Original Suit No. 507 of 1893 instituted by him against the appellant (defendant). In that suit the respondent asked for and obtained a decree for the possession of a hill from which he had been evicted and for the damages caused by the appellants having cut and removed certain trees from the said hill. The damages now claimed are in respect of trees alleged to have been cut and removed subsequent to the institution of the previous suit and in respect of a quantity of timber which it is said had been stored on

(1) 11 M.I.A., 551.

the hill by the respondent, and which also the appellant took away after the institution of that suit. First, as to the item of the present claim relating to the trees cut and removed. Now it is scarcely necessary to say that in the case of property such as the hill, which was in question in the earlier suit, cutting saleable timber is the mode of cultivation (*Honywood* v. *Honywood*(1)) and resembles, to borrow the words of Sir Frederick Pollock, "taking a crop "off arable land." Consequently the profits made by the appellant with reference to the trees cut by him while in possession were really mesne profits. *Bunwad Singh* v. *Sudaseeb Dutt*(2) cited for the respondent directly supports that conclusion, and the finding is that the said mesne profits were received by the appellant since the commencement of the previous litigation. Next, in regard to the damages claimed with reference to the timber said to have been stored on the hill but taken away by the appellant, the argument on his behalf was this: in evicting the respondent from the hill the appellant necessarily dispossessed him of the timber also and in effect converted the same to his own use. Consequently the value thereof should have been claimed in the previous suit along with the damages therein claimed on account of trees which had been cut and removed before the institution of that suit; but a trespass on a piece of land is by itself no proof of any conversion of any moveables to be found on the land at the time the trespass took place. *Non constat* the person committing the trespass either claimed or otherwise interfered with the owner's right to the moveables. Strictly speaking, notwithstanding the respondent's eviction from the hill, the possession of the timber in question should be presumed to continue in the respondent in the absence of proof of any act or acts on the part of the appellant with special reference to such goods showing unequivocally that the respondent was entirely deprived of the use of those goods. Though the facts in the present instance are dissimilar to the facts of the cases to be presently referred to, yet the drift of the decisions in those cases seems to indicate that the view just stated is correct. In *Hartley* v. *Moxham*(3) the defendant claimed a sum of money as due to him from the plaintiff, his lodger, locked up the plaintiff's goods in a room which plaintiff held of the defendant and in which the plaintiff had put them, kept the key and refused the plaintiff access to them, saying that nothing

(1) L.R., 18 Eq., 310. (2) 2 W.R., (Mis. App.), 50. (3) 3 A. & E., (N.S.), 701.

should be removed till the defendant's bill was paid. Cresswell, J., being of opinion "that no taking was proved which would "support an action of trespass" directed a non-suit, and on a motion for a new trial Lord Denman, C.J., Williams, Coleridge and Wightman, JJ., upheld the non-suit. In *Thorogood* v. *Robinson*(1) the plaintiff's goods and servants were on the land which the defendants recovered in ejectment and the defendant on entering under the writ of possession turned the plaintiff's servants off the land and would not let them remain for the purpose of removing the goods. There was no subsequent demand or refusal. It was held that the jury might find that there was no conversion. Lord Denman, C.J., said:—"The plaintiff certainly had a right to the goods; but he "should have sent some one with a proper authority to demand and "receive them. If the defendant had then refused to deliver them "or to permit the plaintiff or his servants to remove them, there "would have been a clear conversion; but it does not necessarily "result from the facts proved in this case that the defendant was "guilty of conversion." Lastly in *England* v. *Cowley*(2) the plaintiff was the holder of a bill of sale over the goods of M. Default having been made in payment of the sum secured, he put a man in possession and afterwards went to M's house to remove them. Upon his arrival at the house he was met by the defendant, M's landlord, who told him that rent was in arrear, and that until it was paid the goods should not be removed; and measures were taken by the defendant to use force, if necessary, to prevent their removal. It being too late for the defendant that day to distrain, he prevented the removal of the goods with a view to distrain them the next day. Kelly, C. B., Bramwell and Pollock, B.B. (Martin, B., dissenting) held that there was no evidence of conversion, and Bramwell, B., went the length of holding that assuming that there was an actual prevention still the action was not maintainable, and after putting several cases by way of illustration, the learned Baron added:—"The truth is that, in order to maintain trover, a "plaintiff who is left in possession of the goods must prove that his "dominion over his property has been interfered with, not in some "particular way, but altogether; that he has been entirely deprived "of the use of it. It is not enough that a man should say that "something shall not be done by the plaintiff; he must say that

(1) 6 A. & E., (N.S.), 769 at p. 772. (2) L.R., 8 Ex., 126.

MOYI v. AVUTHRAMAN.

"nothing shall" (*England* v. *Cowley*(1)). The present case, in one view, is much weaker than any of the cases above cited since in them there was proof of something positive, some words said or some acts done by the party charged, with reference in particular to the goods said to have been converted, whereas here, nothing of the kind was even alleged to have occurred with reference to the timber in question at the time the respondent was evicted from the hill. It follows, therefore, that there was no conversion of the timber by the appellant, but that it was converted, as found by the lower appellate Court, only when, after the suit of 1893 was filed, he actually removed and appropriated it. The lower appellate Court is therefore right in holding that the causes of action relied on now are different from those relied on in the previous suit, and therefore it does not operate, as contended for the appellant, as a bar to the present claim under section 43, Civil Procedure Code. I would dismiss the second appeal with costs.

BENSON, J.—I agree, though not without hesitation as regards the trees cut and lying on the land at the time of the trespass.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Moore.

1898. September 1.

GEORGE (DEFENDANT), APPELLANT,

v.

VASTIAN SOURY (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 521—Legality of order remitting award for reconsideration—Appeal.

An award, submitted by arbitrators to whom all matters in dispute had been referred, stated that "defendant has not produced any witness in support of his "contention raised in issues Nos. 1, 2, 5 and 6; hence we have only to deal with "issues Nos. 3, 4 and 7," and dealing with those issues the arbitrators gave their finding. The award was remitted, on the ground that the arbitrators had not determined the issues Nos. 1, 2, 5 and 6:

Held, (1) that the legality of an order remitting an award for the reconsideration of the arbitrators may be challenged on appeal against the decree ultimately passed; and

(1) L.R., 8 Ex., 126 at p. 130.

* Second Appeal No. 1109 of 1897.

(2) that the award ought not to have been remitted: there was no illegality on the face of it, and there was a decision on the whole matter in issue between the parties.

GEORGE v. VASTIAN SOURY.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of South Malabar, in Appeal Suit No. 722 of 1896, reversing the decree of M. Srinivasa Rao, Subordinate Judge of South Malabar at Cochin, in Original Suit No. 1 of 1895.

Suit for partition. All matters in dispute between the parties were, by consent, referred to four arbitrators, who submitted an award. That award dealt with all the issues, as framed by the Subordinate Judge, except Nos. 1, 2, 5 and 6, as to which the arbitrators said:—"Defendant has not produced any witness in "support of his contention raised in issues Nos. 1, 2, 5 and 6, hence "we have only to deal with issues Nos. 3, 4 and 7." And they proceeded to deal with those issues, and finally made an award containing the following terms:—"For the foregoing grounds we, "being of opinion that the plaintiff is entitled to recover the whole "amount claimed by him, therefore award to him . . . . . "or its equivalent one-half share of the property described in the "plaint, as also proportionate income of . . . . each party "bearing his own costs. The defendant has tacitly admitted the "above amount of income as he has not taken any exception to it "in his written statement." The defendant applied to have the award set aside on the ground of the misconduct of the arbitrators. The misconduct was alleged, *inter alia*, to consist in not having adjudicated on issues Nos. 1 and 2. The Subordinate Judge found that there had been no misconduct, but as in his opinion the arbitrators had not determined issues Nos. 1, 2, 5 and 6, he, under section 520 of the Civil Procedure Code, remitted the award to the arbitrators for reconsideration on those issues. They having refused to reconsider the award, the Subordinate Judge proceeded with the suit and finally passed a decree dismissing it with costs.

On appeal, the plaintiff contended that the Subordinate Judge had improperly remitted the award. The question was then raised whether the District Judge could entertain an appeal on that ground, inasmuch as there is no appeal against an order passed under section 520, Civil Procedure Code. The District Judge accepted *Abdul Rahman* v. *Yar Muhammad*(1) as supporting plaintiff's

(1) I.L.R., 3 All., 636.

GROSSE v. VASUDEVAN BOOAT.

contention that such a question may be considered by an Appellate Court in an appeal against the decree ultimately passed, and he held that the order of the Subordinate Judge remitting the award was one which he could not properly pass under section 520 of the Civil Procedure Code, inasmuch as the issues in question had not been left undetermined, but were clearly intended to be found against the defendant.

The defendant preferred this second appeal.

Sundara Ayyar for appellant.

Sankaran Nayar for respondent.

JUDGMENT.—We think the District Judge is right.

That the award ought not to have been remitted there is, in our opinion, no doubt. There was no illegality on the face of it. There was a decision on the whole matter in issue between the parties.

The other question is whether the legality of the order remitting the award can be challenged on the appeal against the decree. On that question the authorities are distinctly in favour of the respondent see *Mothooranath Tewaree* v. *Brindabun Tewaree*(1), *Ambica Dasia* v. *Nadyar Chand Pal*(2), *Nanak Chand* v. *Ram Narayan*(3), and *Bikramajit Singh* v. *Husaini Begum*(4).

Moreover section 591 of the Code of Civil Procedure provides that any such interlocutory order as the one now in question may be impeached on an appeal against the ultimate decree.

The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

1898. October 3.

TARIYA GOWDU (DEFENDANT), APPELLANT,

v.

VONAMO GOWDU AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Inam Commissioner's grant—Hereditary office-holder—Enfranchisement.

A grant of a portion of inam lands by Government, on enfranchisement, is not illegal because the grantee, though a member of the family of hereditary office-holders, was not himself actually in office at the time of enfranchisement.

(1) 14 W.R., (C.R.), 227. (2) I.L.R., 11 Calc., 173. (3) I.L.R., 2 All., 181
(4) I.L.R., 3 All., 643.
* Second Appeal No. 850 of 1897.

TARIYA GOWDU v. VONAMO GOWDU.

SECOND APPEAL against the decree of G. Campbell, Acting District Judge of Ganjam, in Appeal Suit No. 47 of 1896, affirming the decree of V. Ranga Rao Pantulu, District Munsif of Berhampore, in Original Suit No. 253 of 1895.

Suit to recover possession of land with mesne profits. The plaint set forth that of the plaintiffs, who constituted a joint Hindu family, the second was the karji of Lakshmipuram, his father and grandfather having also been karjis before him; that at first the karji inam held by plaintiffs' family was enfranchised in plaintiffs' favour; that afterwards defendant's name was also entered in the patta by a false representation to the revenue authorities; that defendant was neither a karji at the time nor did he enjoy the karji's inam; and that defendant had taken wrongful possession of the inam lands. Defendant denied having taken wrongful possession and stated that he had been enjoying the plaint land for twenty years; that his name had been entered in the revenue patta by the Circar, as his father (second plaintiffs' great grandfather) was a karji, and owing to other circumstances; that prior to the enfranchisement the Government had every control over the karji inam and as such it could issue a patta at its pleasure, and that plaintiffs had no right to question its action. The District Munsif framed the issue among others, whether, at the said grant, plaintiffs or defendant held possession of the plaint land. In the course of the hearing, defendant admitted that he had never himself served as karji at any time. The District Munsif found that the grant in question of the entire karji lands was made in 1893, and that, up till then, plaintiffs were in possession of all those lands including the plaint land, and not the defendant. He held, as a consequence of this finding, that the possession of defendant was a trespass. He further said:—

"*Venkata* v. *Rama*(1) collects all the authorities on the subject "and I would hold that I have the jurisdiction to consider plaintiffs' "contention, if only on the ground that the second plaintiff was at "the grant in question the karji in office. The prevailing judgment "of the Chief Justice concludes thus:—'On the ground that the "'respondent was not the holder of the office when the lands were "'enfranchised, I must hold that he has failed to show a title to the "'lands and that his claim is unfounded. If he had established a

(1) I.L.R., 8 Mad., 249.

TARIYA GOWDU v. VONAMO GOWDU.

"'title, if he had shown that at the time of the enfranchisement of "'the inam he had been appointed to the office, the Court would "'have had the jurisdiction to determine whether the enfranchise-"'ment in favour of the appellant could be supported.' This also "appears to be the test applied by the majority of Judges, and, "judged by that test, I would hold that this Court has the juris-"diction to question the grant in question."

And he decreed for plaintiffs. This decision was upheld on appeal by the Acting District Judge.

The defendant preferred this second appeal.

Ramachandra Aypar and *Sundara Ayyar* for appellant.

Pattabhirama Ayyar for respondents.

JUDGMENT.—All that was decided in the case of *Venkata* v. *Rama*(1) was that when Government had enfranchised the lands in favor of the office-holder, a person who was one of the family of the hereditary office-holders, but who was not actually in office at the time of the enfranchisement, had no right to question the grant of the lands by Government to the office-holder. This is not the question at issue in the present case. Here the Inam Commissioner on enfranchisement granted the land to five men, all of whom were members of the family of the hereditary office-holders, although only one of them was the actual office-holder. There is nothing in the several decisions of this Court to which reference has been made (*Venkata* v. *Rama*(1), *Venkatarayadu* v. *Venkataramayya*(2), *Sankara Subbayyar* v. *Ramasami Ayyangar*(3), and *Dharanipragada Durgamma* v. *Kadambari Virrazu*(4)) which can be held to support the contention that such a grant on the part of Government was illegal. We cannot find any legal foundation for the view which appears to be held by the two Lower Courts that if on enfranchisement the Government grants a portion of the inam lands to a man who, although a member of the family of hereditary office-holders, was not himself actually in office at the time of enfranchisement, such a grant is illegal, and must be set aside by a Civil Court. We set aside the decrees of both Courts and direct that the suit of the plaintiff be dismissed with costs throughout.

(1) I.L.R., 8 Mad., 249.
(2) I.L.R., 15 Mad., 284.
(3) I.L.R., 20 Mad., 454.
(4) I.L.R., 21 Mad., 47.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

PALANI GOUNDAN AND ANOTHER (PLAINTIFFS NOS. 1 AND 5), APPELLANTS,

v.

RANGAYYA GOUNDAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1898. October 10.

Transfer of Property Act—Act IV of 1882, ss. 85, 88—Decree for sale on mortgage in suit against Hindu father—Suit by son for declaration that decree not binding on his share.

A decree having been obtained against a Hindu father in a suit on a bond hypothecating family property, the sons sued for a declaration that the decree was not binding on their share on the grounds that they had not been made parties to the suit, and that the debt had been contracted by the father for immoral purposes:

Held (not following the decision of the majority of the Full Bench in *Bhawani Prasad* v. *Kallu* (I.L.R., 17 All., 537)), that the true rule as to the effect of section 85 of the Transfer of Property Act, in cases in which a decree is obtained against a Hindu father without making his sons parties to such a suit, is laid down in *Ramasamayyan* v. *Virasami Ayyar* (I.L.R., 21 Mad., 222).

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Appeal Suit No. 261 of 1896, affirming the decree of T. A. Ramakrishna Ayyar, District Munsif of Udamalpet, in Original Suit No. 758 of 1895.

Suit to declare that a decree for the sale of family property obtained on a hypothecation bond executed by plaintiffs' father was not binding on the plaintiffs' share in the family property. The first defendant, who was the undivided father of the plaintiffs (five in number), had executed a bond hypothecating certain land, being ancestral property of the family. A suit having been brought, on the bond, against the first defendant alone, a decree was obtained for the sale of the property. Plaintiffs contended that the said decree was not binding upon them since they had not been made parties to the suit; and they further alleged that the debt itself had been contracted for immoral purposes and not for family necessity; and that their interest in the property could

* Second Appeal No. 1594 of 1897.

PALANI GOUNDAN v. RANGAYYA GOUNDAN.

not be sold in satisfaction of it. They relied upon the Full Bench ruling in *Bhawani Prasad* v. *Kallu*(1). The defence was that the debt was contracted for family purposes by plaintiffs' father, who was fully competent to hypothecate family lands therefor and that the plaintiffs had no right to impeach the validity of the bond. The District Munsif found that the plaintiffs had failed to prove that the debt in question had been contracted by the father for illegal or immoral purposes. On the issue whether the decree bound the plaintiffs or their share in the property, he also decided against the plaintiffs, holding that a decree for sale obtained under section 88 of the Transfer of Property Act was only voidable by the sons and not void; inasmuch as section 85 of that Act as to the joinder of all persons interested lays down a rule only of procedure and not of substantive law. The District Judge, on appeal, confirmed the decree, the plaintiffs having failed to prove that the debt was illegal or immoral.

Plaintiffs Nos. 1 and 5 preferred this second appeal.

Kasturiranga Ayyangar for appellants.

Sivasami Ayyar for respondent No. 3.

JUDGMENT.—We agree in the view taken by Shephard, J., in *Ramasamayyan* v. *Virasami Ayyar*(2), as to the effect of section 85 of the Transfer of Property Act in cases in which a decree is obtained against a Hindu father without making his son or sons parties to the suit brought on a mortgage made by the father. We are not prepared to follow the decision of the majority in *Bhawani Prasad* v. *Kallu*(1).

The second appeal fails and is dismissed with costs.

(1) I.L.R., 17 All., 537. (2) I.L.R., 21 Mad., 222.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

HUTHASANAN NAMBUDRI (PLAINTIFF'S REPRESENTATIVE), APPELLANT,

v.

PARAMESWARAN NAMBUDRI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1898. October 11, 20.

Transfer of Property Act—Act IV of 1882, s. 60—Suit to redeem entire mortgage by purchaser of equity of redemption of a portion—Indivisibility of mortgage.

The mortgagors of four items of property originally mortgaged for an entire sum sold the equity of redemption of one item to the plaintiff who now sued the mortgagee to redeem the whole of the four items:

Held, that he was entitled so to do.

A mortgage for an entire sum is from its very purpose indivisible; and that character of indivisibility exists with reference not only to the mortgagee, but also to the mortgagor; save by special arrangement between all the parties interested, neither mortgagor nor mortgagee, nor persons acquiring a partial interest through either, can obtain relief under the mortgage except in consonance with that principle of indivisibility.

SECOND APPEAL against the decree of A. Venkataramana Pai, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 290 of 1896, reversing the decree of P. P. Raman Menon, Acting District Munsif of Nedunganad, in Original Suit No. 77 of 1895.

Suit to redeem a mortgage. Four items of property were held by the first defendant under a mortgage granted for an entire sum by the fourth and fifth defendants. Subsequently to the mortgage plaintiff purchased the equity of redemption in respect of item No. 1 from the mortgagors. He now sued to redeem the entire mortgage and recover the whole of the mortgaged property on payment of the whole of the mortgage money. Both the first defendant, as mortgagee, and defendants Nos. 4 and 5, as mortgagors, opposed his claim to redeem the whole, and asserted that he was entitled to redeem only the item No. 1 purchased by him on payment of the proportionate mortgage amount. The District Munsif held that, under section 60 of the Transfer of Property Act, plaintiff was entitled to redeem the entire mortgage and he

* Second Appeal No. 1672 of 1897.

HUTHASANAN NAMBUDRI v. PARAMESWARAN NAMBUDRI.

so decreed. The Subordinate Judge in reversing the decree and dismissing the suit said :—

"I am of opinion that the plaintiff is not entitled to redeem "the whole mortgage against the will of the mortgagee and the "mortgagors. The provisions of section 60 of the Transfer of "Property Act, 1882, enable the owners of a part of the mort-"gaged property to redeem the whole mortgage, but this is so "only in case the mortgagee in possession insists upon his right to "treat the mortgage as one and indivisible. In other words this "is an equity in favour of the mortgagee who may claim it or not "as he pleases. No authority is cited in support of the contention "that the part owner of the mortgaged property can compel the "mortgagee to give up more than the share of the former. In "the present case there is the additional reason that the owners of "the remaining portion of the mortgaged property (defendants "Nos. 4 and 5) also oppose the plaintiff's claim to recover their "share of the property."

The plaintiff appealed, on the grounds, among others, that a person who has any right to redeem at all has a right to redeem the whole of the mortgaged property, and that a mortgagee cannot compel him to redeem only the part in which he may be interested. And further, that the right to treat the mortgage as one and indivisible is an equity which may be claimed by either mortgagor or mortgagee.

Hon. *Bhashyam Ayyangar* and *Govinda Menon* for appellant.

Sundara Ayyar for respondent No. 1.

SUBRAMANIA AYYAR, J.—The question for determination in this case is whether the appellant who owns the equity of redemption in the land, plaint item No. 1, which forms part of the property originally mortgaged to the defendants Nos. 1 to 3 for an entire sum, is entitled to redeem the whole of the land mortgaged or the said item only.

The District Munsif held that the appellant was entitled to redeem the whole and gave a decree to him accordingly. But the Subordinate Judge reversed the decree and dismissed the suit being of opinion that the appellant was not entitled to redeem the whole.

The view taken by the District Munsif seems to be clearly right. *Hall* v. *Heward*(1) cited for the appellant is a direct and

(1) L.R., 32 Ch. D., 430.

HUTHASANAN NAMBUDRI v. PARAMESWARAN NAMBUDRI.

clear authority in favour of that view. The Court of Appeal consisting of Cotton, Lindley and Lopes, L, JJ., there held following the decision of Lord Hatherly in *Pearce* v. *Morris*(1), that as the owner of the equity of redemption of one of two estates comprised in the same mortgage cannot insist on redeeming that estate separately, so he cannot be compelled to redeem it separately, his right being to redeem the whole subject to the equities of the other persons interested. This decision and that which it followed were referred to by the learned Chief Justice and Handley, J., in *Kanna Panikar* v. *Karunakara*(2) with approval apparently; for the plaintiff there was refused relief not because he was not entitled to claim a redemption of the whole, but on the unquestionable ground that he could not do so without making the other person interested in the equity of redemption a party to the suit, which he had however failed to do, though that other person was known and could have been impleaded. Reference may also be made to *Norender Narain Singh* v. *Dwarka Lal Mundur*(3) where the judicial committee lay down that in the case of a mortgage for an entire sum each and every one of the mortgagors was interested in the payment of the mortgage money and the redemption of the mortgaged estate and each and every one of them had a right by payment of the money to redeem the estate seeking his contribution from others. In the face of these authorities it is not necessary to notice the other cases cited in favour of the above view. *Ariyaputri* v. *Alamelu*(4) and *Kudhai* v. *Sheo Dayal*(5), which were relied on on behalf of the respondent, are not in point since in those cases the mortgagees had themselves become entitled to the equity of redemption in part of the property mortgaged, which is not so here. The pleader for the respondent urged strongly that the rule entitling a person to redeem the whole in circumstances like the present is opposed to principle inasmuch as a mortgagee for whose benefit the rule that a mortgage is indivisible has been introduced may waive it. But a mortgage for an entire sum is from its very purpose indivisible; a division of such a mortgage, borrowing the language of a text writer, is conceivable in theory and may be carried out in practice. But in order that a mortgage

(1) L.R., 5 Ch., 227.
(2) I.L.R., 16 Mad., 328 at p. 332.
(3) L.R., 5 I.A., 18 at p. 27.
(4) I.L.R., 11 Mad., 304.
(5) I.L.R., 10 All., 570.

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may fully attain its end of securing satisfaction of the entire obligation in the rank and with the efficacy which the law or the will of the parties determined, it is essential that it should not suffer any disintegration (Keelleber on Mortgage in Civil Law, pages 11 and 12).

This character of indivisibility exists not only with reference to the mortgagee, who may generally be more benefited thereby, but also with reference to the mortgagor. And save as a matter of special arrangement and bargain entered into between all the persons interested, neither the mortgagor nor the mortgagee, nor persons acquiring through either a partial interest in the subject, can, under the mortgage, get relief except in consonance with the principle of indivisibility referred to. It is upon this principle, as pointed out by Mr. Bhashyam Ayyangar for the appellant, that the rule in question rests.

The appeal must therefore be allowed. The decree of the Subordinate Judge is reversed and that of the District Munsif restored, with the modification that the sum payable by the appellant for the redemption will be increased by Rs. 400 as admitted on his behalf before us.

The respondent must pay the appellant's costs in this Court. In the lower Courts each party will bear his own costs.

MOORE, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Moore.

1898, September 1.

VASUDEVAN NAMBUDRI (PLAINTIFF), APPELLANT,

v.

MAMMOD (DEFENDANT), RESPONDENT.*

Penal Code—Act XLV of 1860, s. 294A—Companies Act—Act VI of 1882, s. 4—Illegal contract—Bond to secure payments under a kuri.

An agreement is not illegal whereby a number of persons subscribe, each a certain sum, by periodical instalments, with the object that each in his turn (to be decided by lot), shall take the whole subscription for each instalment, all such persons being returned the amount of their contributions, the common fund being lent to each subscriber in turn. Nor is such an agreement rendered illegal by section 294 A of the Indian Penal Code.

* Second Appeal No. 1064 of 1897.

VASUDEVAN NAMBUDRI v. MAMMOD

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of South Malabar, in Appeal Suit No. 645 of 1896, affirming the decree of K. Govindan Nambiar, in Original Suit No. 124 of 1896.

Suit to recover a sum of money due under a hypothecation bond, executed by defendant in favour of plaintiff. The consideration for the bond was as follows:—Plaintiff had organised a kuri, or transaction by which a number of persons agree that each shall subscribe a certain sum of money by periodical instalments and that each in his turn, as determined by lot, shall take the whole of the subscription for each instalment: all being returned the amount of their contributions, the common fund being lent to each subscriber in turn. The defendant became a subscriber to the kuri: his ticket was drawn and he was paid the amount due. The defendant then executed the bond to secure the regular payment by him of his future subscriptions. The plaintiff sued for a balance still remaining unpaid under the bond.

The defence set up was, *inter alia*, that the suit was not maintainable, it being admitted that (1) there were more subscribers to the kuri than twenty, and (2) the kuri had not been registered under the Indian Companies Act. The District Munsif held that the subscribers formed "a company or association for the purpose "of carrying on a business that has for its object the acquisition "of gain by the company or association, or by the individual mem-"bers thereof," within the meaning of section 4 of the Companies Act, and that the kuri ought to have been registered under the provisions of that Act as there were admittedly more than twenty subscribers; and that the fact that the suit was based on a bond did not change the character of the transaction so as to enable plaintiff to recover as on a mortgage deed, the special provisions of the Companies Act not being neutralised by the Transfer of Property Act. He also held that plaintiff was not entitled under section 65 of the Contract Act to a refund of the money received by defendant in excess of subscriptions paid, as if under a contract that had become void; since the contract between the parties was a valid one, but merely non-enforceable owing to the non-observance of formalities prescribed by law.

VAIDINATHAN NAMBUDRI v. MADHAVA.

The District Judge, on appeal, left that question undecided, but dismissed the appeal on the ground that a kuri, where the fund is distributed by lot, is a lottery. The fact that the total monthly subscriptions were given to each subscriber in turn, the order being decided by lot, was sufficient, in his opinion, to constitute a lottery within the meaning of section 294A of the Penal Code.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

The respondent was not represented.

JUDGMENT.—The law as laid down in *Kamakshi Achari* v. *Appavu Pillai*(1) has been followed without question for thirty-five years. The introduction of section 294A into the Indian Penal Code makes no difference.

We must reverse the decrees of both Courts and remand the suit for trial.

We must observe that the question, with reference to the Companies Act, cannot possibly be answered until evidence has been taken. Costs of this appeal must be paid by respondent. Other costs will be provided for in the revised decree.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

1898. September 1.

MUTHU VIJAYA RAGHUNATHA UDAYANA TEVAR AND ANOTHER (PLAINTIFF AND HIS REPRESENTATIVE), APPELLANTS,

v.

THANDAVARAYA TAMBIRAN (DEFENDANT No. 1), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 375—Razinamah not in terms of plaint—Dismissal of suit.

A decree should not be passed in terms of a compromise where the latter does not give to the plaintiff any of the reliefs claimed in the suit, and deals with matters not forming the subject-matter of the suit. Upon such a compromise being presented, the Court should inform the parties that its terms cannot be embodied in a decree, and if it appear that the compromise was arrived at conditionally upon its being incorporated in the decree, the suit should be proceeded with.

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

* Appeal No. 333 of 1897.

MUTHU VIJAYA RAGHUNATHA UDAYANA TEVAR v. THANDAVARAYA TAMBIRAN.

APPEAL against the decree of C. G. Kuppusami Ayyar, Subordinate Judge of Madura (East) in Original Suit No. 53 of 1895.

Suit for the removal of defendants from wrongful possession and management of Anjukovil devastanams and their endowments and for putting plaintiff in possession thereof or for appointing some fit person to manage their affairs efficiently. Plaintiff, the Zamindar of Sivaganga, alleged in his plaint that the former Rajahs of Sivaganga and Ramnad to whom he succeeded had possessed and exercised superintending authority over the religious and other institutions within their territories, including the suit devastanams, and had by custom employed and entrusted a tambiran or mendicant with the management of them; that for the purposes of the present suit he conceded that since the beginning of the century the direct management had been appointed by tambirans appointed one after the death of another by the head of the Tiruvannamalai mutt for the time being; that the last manager, who was also head of the Tiruvannamalai mutt, had died without appointing a successor; and that defendant No. 1 was in wrongful possession of the said devastanams and their endowments on the pretence of having been duly appointed by the deceased to the said management. The reliefs prayed for were: that defendant No. 1 might be removed; that the plaintiff or a person appointed by him or by the Court might be put in possession; that defendant No. 1 be directed to render an account. Defendant No. 1 denied most of the allegations in the plaint and claimed that he had been duly appointed manager and trustee of the devastanams and their endowments.

After nineteen witnesses had been examined for the plaintiff and thirty-six for defendant No. 1, a razinamah was entered into by them, by which they agreed as follows:—That defendant No. 1, as proper successor, should continue as trustee in the management of the devastanams; that he should appoint one of the tambirans to succeed him and communicate such appointment to plaintiff or his successor; that the successors of both parties should act similarly for all time; that defendant No. 1 and his successors should send certain offerings at festivals; and that in the event of defendant No. 1 or any successor to him dying without appointing a successor, the Zamindar of Sivaganga for the time being should appoint one of the tambirans as trustee.

Upon this being presented, the Subordinate Judge held that the prayer in the plaint had not been given effect to in any

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manner whatever, and that matters were dealt with therein which were not embodied in the plaint. He therefore recorded the razinamah but dismissed the suit.

The plaintiff appealed on the grounds, among others, (1) that a decree should have been passed in terms of the razinamah; (2) that notice should have been given to the parties of the course to be adopted when the Court found that it could not pass a decree in terms of the razinamah; and (3) that the suit should have been proceeded with and not dismissed.

Ramasubba Ayyar for appellants.

Sundara Ayyar and *Srinivasa Ayyangar* for respondent.

JUDGMENT.—We are clearly of opinion that the Lower Court was right in holding that a decree could not be passed in the terms of the compromise, inasmuch as the compromise did not give to the plaintiff any of the reliefs claimed in the suit but dealt with various matters not the subject matter of the suit.

It is however contended for the respondent that the Subordinate Judge was right in dismissing the suit as a necessary result of the compromise between the parties. But this contention assumes that the compromise was an absolute one, independent of the question whether the Court could pass a decree in its terms. We do not think it at all clear that such was the intention of the parties. The request that a decree should be passed in the terms of the compromise is contained in the document of compromise itself and would therefore appear to be one of its terms. If so, it would be a condition precedent to the compromise being effectual that it should be included in the decree.

The intention of the parties on this point as we have observed is not clear, and we think that the Subordinate Judge before dismissing the suit should have informed the parties that the terms of the compromise could not be embodied in a decree and should have ascertained from them or upon further evidence, if necessary, whether the compromise was absolute or conditional on its being incorporated in a decree. In the latter case he would of course have proceeded with the suit. We shall therefore reverse his decree dismissing the suit and direct him to dispose of the suit afresh in accordance with the above observations. Costs already incurred in both Courts will be provided for in the revised decree.

APPELLATE CIVIL.

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

OBAI GOUNDAN (DEFENDANT), APPELLANT,

v.

RAMALINGA AYYAR (PLAINTIFF), RESPONDENT.*

1898. September 2.

Registration Act—Act III of 1877, *ss.* 17, 18—*Rent Recovery Act (Madras)—Act VIII of* 1865, *s.* 11—*Reduction of rent.*

A document given by the owner of land to his tenant, varying the terms of tenancy with reference to the amount of rent to be paid, is not an instrument relating to an interest in immoveable property and does not require registration.

Where a landholder has granted a reduction of rent otherwise properly payable in respect of land, the mere fact that the tenant has made some improvements subsequent to the grant does not bring the case within the exception to the proviso of section 11 of the Rent Recovery Act (Madras), 1865, so as to be binding on the landholder's successor.

SECOND APPEAL against the decree of W. J. Tate, District Judge of Salem, in Appeal Suit No. 19 of 1896, reversing the decision of R. H. Campbell, Acting Sub-Collector of Salem, in Summary Suit No. 18 of 1895.

Suit under section 9 of the Rent Recovery Act (Madras), 1865, by the manager of the Berikai estate, against one of the tenants of the estate, to enforce acceptance of a patta and execution of a muchalka.

The defendant (who was admittedly a tenant under the estate and liable to pay rent) claimed a permanent remission under an order given to him by the late zamindar of Berikai, the plaintiff's predecessor. The material portion of the order (filed as exhibit II in the case) was as follows:—

"You having asked me to grant you a cowle remission of half "assessment on the ground that out of the wet lands under the "tank held on patta formerly by your father and now by you— "those near the tank contain much 'chowdu' soil, while those "far from the tank are sandy and some of them within the waters "spread, with the result that there is loss of crops, the said lands "have been inspected with the result that the above defects have "been found to really exist, it also appears that the custom has "been for you to pay assessment in the year in which crops "are raised and to obtain remission in years in which the lands

* Second Appeal No. 1284 of 1897.

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"lare left waste. Considering all these facts a permanent cowle "remission of half the above assessment is granted from fasli 1297, "and you shall pay the balance every year whether the lands are "cultivated or left waste."

The Acting Sub-Collector accepted the document as genuine, and held it to imply that the remission was granted by the late zamindar for the purpose of effecting permanent improvements, though there was no express proviso to that effect; that it complied substantially with the first proviso to section 11 of the Rent Recovery Act, and that the defendant had substantially performed the conditions upon which the remission had been granted. It was contended on behalf of the plaintiff, that the said order was inadmissible in evidence on the ground that it was a permanent lease, and as such required registration under section 17 of the Registration Act. The Acting Sub-Collector overruled the objection and permitted the document to be put in as an admission by plaintiff's predecessor in title of the conditions on which the remission was granted,—such a remission in 1888 being admitted by the plaintiff. He found that the plaintiff was entitled to claim only a reduced rent, and ordered the plaintiff to tender and the defendant to accept patta accordingly and to execute a muchalka in the same terms.

The District Judge, on appeal, held that the order was one that required registration. He said:—

"Exhibit II is unregistered. It is conceded that if it "contains a 'grant' or 'present demise' [this is fatal to its "admission in evidence. And the patta which followed it is "unregistered likewise, and equally inadmissible to prove the "terms of the tenancy, though, no doubt, the tenancy itself "may be proved *aliunde* (*Venkatagiri Zamindar* v. *Raghava*(1)). "But it is argued that the present plaintiff cannot take advantage "of the fraud of his predecessor in title in not having the document "registered (*Nagappa* v. *Devu*(2)). Now there was in this case "no refusal to register. Defendant could also have applied for "registration under section 32 of the Registration Act inasmuch "as he claimed under the document. The then Poligar, who at "the time (as appears from the evidence), owed defendant money, "would hardly have refused registration had it been asked of him

(1) I.L.R., 9 Mad., 142. (2) I.L.R., 14 Mad., 55.

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"And it is in fact probable that the need for registration was "presented to the mind of neither party. The argument fails, "there having been no fraud. I must hold that neither exhibit "II nor the patta can be used to prove the grant; that one or "other of them does contain the grant, and that the grant being con-"tained in a document, cannot be proved otherwise (*Purmanandas* "*Jivandas* v. *Dharsey Virji*(1)).

On the question of improvements he said:—"I also think "that the Sub-Collector has somewhat misconceived the scope of "the last proviso to section 11 of the Act. That provision applies "to the clearing and bringing waste land into cultivation and the "'making of any permanent improvement thereon.' Now the "evidence in this case shows that the land was not waste, nor "newly brought under cultivation. It had been in the defendant's "family for years (see here exhibit VII and the oral evidence). "It had been, as the evidence of defendant's own tenant shows, "cultivated from time to time with a 'moderate' or 'partial' yield. "The proviso to section 11 does not therefore apply. *Qua* contract "the grant also appears bad, as argued, for want of considera-"tion. The evidence of defendant's third witness, the karnam who "wrote exhibit II, shows that the concession was 'granted as a "'favour' on account of the Poligar's friendship with the defendant. "The Poligar was not legally bound to grant remissions so that "the consideration was on the face of the takid, *nil*. There was, "it is true, no proved coercion or undue influence within the "meaning of the Contract Act. But the parties not being relations "and the grant not being registered, the contract, it appears to me, "cannot be enforced for want of consideration (Contract Act, "section 25). It is probable that the defendant improved the land, "though I am inclined to think the evidence on this head somewhat "exaggerated, and even suspicious from the absence of any written "agreement with the wudders. But it is doubtful if the conces-"sion was necessary. The evidence is that the neighbouring lands "all pay full rates with one exception and this is in the case of a "piece of genuine 'waste' land."

For these reasons he reversed the decree, and directed the defendant to accept the plaint patta and execute a muchalka in accordance therewith.

(1) I.L.R., 10 Bom., 101.

ORAI GOUNDAN v. KAMALINGA AYYAR.

The defendant preferred this second appeal.

Hon. *Bhashyam Ayyangar* and *Tiruvenkatachariar* for appellant.

Ramasubba Ayyar for respondent.

JUDGMENT.—We think the Judge was in error in holding that exhibit II required to be registered. The document only evidences an agreement to vary the terms of tenancy with reference to the amount of rent to be paid. As such it cannot be held to relate to an interest in immoveable property, and therefore did not require registration (*Satyesh Chunder Sircar* v. *Dhunpul Singh*(1)). It was next contended that this document exhibit II should be held to be binding on the plaintiff inasmuch as rent which up to then was payable only in respect of such lands as were cultivated was thereby made payable in respect of the entire holding whether cultivated or not. If up to the date of this document the defendant was not bound to pay for other than cultivated lands, the agreement on the part of the defendant to pay for lands whether cultivated or not would have made the agreement binding not only on the late zamindar but also upon the plaintiff, his successor, and no question would have arisen under the proviso to section 11, Rent Recovery Act, but in the Lower Courts the defendant did not allege that prior to this document he was entitled to remission as a matter of right. We cannot, therefore, say that the Judge was wrong in holding that the remissions prior to it were mere concessions. Exhibit VII to which our attention has been drawn is not consistent with the contention that the remissions were a matter of right, nor does the language of exhibit II itself support that view. That exhibit II does grant reduction of rent otherwise properly payable in respect of the land is quite clear and unless such reduction is granted for any of the purposes set out in the proviso to section 11 already referred to the arrangement must be held not to be binding upon the plaintiff. The finding of the Judge is that the reduction was not agreed to for any such purposes.

The mere fact that the defendant has made some improvement since the execution of exhibit II cannot bring the case within the exception to the proviso.

For these reasons we must hold that the decree of the lower appellate Court is right and dismiss the second appeal with costs.

(1) I.L.R., 24 Calc., 20.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

GILKINSON AND ANOTHER (PLAINTIFFS), APPELLANTS, 1898. October 1 20.

v.

SUBRAMANIA AYYAR (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 96, 102, 103—Order dismissing suit for default of appearance—Appeal.

The decision of a Court passed under section 102 of the Civil Procedure Code, dismissing a suit in default of appearance by a plaintiff, is an order and not a decree, and there is no first or second appeal therefrom.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of South Malabar, in Appeal Suit No. 786 of 1896, affirming the order of J. H. Munro, Subordinate Judge of South Malabar at Calicut, in Original Suit No. 15 of 1896.

Upon a suit to recover money coming on for hearing, the Subordinate Judge passed the following order:—"The plaintiffs "do not appear though it is now 11-25. The suit is dismissed "with costs under section 102 of the Civil Procedure Code." Plaintiffs applied under section 103 to have the order of dismissal set aside, and the application being rejected, appealed against the order of rejection under section 588, clause (8). Upon this being dismissed, they preferred a regular appeal from the order of dismissal under section 102, as if it were a decree. They further contended that section 102 of the Civil Procedure Code is governed by the provisions of section 96, and that the power to dismiss a suit given by section 102 only relates to non-appearance on the day "fixed in the summons for the defendant to appear and "answer," as stated in section 96. Though the day upon which default had taken place was a day so fixed in the summons, it was urged that it had lost that character in consequence of a further order which had been issued by the Court, that the plaintiffs should show cause why the plaint should not be amended. The District Judge dismissed the appeal.

The plaintiffs preferred this second appeal.

Mr. *A. G. Gover* for appellants.

Sundara Ayyar for respondent.

* Second Appeal No. 1661 of 1897.

GILKINSON v. SUBRAMANIA AYYAR.

MOORE, J.—The Subordinate Judge of Calicut dismissed a suit under section 102 of the Code of Civil Procedure. The plaintiff applied under section 103 to have the order of dismissal set aside, but his application was rejected and an appeal preferred by him against this rejection under section 588, clause (8), was dismissed by the District Judge. He then preferred a regular appeal from the order of dismissal under section 102, as if it were a decree, to the District Judge who heard the appeal and disposed of it on the merits. Against his judgment a second appeal has been preferred here. It is now urged on behalf of the respondent that there was no appeal to the District Judge from the order passed under section 102 and that consequently there is no second appeal here.

This contention is in my opinion a valid one. It must be held that an order passed under section 102 is not a decree (*vide Mansab Ali* v. *Nihal Chand*(1)). Reference should also be made to the decision of their Lordships of the Privy Council in *Chand Kour* v. *Partab Singh*(2), where it was held "that the dismissal of "a suit in terms of section 102 was plainly not intended to operate "in favour of the defendant as *res judicata*," and to an unreported decision of this Court (*Muniappa Chetti* v. *Venkatarama Chetti*(3)), where the ruling in *Mansab Ali* v. *Nihal Chand*(1) is approved and followed.

It is further urged that although it is the case that the 23rd September 1896 (the day on which the suit was dismissed for default) had been fixed for settlement of issues yet that it should be held that this arrangement was superseded by a further order of the Court directing that an application on the part of the defendant praying that the plaintiffs should be directed to amend the plaint should be heard on the same day. There does not appear to be anything in this argument. On the 4th September the defendant put in the petition just mentioned and the order passed on it by the Subordinate Judge was that the question raised would be considered at the first hearing and that notice should be sent to the plaintiffs for the 23rd. It is impossible to hold that by this order the Subordinate Judge "superseded" the order fixing the 23rd September for the first hearing; on that the plaintiffs could reasonably have supposed that he had done so.

(1) I.L.R., 15 All., 359. (2) I.L.R., 16 Calc., 98.
(3) Appeal against Order No. 140 of 1893 (unreported).

GILKINSON v. SUBRAMANIA AYYAR.

On the ground that the order passed under section 102 of the Code of Civil Procedure was not a decree, it must be held that there was no regular appeal to the District Judge, and that consequently there is no second appeal here. This second appeal must be dismissed with costs.

SUBRAMANIA AYYAR, J.—I concur.

APPELLATE CIVIL.

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

SIVAYYA AND OTHERS (DEFENDANTS NOS. 3 TO 6), APPELLANTS,

v.

RAMI REDDI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

1899. February 1, 2, 21.

Religious Endowments Act—Act XX of 1863, ss. 2, 13, 14, 16—Regulation VII of 1817 (Madras)—Joinder of purchasers in a suit against trustee.

A temple having been endowed with immoveable property after the passing of Regulation VII of 1817 (Madras), and before the Religious Endowments Act (XX of 1863), and the trustee having without authority sold the same, a suit was instituted under Act XX of 1863 against the trustee and the purchasers of the property, to annul the sales and to declare the right of the temple thereto:

Held, (1) that a transferee of trust property, under a transaction which amounts to a breach of trust on the part of the trustee of the institution, cannot be proceeded against under the provisions of the Religious Endowments Act, 1863; and

(2) that the trustee of a public religious institution can be sued under the provisions of the Religious Endowments Act, 1863, notwithstanding the fact that the institution came into existence after Regulation VII of 1817 was passed.

APPEAL against the decree of the District Judge of Bellary in Original Suit No. 13 of 1897.

Suit under sections 14 and 15 of the Religious Endowments Act, 1863, to annul the sales by the second defendant of the plaint houses to defendants Nos. 3 to 6, and to declare the right of the Sri Lakshmi Narasimhasami's temple to the said houses.

The plaint set forth that the first defendant's husband was the dharmakarta of Sri Lakshmi Narasimhasami's temple in Kollegal

* Appeal No. 122 of 1898.

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village, Bellary taluk, and had died seven years before the date of the plaint, leaving no male issue; that first defendant was his heir; that second defendant was a bandhu of the late dharmakarta, and in order to assist the first defendant, undertook to manage the affairs of the dharmakarta of the said temple; and that the second defendant, without right, authority or justifiable necessity, had sold the plaint immoveable properties, which belonged to the temple, and the revenue of which was allotted for the expenses of worship therein to defendants Nos. 3 to 6, and executed and registered sale-deeds therefor. This suit was brought to annul the sales, and to declare the right of the temple to the said property.

Defendants Nos. 3 to 6 claimed, *inter alia*, that, if a decree should be given in favour of the plaintiff, the second defendant should be directed to re-pay the purchase money handed over by them on behalf of the temple, with interest. The third and the eleventh issues were as follows:—

"3. Does the plaintiff's suit lie under Act XX of 1863?

"11. Are the sales to the third, fourth, fifth and sixth defend-"ants binding on the parties to this suit? If so, are the said "defendants entitled to any relief in this suit?"

The District Judge held that the suit did lie under Act XX of 1863. He found it to have been proved that the houses in question had been set apart as an endowment for the said temple about fifty years ago; and though the exact date of the endowment could not now be ascertained, it had been clearly shown to have been made after the passing of Regulation VII of 1817 and before Act XX of 1863 came into force. He also held that the temple came under the provisions of Regulation VII of 1817, and consequently under Act XX of 1863; and he referred to *Jan Ali* v. *Ram Nath Mundul*(1) and *Muthu* v. *Gangathara*(2). On the eleventh issue he held that as it was impossible to hold that the sales were made for the benefit of the temple, or that the second defendant had any authority to dispose of the property in such a manner, the said sales were not binding on the temple or its trustees. And he declared them to be null and void in so far as the temple and its trustees were concerned, and further declared the said houses to be the property of the temple and its dharmakartas

(1) I.L.R., 8 Calc., 32. (2) I.L.R., 17 Mad., 95.

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as trustees for the performance of the requisite religious ceremonies in the same.

Defendants Nos. 3 to 6 preferred this appeal.

The Advocate-General (Hon. *C. Arnold White*) for appellants:—Act XX of 1863 is restricted to endowments existing at the time of the passing of Regulation VII of 1817. It only substitutes new machinery. Regulation VII of 1817, as shown by its preamble, only applied to institutions existing in 1817, and Act XX of 1863 applies to the same. [SUBRAMANIA AYYAR, J., referred to *Ganes Sing* v. *Ramgopal Sing*(1) and *Jan Ali* v. *Ram Nath Mundul*(2), and *Sheoratan Kunwari* v. *Ram Pargash*(3). The regulation recognized the duty of Government to look after charities at large.] Unless the institution came within the Regulation of 1817 it would not be governed by the Act of 1863 (*Muthu* v. *Gangathara* (4)). [SHEPHARD, J.—There, the Court was considering, not the date of endowment but its nature. Why limit Act XX of 1863, section 14, so inconveniently?] The Government wished to relieve itself from the duties assumed in 1817. The thirteenth and succeeding sections give the right to institute suits only in cases where such rights existed before. [SUBRAMANIA AYYAR, J.—Government had those duties before 1817, as is shown by public records and the preamble.] Those duties were defined by Regulation VII of 1817. The object of the Act is that which is stated in the preamble, namely, to relieve the Boards of Revenue. The question now under consideration is merely as to the right to sue given by the Act. I cannot distinguish *Sheoratan Kunwari* v. *Ram Pargash*(3) referred to in *Jan Ali* v. *Ram Nath Mundul*(2), but the general proposition in the latter case helps me. Moreover, as to the decision in this latter case the temple was built before 1817, though the endowment in question was later. The term "granted" in the Regulation of 1817 must apply only to endowments then already existing; not to endowments that might thereafter be granted. See preamble and section 2. [SHEPHARD, J.—See section 5, the word is not there used in your sense.] The word must be taken in the same sense throughout; see also reference to former Governments. The words "is hereby vested" in section 2 of Regulation VII of 1817, and the phraseology of section 3 of

(1) 5 B.L.R., Appx., 55. (2) I.L.R., 8 Calc., 32.
(3) I.L.R., 18 All., 227 at p. 232. (4) I.L.R., 17, Mad., 95.

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Act XX of 1863, and section 15 and other sections must be read in the past tense. The weight of authority supports this view; see *Narasimha* v. *Ayyan Chetti*(1) and *Jan Ali* v. *Ram Nath Mundul*(2).

Assuming that the suit does fall within the scope of Act XX of 1863, it is misconceived. If section 14 of Act XX of 1863 gives a right independent of Regulation VII of 1817, it must be construed strictly, and the plaintiff must, under it, proceed against the individual mentioned there and ask for relief of the kind therein mentioned. This plaint does not conform to the section nor does the decree, which is merely declaratory. If a plaintiff wishes to sue (*a*) under the Act, (*b*) in the District Court, he must conform strictly to the section. He cannot obtain a decree for an injunction or possession: if he wishes for such relief he must adopt the ordinary procedure. Defendants Nos. 3, 4, 5 and 6 are purchasers from trustees; and they should not have been joined. (In addition to the cases cited above the following cases were referred to in the course of the argument:—*Mahalinga Rau* v *Vencoba Ghosami*(3), and *Ittuni Panikkar* v. *Irani Nambudripad*(4)).

Ramachandra Rau Saheb for respondent No. 1.

SHEPHARD, J.—This is an appeal on behalf of some defendants who have been joined as parties in a suit brought under the provisions of section 14 of the Religious Endowments Act against a trustee.

It appears that the temple in the interests of which the suit is brought was established after the year 1817 and it is accordingly argued that, inasmuch as the Regulation VII of 1817 applies only to institutions founded before that Regulation came into force and the Act applies only to institutions coming within the scope of the Regulation, the provisions of Act XX of 1863 have no reference to the Kollegal temple. Of the two propositions necessary to establish this conclusion, I think that the latter, at any rate, that relating to the operation of the Act of 1863, is not well founded.

There is, in my opinion, no reason to suppose that section 14 of that Act was intended to be restricted to such institutions as

(1) I.L.R., 13 Mad., 157.
(2) I.L.R., 4 Mad., 167.
(3) I.L.R., 6 Calc., 32.
(4) I.L.R., 3 Mad., 401.

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came within the purview of the Regulation or even to institutions founded before the Act itself came into force.

But there is another ground on which I think this appeal must be allowed. On further consideration of the provisions of the Act, I do not think it can have been intended that persons in the position of purchasers from a trustee should be rendered answerable in a suit brought under section 14 of the Act. In the case of an ordinary suit against a defaulting trustee, it would undoubtedly be right to join as defendants persons in whose favour a conveyance of trust property had been made. With the view to obviating further litigation it is clearly expedient that they should be joined and that the property should be recovered from them in the same suit. But there are indications in this Act that the suit was not intended to be the ordinary suit against a trustee. Section 14 taken with section 2 gives jurisdiction to a Court which ordinarily does not possess jurisdiction in the matter of such suits and section 16 provides for a compulsory reference to arbitration.

With reference to trustees there may well have been reasons for these special provisions, but it would be difficult to explain why as regards persons other than trustees a special jurisdiction should have been created, or power conferred on the Court to insist on reference to arbitration.

There is another difficulty in the construction of the section for which the plaintiff would contend and that is that he clearly cannot be entitled to recover in his own name the trust property and that no provision is made in the Act for the appointment of a new trustee and bringing him on the record as the plaintiff. Perhaps it might have been convenient to give the Court the jurisdiction exercised by the Allahabad High Court in the case of *Sheoratan Kunwari* v. *Ram Pargash*(1), but I cannot agree in holding with that Court that the jurisdiction has been given. It may be said that the damages recoverable against a trustee must include damages recoverable in the interest of the trust. That seems to have been the view held by this Court in one case, (*Srinivasa* v. *Venkata*(2)). I doubt if this view is correct, but assuming that it is correct, I do not think it follows that trust property can be

(1) I.L.R., 18 All., 227 at p. 232.
(2) I.L.R. 11 Mad., 148.

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recovered against third parties in a suit brought under the section. The suit for that purpose or for the purposes mentioned in the plaint, so far as they affect the appellants ought, in my judgment, to be brought by the trustee, either the original or the newly-appointed trustee, and in the ordinary Court.

I am of opinion that the appeal should be allowed and the suit dismissed as against the appellants with costs. As against the trustee the declaration ought, I think, to stand.

SUBRAMANIA AYYAR, J.—I have never entertained any doubt that a manager of a public religious institution such as the present can be sued under the provisions of the Religious Endowments Act, XX of 1863, even though the institution itself came into existence after Regulation VII of 1817 was passed. It is not, however, necessary to deal with the contention to the contrary, urged on behalf of the appellants by the learned Advocate-General, inasmuch as I agree that the appeal must be allowed on the ground that a person who is but a transferee of trust property under a transaction which amounts to a breach of trust on the part of the manager of the institution, cannot be proceeded against under the provisions of the Act in question. As to this latter point I first took a different view. But I am now satisfied that the present conclusion is the correct one. The case of *Sabapathi* v. *Subraya*(1) clearly warrants the proposition that the suits contemplated by Act XX of 1863 are suits against a trustee, manager or superintendent or member of committee and against no other persons. See too *Virasami Nayudu* v. *Subba*(2). The clearest indication in the Act itself in favour of the view taken above is furnished by the provisions relating to the tribunal competent to entertain a suit brought under the enactment. Now suppose that the property of a temple alienated by the trustee is land situated outside the ordinary territorial jurisdiction of the Court empowered to entertain a suit against the trustee, can it be said that that Court can try a question affecting such land as against the alienee in possession and pass a decree against him with reference to the land as was apparently held in *Sheoratan Kunwari* v. *Ram Pargash*(3)? There is nothing in any part of the enactment that can be referred to as expressing an intention to confer such absolutely unprecedented

(1) I.L.R., 2 Mad., 58 at pp. 60, 61. (2) I.L.R., 6 Mad., 54.
(3) I.L.R., 18 All., 227 at p. 232.

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and extraordinary jurisdiction on the Courts acting under the enactment. Nor can I see adequate reasons for holding that such an intention is necessarily implied by any of the provisions to be found therein. If this argument is right, it follows that a Court acting under this enactment has no power to determine any question as against the alienee, although the land he is concerned with is situated within the Court's territorial jurisdiction under the ordinary law as in this case. I therefore concur in the order proposed by my learned colleague SHEPHARD, J.

DAVIES, J.—The view taken by my learned colleagues is the view that I have entertained throughout. Looking to the terms of section 14 of the Act limiting the operation of the special jurisdiction thereby conferred to a certain class of persons and to certain forms of relief as against those persons only, it seems to me that no other conclusion is possible. I therefore concur in allowing the appeal, and directing that the suit as against the appellants be dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

VEDACHALA MUDALI (DEFENDANT), APPELLANT,

v.

RAMASAMI RAJA (PLAINTIFF), RESPONDENT.*

1899. March 8, 21.

Provincial Small Cause Courts Act—Act IX of 1887, *s.* 15, *sched. II, art.* 8—*Suits for rent*—"*Suits of the nature cognisable in Courts of Small Causes*"—*Second appeal*—*Civil Procedure Code*—*Act XIV of* 1882, *s.* 586.

A suit for the recovery of rent other than house-rent does not become a suit of the nature cognizable in Courts of Small Causes within the meaning of section 586 of the Code of Civil Procedure because a Judge of a Court of Small Causes has been invested by the Local Government with authority to exercise jurisdiction with respect thereto under section 15 and schedule II, article 8, of the Provincial Small Cause Courts Act, 1887.

A second appeal will lie in such a suit, though the amount or value of the subject-matter of the original suit does not exceed Rs. 500.

* Second Appeal No. 1160 of 1898.

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SECOND APPEAL against the decree of J. Hewetson, District Judge of Chingleput, in Appeal Suit No. 826 of 1897, affirming the decree of S. Saminatha Sastri, District Munsif of Chingleput, in Original Suit No. 226 of 1896.

Suit for rent for Rs. 238-4-2. The District Munsif gave a decree for the plaintiff for Rs. 178-11-9, which was affirmed on appeal by the District Judge.

The defendant preferred this second appeal, (second appeals Nos. 1161 to 1164, 1166, 1167 and 1169 to 1173 of 1898 following the result in this case).

Pattabhirama Ayyar, for respondent, took the preliminary objection that as the original suits now appealed against were for rent not exceeding Rs. 500 in amount, no second appeals lay (Civil Procedure Code, section 586). Article 8 of the second schedule to the Provincial Small Cause Courts Act, 1887, enables Judges of Small Cause Courts to try such suits if they have been expressly invested with authority by the Local Government. Such authority has been conferred on all Subordinate Judges and District Munsifs within the Presidency, and the effect is to render all suits for rent preferred throughout the Presidency and falling within the pecuniary limits of jurisdiction of such Courts, "suits of the "nature cognizable in a Court of Small Causes."

Sundara Ayyar and *Ramachandra Ayyar* for appellant.—By section 586 of the Civil Procedure Code, no second appeal shall lie in any suit of the nature cognizable in Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed Rs. 500. Section 15 of the Provincial Small Cause Courts Act, 1887, provides that a Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes; and article 8 of that schedule excepts a suit for the recovery of rent other than house-rent. The remainder of the article consists of a proviso relating to Courts in which the Judges have been expressly vested by the local Government with authority to exercise jurisdiction with respect to such suits. The fact that the jurisdiction of a particular Judge, or of particular Judges, has been, or may be, so extended by Government, does not change the character of a suit which is thus permitted to be tried. Nor is a suit by such an extension of powers, on the part of a Judge or of Judges, converted

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into one that is "of the nature cognizable in Courts of Small Causes." The terms of section 586 of the Civil Procedure Code are express in their prohibition as regards "suits of the nature cognizable" in this particular class of Court; and article 8 of the second schedule to the Provincial Small Cause Courts Act is equally clear in its exception of suits "for the recovery of rent other than house-rent" from the cognizance of Small Cause Courts. The prohibition of section 586 of the Civil Procedure Code is aimed at the nature of the suit, and not at the powers of a Judge who may happen to try it. District Judges exercising Small Cause Court jurisdiction cannot try rent suits on the Small Cause side, notwithstanding the notification of the local Government by which the extended powers referred to have been conferred. If the power to try such suits had been conferred upon one Judge alone, it could not be said that such an authority would convert all such suits into suits of a nature cognizable in Courts of Small Causes throughout the Presidency. A suit for rent other than house-rent, therefore, being excepted from the cognizance of a Court of Small Causes, is not a "suit of the "nature cognizable in Courts of Small Causes" and is not within the prohibition of section 586 of the Civil Procedure Code. A second appeal therefore lies.

MOORE, J.—A preliminary objection is taken to these second appeals that as the original suits were for rent not exceeding Rs. 500 in amount, no second appeals lie (section 586, Civil Procedure Code).

Section 586 of the Civil Procedure Code provides that no second appeal shall lie in any suit of the nature cognizable in a Court of Small Causes when the amount or value of the original suit does not exceed Rs. 500. Section 15 of the Provincial Small Cause Courts Act (IX of 1887) directs that a Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes. Among the suits to be found in this second schedule are suits for the recovery of rent other than house-rent (clause 8). The following proviso is, however, added to this clause:—"Unless the Judge "of the Court of Small Causes has been expressly invested by the "Local Government with authority to exercise jurisdiction with "respect thereto." The Madras Government has by a notification of the 24th January 1888 invested all Subordinate Judges and District Munsifs within the Presidency with jurisdiction to try on their

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Small Cause side all suits for rent falling within the pecuniary limits of their special jurisdiction.

On behalf of the respondents it is urged that the effect of this notification is to render all suits for rent preferred throughout the Presidency "suits of the nature cognizable in a Court of Small "Causes." For the appellants it is argued that this notification cannot be held to operate so as to convert rent suits into suits of the nature cognizable in a Court of Small Causes, and that all it does is to empower certain Judges named in the notification to try such suits on the Small Cause side of their Courts. It is pleaded that the fact that certain Judges throughout the Presidency have been authorised to try such suits on the Small Cause side cannot alter the nature of the suits, and it is pointed out that, notwithstanding the notification, such District Judges as have been invested with Small Cause jurisdiction cannot try rent suits on the Small Cause side. Suppose, it is urged, that Government had invested the Subordinate Judge of Ootacamund (*e.g.*), and no other Judge with the power to try rent suits as Small Causes, would this fact convert such suits into suits of the nature cognizable in a Court of Small Causes throughout the Presidency? This question is not, it must be admitted, void of difficulty, but the answer to it must, in my opinion, be in the negative.

It does not appear to me that it can possibly be held that as soon as Government by a notification empowers any Judge to try rent suits on the Small Cause side all such suits throughout the Presidency cease to be suits excepted from the cognizance of Courts of Small Causes and become suits of the nature cognizable in such Courts (section 586, Civil Procedure Code).

This question does not appear to have ever been formally decided by this Court. In *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rau*(1), it was no doubt held that as the suit there under consideration was a suit for rent and as such triable by a Court of Small Causes, it followed that it was a suit of the nature cognizable by a Court of Small Causes and that consequently under section 586, Civil Procedure Code, no second appeal lay, but what was there discussed was the question as to whether a suit for kattubadi and karnam's emoluments was a suit for rent and the point now raised does not appear to have been argued or considered. On the other

(1) I.L.R., 19 Mad., 329.

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hand in *Ramchandra Raghunath* v. *Abaji Rastya*(1) it was held that the expression "suits of the nature cognizable by Courts of "Small Causes" must mean suits which are so cognizable in general without reference to clause 4 of section 6 of Act XI of 1865, which provides that certain suits shall not be cognizable by Courts of Small Causes unless the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction over them:

I am consequently of opinion that the fact that certain Judges have been empowered by Government to hear suits for rent on the Small Cause side does not render such suits generally suits of the nature cognizable in Small Cause Courts and that these second appeals do lie.

The several questions raised in these appeals have been already disposed of by us in the judgments in Second Appeals Nos. 1165 and 1168 of 1898.

These second appeals are accordingly dismissed with costs.

SUBRAMANIA AYYAR, J.—In *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rau*(2), as also in certain cases not reported, in the decision whereof I took part, I proceeded, I must admit, on the assumption that suits for rent other than house-rent, not exceeding Rs. 500, were suits of the class mentioned in section 586 of the Code of Civil Procedure. In making that assumption, which I now find to be erroneous, I overlooked the fact that suits for rent described above are cognizable by certain Judges exercising the powers of a Small Cause Judge, not by virtue of the provisions of the Provincial Small Cause Courts Act IX of 1887 themselves, but by virtue of the authority conferred on such Judges by the Local Government under the latter part of article 8 of the second schedule to the said Act. Now suits for rent other than house-rent are, by section 15 of the Act and the former part of the article referred to, expressly excluded from the cognizance of Small Cause Courts as a rule. The latter part of the article, no doubt, contains a qualification. But by it the Local Government is empowered, not to bring such suits within the category of suits generally cognizable by a Court of Small Causes, but only to vest a Judge exercising powers of a Judge of a Small Cause Court with authority to try that class of suits. Suits capable of being taken

(1) 6 Bom. H.C.R., (A.C.J.), 12 at pp. 15, 16. (2) I.L.R., 19 Mad., 329.

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cognizance of by virtue of such special authority cannot properly be treated as suits of the nature cognizable by a Court of Small Causes within the meaning of section 586 of the Civil Procedure Code. The decision of Couch, C.J., and Gibbs, J., in *Ramchandra Raghunath* v. *Abaji Rastya*(1) is a distinct authority in favour of the above conclusion. I would only add that in the circumstances I see no objection to our acting upon that conclusion in the present instance, notwithstanding the decisions of this Court alluded to above.

I therefore concur in holding that second appeals lie in all these cases. But as they fail on the merits they must be dismissed with costs.

APPELLATE CIVIL.

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

1899. March 3, 8.

THOYI AMMAL (PLAINTIFF), APPELLANT,

v.

SUBBAROYA MUDALI (DEFENDANT), RESPONDENT.*

Oaths Act—Act X of 1873, ss. 9 to 11—Offer by party to be bound—Conclusive proof of the matter stated.

Defendant in a suit, before trial, filed a petition under section 9 of the Indian Oaths Act, 1873, to the effect that if the plaintiff should make an oath according to law regarding certain facts, "this defendant will forfeit his right of contesting "this suit." He subsequently desired to withdraw the petition on insufficient grounds, but the plaintiff took the oath, and on the strength thereof all the issues were decided, and a decree passed, in plaintiff's favour. The suit was, however, remanded on appeal, for disposal after recording evidence on both sides. On appeal by plaintiff against this order of remand:

Held, (1) that there is nothing in sections 9 to 11 of the Indian Oaths Act, 1873, which allows a party who has agreed to the administration of an oath under those sections to retract after the opponent has accepted the proposal;

(2) that the Act gives the Court a discretion to administer the oath or not, and though it should not administer it if good grounds be shown for retracting, it is justified in so doing, notwithstanding the retractation, if the grounds are frivolous;

(1) 6 Bom. H.C.R., (A.C.J), at pp 15, 16.

* Appeals against Orders Nos. 126 and 127 of 1898.

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(3) that if "the matter stated," as referred to in section 11 of the Act, affords sufficient material for the decision of the suit, a decree may be passed on the facts so proved. But if the facts so proved are not sufficient for the decision of the case, such further facts as are necessary should be proved by evidence adduced on both sides. The Act provides, not for the adjustment of a suit in an arbitrary way, but merely for the conclusive proof of facts; such facts, if not sufficient for the decision of the suit, should be supplemented by facts duly proved by evidence; and

(4) that the facts proved by the special oath are conclusively proved, and any further evidence that may be taken should be limited to matters not proved by the oath.

APPEAL against the remand order of W. F. Grahame, District Judge of South Arcot, in Appeal Suit No. 119 of 1898 (Original Suit No. 660 of 1897 on the file of the District Munsif of Tindivanam).

The facts of this case appear, sufficiently for the purpose of this report, from the judgment.

Ramachandra Ayyar for appellant.

Sivasami Ayyar for respondent.

JUDGMENT.—The facts of this case are briefly as follows:—In Original Suit No. 373 of 1896, the plaintiff obtained a decree for possession of land against certain persons said to be the plaintiff's tenants. On proceeding to execute the decree, the present defendant, who was no party to the decree, refused to give up possession, and plaintiff therefore brought the present suit (Original Suit No. 660 of 1897) under section 331, Civil Procedure Code. The plaintiff alleged that he purchased the land from Mari Mudali, the last owner, and had possession from that time, but that the defendant wrongfully claimed to be in possession under his sister Subbammal, who had no title. The defendant alleged that he purchased and got possession of the land from Subbammal, the widow of Moothia Mudali, the last male owner. The issues framed were as follows:—(1) Whether Mari Mudali had right to, and enjoyment of, the plaint properties or not? (2) Whether the deed and the decree on which plaintiff relies are valid and operative against defendant and his deed or not? (3) Whether plaintiff had possession and enjoyment of the properties, or whether Subbammal's husband and she had possession and the deeds she executed are valid or not? (4) Whether defendant had no possession and the obstruction offered is unlawful or not? (5) What other order is necessary in case plaintiff fails?

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Before the trial, the defendant put in a petition under section 9 of the Indian Oaths Act X of 1873, in these terms :—" If the " plaintiff should get into the witness box in this Court and make " an oath according to law, that payment of money has been made " to Mari Mudali as mentioned in the sale-deed executed by Mari " Mudali to the plaintiff in this suit ; that the plaint lands have been " in her enjoyment from date of bond ; that, subsequent to the " said sale, neither Moothia Mudali, Subbammal nor Subbaroya " Mudali enjoyed it, this defendant will forfeit his right of " contesting this suit."

The defendant subsequently desired to withdraw the petition on grounds which the Court found to be insufficient. The plaintiff then took the oath in the form proposed and the District Munsif, on the strength of it, decided all the issues in plaintiff's favour and gave her a decree for possession. Against this decree, the defendant appealed and the District Judge, relying on the case of *Vasudeva Shanbog* v. *Naraina Pai*(1) remanded the suit for disposal after recording evidence on both sides, apparently on the ground that the defendant was at liberty to revoke the agreement with regard to the oath and that, as the defendant's consent was not adhered to after the oath was taken, the proceedings taken in connection with the oath were not binding, and the only course was to dispose of the case *de novo* on evidence taken in the ordinary way. Against this order of remand, the present appeal is made by the plaintiff.

We think that the District Judge is in error in supposing that *Vasudeva Shanbog* v. *Naraina Pai*(1) is an authority for holding that a party who has agreed to the administration of an oath under section 9 of the Indian Oaths Act is at liberty, without good reason, to revoke the agreement so as to render the taking of the oath invalid or futile for all purposes. The learned Judges in that case did not discuss what the effect of the party to be bound withdrawing from the agreement would be in regard to matters of fact duly sworn to in accordance with the agreement, nor did they decide that the oath could not legally be administered after such party had signified his wish to withdraw. There is nothing in sections 9 to 11 of the Act which allows a party to retract after the opponent has accepted the proposal. The Act gives the Court a

(1) I.L.R., 2 Mad., 356.

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discretion to administer the oath or not, and if a party after agreeing to an oath satisfies the Court that there is good ground for retracting, the Court would probably exercise a wise discretion in refusing to administer the oath, but when a party puts forward frivolous reasons for retracting we think the Court is justified in administering the oath notwithstanding the retractation. This has been expressly decided in *Ram Narain Singh* v. *Babu Singh*(1) and *Abaji* v. *Bala*(2), and there is nothing in the case of *Vasudeva Shanbog* v. *Naraina Pai*(3) to support the contrary view. Indeed it is plain that if the facts sworn to in that case had been sufficient for the decision of the suit, the learned Judges would have decided it accordingly instead of remanding it for disposal on the merits. What the learned Judges in that case decided is that, if the party to be bound by the oath does not adhere to the agreement, the taking of the oath by the other party cannot be regarded as an adjustment of the suit under section 375, Civil Procedure Code, so as to be made the ground for a decree by consent being recorded by the Court. The taking of an oath was itself a mode of adjustment under the old Regulation (III of 1802), but the Regulation was repealed, and when the Indian Oaths Act was passed it did not re-enact the provisions of the Regulation. It only allowed the Court, in its discretion, to permit the taking of an oath in a form proposed by one party and accepted by the other, and it enacted (section 11) that " the evidence so given shall, as against the person who " offered to be bound as aforesaid, be conclusive proof of the matter " stated." If the matter stated affords sufficient material for the decision of the suit, a decree may be passed on the facts thus conclusively proved. If the facts so proved are not sufficient for the decision of the case, such further facts as are necessary must be proved in the ordinary way, by evidence adduced on both sides. The facts proved by the special oath are, however, conclusively proved, and the further evidence must, in our opinion, be limited to matters not proved by the oath.

The mistake lies in attempting to utilize the Oaths Act for a purpose outside its scope, and in treating it as if it were the old Regulation re-enacted in a new form. It does not provide for the adjustment of a suit in an arbitrary way by the oath of a party, but it provides for the conclusive proof of facts by the oath of a

(1) I.L.R., 18 All., 46. (2) I.L.R., 22 Bom., 281. (3) I.L.R., 2 Mad., 356.

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party. It is for the parties, and for the Court acting under these provisions of the Oaths Act, to take care that the facts to be proved by the oath are sufficient for the decision of the suit. Otherwise they must be supplemented by facts proved in the ordinary way.

The clause in the agreement that the defendant would "forfeit "his right of contesting the suit" if the plaintiff should take the oath, must be understood with reference to the scope of the Act under which the agreement was made, and therefore means that the defendant will not raise any contention as to any matter sworn to by the plaintiff, but will accept her oath. The facts proved by the oath are admittedly not sufficient to decide the first and second issues or the suit. They do not touch the title of Mari Mudali through whom the plaintiff derives her title. It was therefore necessary to remand the suit for a finding on those issues, but the District Judge was in error in remanding the suit for disposal *de novo* on all the issues. The facts sworn to by the plaintiff in her oath must be regarded as conclusively proved, and the further evidence on both sides must be limited to other matters. With these remarks, we confirm the order of remand and direct that costs in this appeal do abide and follow the result of the suit.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

QUEEN-EMPRESS,

1898. September 16, 20.

v.

YAKOOB SAHIB.*

Penal Code—Act XLV of 1860, *ss.* 65, 67—*Imprisonment in default of fine—Towns Nuisances Act (Madras)—Act III of* 1889, *s.* 3, *cl.* 10.

An accused having been convicted of an offence under section 3, clause 10, of the Towns Nuisances Act (Madras), 1889, and sentenced to pay a fine of Rs. 8 and in default of payment to undergo simple imprisonment for a week:

Held, (1) that section 67 of the Indian Penal Code refers solely to cases in which the offence is punishable with fine only: and has no application to offences punishable either with imprisonment or with fine, but not with both; such sentences are governed by section 65 of the Indian Penal Code; and

* Criminal Revision Case No. 260 of 1898.

(2) that the sentence of imprisonment in default should not exceed one-fourth of the maximum term of imprisonment provided for the offence.

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Case referred for the orders of the High Court, under Criminal Procedure Code, section 438, by E. A. Elwin, Acting District Magistrate of Bellary, in Summary Case No. 244 of 1898, on the file of the Bench Magistrate of Hospet.

Accused was convicted under the Towns Nuisances Act (Madras), 1889, section 3, clause 10, of an offence which is punishable thereunder with fine not exceeding Rs. 50 or imprisonment of either description not exceeding eight days. The Magistrate sentenced him to pay a fine of Rs. 8 and in default to undergo simple imprisonment for a week.

The Public Prosecutor (Mr. *E. B. Powell*) for the Crown:—Section 65 of the Indian Penal Code applies, not section 67. The Magistrate, under section 65, cannot impose more than one-fourth of the maximum term of imprisonment in default of payment of the fine, even if the offence be punishable with imprisonment as well as fine; *a fortiori* he cannot impose more than one-fourth of the maximum term of imprisonment prescribed by the section under which the accused was convicted, which provides for a sentence of fine or imprisonment but not for both.

The accused was not represented.

BENSON, J.—In this case the accused was found guilty of an offence punishable under section 3, clause 10, of Act III of 1889, and was sentenced to pay a fine of Rs. 8 or in default to undergo simple imprisonment for a week. The punishment awardable under the section is a "fine not exceeding Rs. 50 or imprisonment of either "description not exceeding eight days."

The question is whether the award of a week's imprisonment in default of payment of the fine is legal, or whether the term of imprisonment in default is limited by section 65, Indian Penal Code, to one-fourth of the term (eight days) of imprisonment awardable for the offence under section 3 of Act III of 1889, *i.e.*, to two days in the present case. Section 67, Indian Penal Code, has obviously no application to the case. It refers solely to the cases in which the offence is punishable with fine only. The present case is punishable with imprisonment or with fine at the option of the Magistrate, though not with both. Section 65, Indian Penal Code, however, in my opinion, is applicable to such a sentence. The words "punishable with imprisonment as well as fine" in that

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section must be understood in the same sense as those words bear in section 64. The wording of section 64, it must be admitted, is not happy, but I am of opinion that the Legislature intended by it to provide for the award of imprisonment in default of payment of fine in all cases in which fine can be imposed. Those cases the section divides into three classes, viz., offences (1) "punishable with imprisonment as well as fine," (2) "punishable with "imprisonment and fine" and (3) "punishable with fine only." The first of these classes in my opinion includes two classes, viz., (*a*) offences like the present punishable with imprisonment or fine in the alternative, and (*b*) offences punishable, as most of those under the Indian Penal Code are, with imprisonment, or fine, or both, cumulatively. Grammatically it would seem also to include the second class, viz., offences punishable with imprisonment and fine, but this class is separately mentioned, probably because reference was intended to cases in which a substantive sentence of imprisonment must be awarded, the fine, if any, being only in addition thereto. The Legislature, by section 64, having given the general power to impose imprisonment in default of payment of fine, then proceeded to lay down limits to that power. Section 65 limited the power in the first class of cases, section 67 in the third class. If the second class is, as I think it is, included in the first, then section 65 applies to it also; but, in any case, section 33, Criminal Procedure Code, imposes the same limit in unmistakable terms. It seems to me unreasonable to suppose that the Legislature did not intend to include cases like the present in the first class since the result would be that, in such cases alone, there would be no limit save that of the general power of a Magistrate, and a first-class Magistrate in a case like the present could award two years' rigorous imprisonment in default of payment of a petty fine, though in all other classes of cases his power is strictly limited.

There is no reason for such an anomaly, and I do not think that the language of the several sections obliges us to hold that it exists.

I would therefore modify the sentence of imprisonment in default passed in this case to one of two days only.

MOORE, J.—It appears to me to be clear that this case comes under section 65 of the Indian Penal Code. That section applies to all cases where the offence is punishable with imprisonment as well as fine, *i.e.*, as I understand the wording, cases where fine and

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imprisonment can be awarded and also those where the punishment may be either fine or imprisonment (as in the present case) but not both. The only cases that it does not apply to are those dealt with in section 67 where fine only can be awarded. An offence committed under section 3, Act III of 1889, is liable to fine not exceeding Rs. 50, or to imprisonment of either description not exceeding eight days. In default of payment of fine the maximum term of imprisonment that can be awarded is, under section 65, Indian Penal Code, two days.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Moore.

GRANT (PLAINTIFF), APPELLANT,

v.

SUBRAMANIAM (DEFENDANT), RESPONDENT.*

1898 September 8, 1

Civil Procedure Code—Act XIV of 1882, s. 295, proviso (b)—Same judgment-debtor—Sale of lands under attachment—Disposal of amount realised—Rateable distribution.

A father and son having mortgaged certain villages, the mortgagee obtained against both mortgagors a decree for the amount due, which was transmitted for execution to a District Court. The villages were subsequently, by order of the District Court, attached, and plaintiff, as receiver representing the mortgagee then obtained an order that the villages under attachment should be sold free from the mortgage, and that plaintiff should have the same rights against the proceeds of sale, as he, as such receiver, had against the property to be sold. Some of the villages were sold accordingly and the amount realised paid into the District Court. The defendant, who had obtained a separate decree against the son alone (the father having meanwhile died) in the same District Court, applied for, and was granted, a rateable distribution of the moneys realised by the sale of the villages attached and sold as aforesaid, towards satisfaction of his decree. On plaintiff bringing a suit for the recovery of the amount so obtained by defendant from the District Court:

Held, (1) that the judgment-debtor against whom plaintiff and defendant held decrees was the same within the meaning of section 295 of the Code of Civil Procedure, it being immaterial that in plaintiff's suit there had been a co-defendant against whom the decree might have been separately executed; and

* Original Side Appeal No. 25 of 1898.

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(2) that the order for sale of the villages under attachment was illegal and invalid in so far as it gave plaintiff the same rights against the proceeds of sale as he had by virtue of the mortgage against the property to be sold.

APPEAL against the decree of Mr. Justice Boddam sitting on the Original Side of the High Court in Civil Suit No. 1 of 1898.

Suit for money. The late zamindar of the Karvetnagaram samasthanam and his eldest son, the present zamindar, had in 1878 mortgaged thirty-three villages as security for a debt. In 1880 the mortgagee (to whom plaintiff had since been appointed receiver) instituted a suit (No. 378 of 1880) in the High Court of Judicature at Madras against both the mortgagors, claiming the amount due on the mortgage and praying that, in default of payment, the mortgaged premises might be sold, and the proceeds applied in and towards the payment thereof. He obtained a decree ordering payment of a sum of money. This decree was, on 22nd December 1880, ordered to be transmitted to the District Court of North Arcot for execution. In 1885 the mortgagee filed execution application No. 12 of 1885 in the District Court of North Arcot praying for attachment of the villages comprised in the mortgage deed, in execution of the amount decreed to be paid to him, and the villages were attached in pursuance of such application.

In December 1886 plaintiff was appointed receiver as representing the mortgagee in Civil Suit No. 148 of 1885 in the Madras High Court and was re-appointed in September 1890. On 12th December 1888 plaintiff, as such receiver, filed a petition praying that the said villages then under attachment might be orderd to be sold free from the mortgage, but that plaintiff might be given the same rights against the proceeds of sale as he, as such receiver, had against the property to be sold. An order was passed by the District Court in the terms of plaintiff's petition on 11th March 1889. In October 1895 certain of the villages comprised in the deed of mortgage, and so attached, were sold in pursuance of the said order of 11th March 1889, and under the attachment issued in the execution application No. 12 of 1885 already referred to, and the amount so realised was paid into the District Court of North Arcot.

In July, 1889, defendant obtained a decree in the District Court of North Arcot against the present zamindar, who had been defendant No. 2 in the mortgagee's suit already referred to

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(No. 378 of 1880), and upon defendant's application the District Court of North Arcot allowed defendant a rateable distribution of the money realised by the sale of the villages attached, and sold pursuant to the order of 11th March 1889: and defendant was accordingly paid a sum based upon such a rateable distribution towards satisfaction of his decree. Plaintiff contended that defendant was not entitled to any such rateable distribution and claimed a refund of the sum so received on the grounds, *inter alia*, (1) that by virtue of the order of 11th March 1889 plaintiff had the same charge and rights on the sale proceeds of the villages sold as he had against the villages themselves; (2) that the decree in the suit by the mortgagee was against the late zamindar and his son whilst defendant's decree was against the son only.

Defendant claimed that he was entitled to the rateable distribution he had received out of the sum realised by the sale of the villages pursuant to the order of 11th March 1889, and contended that plaintiff was not entitled to the rights of a mortgagee in those properties, and did not by virtue of the said order of 11th March 1889 acquire the same charge and rights on the sale-proceeds of the villages sold as he had against the villages themselves, assuming the mortgage to be found valid and binding. And he claimed that the decree in the mortgagee's suit conferred no greater rights than the decree obtained by the defendant.

An issue was framed as follows:—"Whether the order of the "District Court of North Arcot allowing defendant a rateable "distribution of the money realised by the sale of the villages "attached and sold under the order of 11th March 1889 was "wrong?"

It was held that the order was not wrong and that plaintiff was not entitled to recover anything from the defendant.

The plaintiff preferred this appeal.

Mr. *K. Brown* for appellant.

The Advocate-General (Hon. *C. Arnold White*) for respondent.

SHEPHARD, OFFG. C.J.—The plaintiff in order to recover has to show that the defendant was not entitled to receive the money paid to him in the distribution of the proceeds of the sale which took place in 1895.

The first question is whether the judgment-debtor, against whom the defendant holds a decree, is the same within the meaning of section 295 of the Code of Civil Procedure, as the judgment

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debtor against whom the decree in which the plaintiff is interested was passed. This latter decree, obtained in 1880, was made against the late zamindar and his son, the present zamindar. In 1884 the father died, and in 1889 the defendant obtained a decree against the present zamindar. Meanwhile, in December 1888, application for execution of the decree of 1880 was made in the District Court of North Arcot on behalf of the plaintiff. It was stated therein that the late zamindar was dead, that the present zamindar was his legal representative, and that the mortgaged property of which sale was required was then enjoyed by the present zamindar. No special application and no special order seem to have been made under section 234 of the Code of Civil Procedure. No attempt was made to realize the property as assets of the deceased zamindar. It was simply the property of the present zamindar, one of the judgment-debtors, that was to be sold.

Under these circumstances I am clearly of opinion that section 295 of the Code of Civil Procedure applies. The only judgment-debtor under the decree of 1880 with whom we are concerned is the individual who is judgment-debtor under the other decree.

It is immaterial that in the first suit he had a co-defendant against whom the decree might have been separately executed. It seems to me a mistake to say that there is a conflict between *Shumbhoo Nath Poddar* v. *Luckynath Dey*(1) and *Deboki Nundun Sen* v. *Hart*(2). Farran, J., in *Nimbaji Tulsiram* v. *Vadia Venkati*(3) shows how they may be reconciled, and I adopt his statement of the law.

The next contention on behalf of the appellant is that in consequence of the order of the District Judge, dated 11th March 1889, directing that the sale be made free of the mortgage, and that the receiver should have the same rights against the proceeds as against the property, the case is one in which the proviso (*b*) to section 295 of the Code of Civil Procedure comes into force. Accordingly no order for rateable distribution ought to have been made. If the order of 11th March 1889 was a valid and proper order, this contention must be sound. As between the judgment-debtor and the purchasers the order may be conclusive. The sale which took place in pursuance of it has not been questioned by either of them and

(1) I.L.R., 6 Calc., 920. (2) I.L.R., 12 Calc., 204.
(3) I.L.R., 10 Bom., 683.

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cannot be questioned in the present suit, because neither the purchasers nor the judgment-debtor are before the Court. The sale is an admitted fact, but it does not follow that the defendant is bound by the terms of the order under which the sale was effected. If those terms instead of being embodied in an order had been made the subject of a mere agreement between the decree-holder and the judgment-debtor, it is plain that the other judgment-creditors would not have been prejudiced thereby. They cannot by any such agreement be deprived of the benefit of the provision which section 295 of the Code of Civil Procedure makes for their protection. Seeing that the order was entirely illegal being made in contravention of the 99th section of the Transfer of Property Act, I think that those terms of it of which the plaintiff seeks to take advantage can have no other force than they would derive from the agreement of parties. If the plaintiff had not possessed a mortgage interest, the order for sale omitting the terms in question would have been a legal one. What the defendant asks is that he should not be in a worse position than he would be in if such a legal order had been made. Such terms of the order as are based on the existence of the plaintiff's mortgage were, according to the defendant's contention, terms which the District Court had no power to impose, and therefore should not be considered to have any judicial force. In my opinion this is the right view of the matter, and the order of the 11th March 1889, in so far as it recognizes the plaintiff's mortgage, is not valid or binding as against the defendant. In this view of the case it is unnecessary to consider whether proviso (*b*) to section 295 of the Code of Civil Procedure, which was enacted before the Transfer of Property Act came into force and applies to moveable as well as immoveable property, affects the case of a mortgage held by the decree-holder himself; nor is it necessary to consider the question whether the remedy on the mortgage was lost by limitation or by the fact that a suit had previously been brought upon it.

For the reasons already stated I think the suit was rightly dismissed, and I would dismiss the appeal with costs.

MOORE, J.—I concur.

Wilson & King—Attorneys for appellant.

Branson & Branson—Attorneys for respondent.

APPELLATE CRIMINAL.

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

1899. March 29.

VENKAṬAKRISHNA PATTER (COUNTER-PETITIONER), PETITIONER,

v.

CHIMMUKUTTI (PETITIONER), RESPONDENT.*

Criminal Procedure Code—Act V of 1898, s. 488—Usage in Malabar—Order for maintenance of child—Marumakkatayam law as observed by Nayar community.

The father of a child born during the continuance of the form of marriage known as sambandham, under the Marumakkatayam law as observed by the Nayar community in Malabar, is liable to have an order made against him for its maintenance under section 488 of the Code of Criminal Procedure.

PETITION under Criminal Procedure Code, sections 435 and 439 praying the High Court to revise the order of R. E. Holland, Acting Head Assistant Magistrate of Malabar, in Miscellaneous Case No. 41 of 1898.

The respondent had applied under section 488 of the Criminal Procedure Code for an order against the petitioner for the maintenance of her child, of which she alleged he was the father. In her evidence she said that the petitioner had had sambandham with her on 15th Edavom, 1069, until 30th Magarom, 1073; that she had one child by him; that it had been born three years previously; that the sambandham was over; that the petitioner did not pay for the child's maintenance; and that she had no other means. The Acting Head Assistant Magistrate, after hearing other evidence, believed the respondent's claim and ordered the petitioner to pay Rs. 5 a month to the respondent for the child's maintenance. Against that order the petitioner presented this petition, on the grounds, among others, that, since the child belonged to a Marumakkatayam family, the father of it was not legally liable for its maintenance; that section 488 of the Criminal Procedure Code could not supersede the usages and customs of the class to which the parties belonged; that the provisions of section 488 are intended to provide against vagrancy, and the tarwad being legally bound and in a position to maintain the child, the section did not apply.

* Criminal Revision Case No. 52 of 1899.

Sundara Ayyar and *Venkataramana Ayyar* for petitioner.

Govindan Nambiar for respondent.

JUDGMENT.—We have no doubt but that the Magistrate believed the woman and found that the petitioner before us was the father of the child. He is therefore liable, as ruled by this Court in *Ayya Patter* v. *Kaliani Ammal*(1).

We dismiss the petition.

(1) Criminal Revision Case No. 338 of 1893 (unreported). In this case the petitioner in the Magistrate's Court had applied for an order under section 488 of the Code of Criminal Procedure, directing the counter-petitioner to pay her a monthly allowance for the maintenance of her child aged two years and three months, of which she alleged that the counter-petitioner was the father. In defence, the counter-petitioner denied his liability for maintenance, the petitioner being a woman of the Nayar caste. The Acting Head Assistant Magistrate referred to the petition as the first which had come to his notice of a woman of the community referred to claiming that the provisions of section 488 should be put in force on behalf of her child; he therefore heard a considerable amount of evidence regarding the customs of that community, which he summarised as follows:—

"The recognised form of marriage among Nayars is known as 'sambandham.' "A Brahmin may have sambandham with a Nayar woman in the same way in "which a Nayar can have it with a Nayar woman. Practice seems to vary in "regard to the residence of the wife.

"Apparently a custom is gaining ground akin to that prevailing in North "Malabar, according to which the wife is expected to live in the husband's house, "but this is certainly not the usual practice. The sambandham can be dissolved "at the will of either party, but, during its existence, the woman is expected to "be faithful to her husband. In regard to the maintenance of the wife and "children, in all the cases in which they live with the husband or father, the "latter undertakes the liability of maintaining them; but, when they live in their "own tarwad house, the husband is expected to give the extra expenses of his "wife such as clothing, &c. The education of the children appears to be regarded "as one of the duties of the father, but, in some cases, the expense is shared "between the father and the karnavan of the tarwad."

This being the recognised form of relationship among the Nayars, he held that a child born during its continuance must be presumed to be the child of the man who was received and recognized as the husband; and on the evidence he found that the child for which maintenance was claimed was the child of the counter-petitioner. In considering the question of counter-petitioner's liability under section 488 of the Criminal Procedure Code, he overruled the objection that an order under that section would affect the Marumakkatayam law as observed by the Nayar community. With reference to the words "unable to "maintain itself" in the section, it was contended that the maintenance of the child being a charge upon the tarwad property, it was a matter for inquiry if the tarwad funds were insufficient for its support, and that the father's liability for maintenance could only arise if they were shown to be so insufficient. Having heard evidence on this point, the Acting Head Assistant Magistrate found that if the means of the tarwad had anything to do with the liability of the father, the tarwad was too poor to take the responsibility of supporting the child. He, however, construed the phrase "unable to maintain itself" to mean "unable to "earn its own livelihood." In the result he held the counter-petitioner liable to

APPELLATE CIVIL.

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

1898. November 11.

KUMARASAMI PILLAI (DEFENDANT), APPELLANT,

v.

PRESIDENT, DISTRICT BOARD OF TANJORE (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 110—Rent Recovery Act (Madras)—Act VIII of 1865, s. 10—Suit to recover arrears of rent—Suit to enforce acceptance of patta pending—Time from which period of limitation is computed.

The cause of action, with reference to limitation, in a suit for rent, accrues on the date on which the rent is payable by custom or contract, irrespective of whether patta has been tendered or a suit to enforce acceptance of patta under the Rent Recovery Act (Madras), 1865, is pending.

SECOND APPEAL against the decree of F. H. Hamnett, Acting District Judge of Tanjore, in Appeal Suit No. 519 of 1896, modifying the decree of K. Krishnama Chariar, District Munsif of Kumbakonam, in Original Suit No. 232 of 1895.

Suits by the District Board of Tanjore against two of its tenants for the recovery of the rents alleged to be severally due by them for faslis 1301 and 1302. Defendants having refused to accept the pattas tendered them for the above faslis, summary suits had been brought against them for compelling acceptance of the pattas and decrees were obtained. Cause of action was alleged to

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maintain the child and accordingly made an order for the payment by him of Rs. 3 a month.

Against that order the counter-petitioner presented this petition, on the grounds, among others:—that section 488 of the Criminal Procedure Code did not apply to the case; that taking the usage and custom of Nayars into consideration it could not be held to be proved that the counter-petitioner was the father of the child; that there could be no presumption that a child born during a sambandham was the child of the sambandhakaran; and that the tarwad being according to the law and custom bound to maintain all the children of the family, no order for maintenance could be made against the father under section 488 of the Criminal Procedure Code.

The Court (COLLINS, C.J., and SHEPHARD, J.) on the 20th September 1898 delivered the following judgment.—"As the facts are found, there is no doubt "that the order is right. There is no foundation for the suggestion that the "law enacted by the Code does not apply to Malabar. The petition is dis-"missed."

* Second Appeal No. 1767 of 1897.

have arisen on the dates of the said decrees, respectively. Defendants contended that the cause of action for fasli 1301 had arisen on the date when the rents were actually payable for that fasli, which date was more than three years before suit; and that the claim in respect of fasli 1301 was therefore barred by limitation. The District Munsif upheld this objection, and, relying upon *Sriramulu* v. *Sobhanadri Appa Rau*(1), held that the claim for fasli 1301 was barred by limitation. On the rest of the claim he awarded Rs. 60-8-0. On appeal this decree was modified by the Acting District Judge who directed the defendant to pay plaintiff Rs. 476-8-0 in addition to the Rs. 60-8-0, awarded by the lower Court. Referring to *Sriramulu* v. *Sobhanadri Appa Rau*(1), he considered that decision to have been very generally misunderstood by the lower Courts in that district; that both the Judges had clearly ruled that the right to sue began only after tender of a proper patta; and, according to the principles enunciated in that case, limitation in the present suits only began to run from the dates of the judgments in the suits under section 10 of the Rent Recovery Act (Madras), 1865. He held that the suits were not time barred for fasli 1301.

KUMARASAMI PILLAI v. PRESIDENT, DISTRICT BOARD OF TANJORE.

The defendant preferred this second appeal.

Rangachariar for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—It has been repeatedly held that the cause of action with reference to limitation in a suit for rent, like the present, accrues on the date on which the rent is payable by custom or contract, irrespective of whether patta has been tendered or a suit to enforce acceptance of patta is pending; *Sriramulu* v. *Sobhanadri Appa Rau*(1), *Rangayya Appa Rau* v. *Venkata Reddi*(2),

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(1) I.L.R., 19 Mad., 21.

(2) Referred Cases Nos. 11 and 13 to 136 of 1893 (unreported). The judgment of PARKER and SHEPHARD, JJ., in this case was delivered on 16th January 1895 as follows:—"The suits are brought in 1893 to recover rent due for the faslis ending June 1888 and 1889. *Primâ facie* they are barred by the Act of Limitation, and the contention that the cause of action was suspended during the pendency of proceedings to enforce the acceptance of pattas is one which has been admittedly overruled in previous decisions. But it was argued for the plaintiff that the provisions of section 72 of the Rent Recovery Act had been overlooked, and that the effect of that section was to give the landlord a fresh right of action against the tenant. We do not think that the section bears this construction. It declares that a copy of the judgment shall be of the same force and effect as a muchalka executed by the tenant. Under the muchalka the

KUMARASAMI PILLAI v. PRESIDENT, DISTRICT BOARD OF TANJORE.

and *Paramasiva Goundan* v. *Kandappa Goundan*(1).

We are unable to agree with the District Judge that the present case is distinguishable from the first of the above cases. No doubt the learned Judges in that case referred to the patta as correct, but whether it was correct or not is immaterial with reference to the question as to when the rent becomes due. In the present case therefore the claim for the rent for fasli 1301 must be held to be barred by limitation. The claim except as regards road-cess and the rent for punja is clearly barred, as it appears on the face of the plaint that the cause of action accrued before the end of the fasli. As regards road-cess and punja it is urged that they became due only at the end of the fasli, viz., on the 30th June 1892, *i.e.*, within three years of the suit. No such allegation however was made or was proved in the lower Courts, and it is inconsistent with the case placed before the District Munsif.

We must therefore hold that the entire claim is time-barred, and reversing the decree of the Lower Appellate Court we must restore that of the District Munsif with costs in this and in the Lower Appellate Court.

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obligation would be to pay rent in the fasli to which the muchalka relates, and under the judgment there can be no other obligation. It is an apparent hardship for the landlord that he should, after succeeding in compelling his tenants to accept pattas, be unable to recover his rent. But the landlord was at liberty to institute a suit before the other proceedings were concluded. His proper course was to file such a suit, and if necessary to have the hearing adjourned until the disposal of the other proceedings between him and the tenants. Following the decision of this Court we think the question referred must be answered in the negative. We make no order as to costs."

(1) Second Appeal No. 1091 of 1897 (unreported). On 30th August 1898 the Court (SUBRAMANIA AYYAR and BENSON, JJ.) delivered judgment in this case as follows:—"The real question for decision is whether the suit for recovery of rent for fasli 1301 is barred. It is not correct to say that the landlord's right to the rent accrues only after exchange of patta and muchalka, or tender of patta. The right of the landlord to the rent is a right existing prior to, and independent of, the written engagements prescribed by the Rent Recovery Act. The exchange of patta and muchalka or tender of patta is a condition imposed by law as a necessary preliminary to the filing of a suit, but does not affect the accrual of the cause of action for purposes of limitation in a suit like the present for arrears of rent. (See *Coburn* v. *Colledge*, (1897) 1 Q.B., 702.) Such cause of action accrues when the rent becomes payable according to contract or usage. It was for the plaintiff to show that the rent became due within three years prior to the bringing of his suit. He has not attempted to do so. As the defendants pleaded limitation in their written statement the plaintiff ought to have called evidence to prove the facts necessary to show that his suit was in time. Having failed to do so, we cannot at this stage allow him to remedy the defect. We therefore, dismiss the second appeal with costs."

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice), and Mr. Justice Moore.

BOYSON AND OTHERS (DEFENDANTS), APPELLANTS,

v.

DEANE AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1898. September 9, 21. 1899. February 7.

Specific Relief Act—Act I of 1877, s. 54—Injunction—Remedy in damages.

Under the Specific Relief Act, 1877, section 54, the Court may grant a perpetual injunction against a defendant who invades or threatens to invade a plaintiff's right, in cases there specified, and, *inter alia*, when the invasion is such that pecuniary compensation would not afford adequate relief. The rule so laid down differs from the rule upon which the decisions are based in English law. In the latter the right to an injunction is a *primâ facie* right to which a plaintiff is entitled on proof that material injury has been sustained, provided that no circumstances are disclosed to deprive him of that *primâ facie* right. Under the Specific Relief Act an injunction is not to be given when the remedy in damages is considered adequate.

APPEAL against the decree of Mr. Justice Boddam sitting on the Original Side of the High Court in Civil Suit No. 284 of 1897.

Suit for the removal of a certain building and for an injunction. Plaintiffs had enjoyed as an easement and without interruption for more than twenty years the access and use of light and air into certain windows. Defendants had, it was alleged, largely diminished the amount of light and air to which plaintiffs were entitled, by raising a boundary wall between the premises of the plaintiffs and defendants; and it was intended, the plaint alleged, to still further raise the said wall and also to build other walls and erect buildings. Plaintiffs claimed that the injury to their property was such that injunction, and not damages, was the proper remedy for the Court to award. Defendants denied that any amount of light and air to which plaintiffs were entitled in respect of the said windows had been at all diminished by the defendants' buildings, or that such buildings had in any way caused substantial damage to the plaintiffs in respect of the said windows and denied any present intention of further raising the height of the said buildings; and they submitted that if the plaintiffs were entitled to any relief, damages

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* Original Side Appeal No. 16 of 1898.

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would be a sufficient remedy. The third issue was :—"Whether "the plaintiffs are entitled to an injunction or to any and what "damages." On this issue the judgment of the Court was as follows :—

"I have found that there has been a material disturbance of the "plaintiffs' easements to the right to the free passage of light and "air to the windows and openings mentioned in the plaint except "H_1 causing substantial damage to the plaintiffs, as it interferes "with their physical comfort and prevents them from carrying on "their accustomed business as beneficially as they had done previous "to the erection which caused the disturbance. This would entitle "the plaintiffs to compensation, and the only question is whether I "ought, in the circumstances, to hold that compensation in money "damages is sufficient, or whether I ought to grant a mandatory "injunction. Such an injunction may be granted where there exists "no standard for ascertaining the actual damage caused or likely to "be caused by the invasion and also where the invasion is such that "pecuniary compensation would not afford adequate relief.

"I am of opinion that (as the plaintiffs' evidence is entirely "uncontradicted) this case comes within the latter of the above "alternatives, and having regard to the conduct of the defendants "throughout, particularly the way in which, despite protests, they "have continued to build to the injury of the plaintiffs' admitted "ancient lights, apparently hurrying on these building operations "in the belief that, once erected, they would prevent the plaintiffs "from getting anything but pecuniary damages, I think I should not "be doing my duty if I did not hold that the plaintiffs are entitled "to a perpetual injunction restraining the defendants from contin-"uing to interfere with the plaintiffs' right to the free passage of "light and air to their windows H_2 and H_3 and J_1 and J_2 and to "an order directing that the defendants at once remove so much "of their buildings as interfere with the plaintiffs' right to free "passage of air and light to H_2, H_3 and J_1, J_2 in the plaint "mentioned." A perpetual mandatory injunction was granted.

The defendants preferred this appeal.

Mr. *E. Norton* and Mr. *J. H. M. Ryan* for appellants.

Mr. *K. Brown* and Mr. *R. A. Nelson* for respondents.

SHEPHARD, OFFG. C. J.—The only part of the decree with which we are concerned is that which relates to the windows marked H_2, H_3 and J_1, J_2, in regard to which windows a perpetual

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injunction has been given. The learned Judge found that the light coming through the two windows upstairs had, owing to the defendants' building, become a reflected light instead of a pure and true light, that the light at the windows below was materially affected, and that the plaintiffs were not able to carry on their business as conveniently as they did before the obstruction was erected. If the damage to the plaintiffs had been confined to an alteration of the character of the light without any diminution of the quantity of light reaching the rooms lit by the four windows in question, I do not think the plaintiffs would have been entitled to any relief. Such authority as there seems to be on the subject goes to show that a complaint of disturbance of an easement in respect of ancient lights is not established by proving that the light has in consequence of the defendants' acts become glaring or reflected (*Lazarus* v. *Artistic Photographic Company*(1), *Lanfranchi* v. *Mackenzie*(2)), and this, if I may say so, appears to be the reasonable view of the matter. The point is of importance in this case because the gist of the plaintiffs' complaint is that now, or rather when the building had reached its full height, they got a reflected light which was not suitable for the business of sampling indigo. I cannot help thinking that if the complaint had not been made the learned Judge would have contented himself with giving relief in the way of damages. So far as regards the upper windows, though the evidence is scanty, there can be little doubt that at certain times of year or certain hours in the day a diminution of light must be caused by a building stretching out at right angles to the line of the plaintiffs' house and considerably overtopping their windows. Still more must this be the case with regard to the windows below, as to which, moreover, the evidence is more distinct. In point of air, too, the plaintiffs must have suffered to a certain extent. It was hardly denied by the defendants' learned counsel that some compensation was due to the plaintiffs. But on their behalf it was strenuously argued that no remedy except by way of injunction would be efficacious. The question must be decided with reference to the tests prescibed in section 54 of the Specific Relief Act. Assuming that the plaintiffs are entitled to compensation, the Court may grant a perpetual injunction in respect of an invasion of a right to, or

(1) [1897], 2 Ch., 214. (2) L.R., 4 Eq., 421.

enjoyment of, property when the invasion is such that pecuniary compensation would not afford adequate relief.

This test is in practice a difficult one to apply. On the one hand it may be said that there can be no disturbance of an easement on which a pecuniary value cannot be placed because it is always possible to ascertain the difference in the selling value of the property brought about by the obstruction of which complaint is made. On the other hand, if the phrase means "such a compensation as "would, though not in specie, in effect place the plaintiffs in the "same position in which they stood before," it would, as observed by Farran, J., be difficult to predicate of any material obstruction to ancient lights that pecuniary compensation could bring about that result (*Ghanasham Nilkant Nadkarni* v. *Moroba Ramchandra Pai*(1).

Only in the case in which the money might be spent in the structural alteration or re-arrangement of the premises could that result possibly be produced. The question really comes to be one of degree. At the one end of the scale is the case in which the plaintiffs' building will be rendered useless, unless the proposed building is stopped. At the other is the case in which diminution of light is comparatively small though still substantial. If I may take *Martin* v. *Price*(2) as a statement of the English law on the subject I think it must be admitted that it is different from the law we have to administer here under the Specific Relief Act and the Easements Act; see *Dhunjibhoy Coicasji Umrigar* v. *Lisboa*(3) and *Ghanasham Nilkant Nadkarni* v. *Moroba Ramchandra Pai*(1). In *Martin* v. *Price*(2) the evidence was to this effect;—The plaintiff's house standing on ground higher than the level of the houses opposite faced a street from 35 to 37 feet wide: opposite was a house having an elevation of 37 feet and a frontage of 77 feet. For that house defendant proposed to substitute one having a frontage of 27 feet and a height of 62 feet. Kekewich, J., having regard, among other things, to the term for which plaintiff held, gave judgment for £120 damages and refused an injunction. The Court of Appeal held that as the plaintiff had sustained material injury he was entitled to an injunction in the absence of proof of circumstances depriving him of the *primâ facie* right. No reference was made to

(1) I.L.R., 18 Bom., 474 at p. 488. (2) [1894] 1 Ch., 276.
(3) I.L.R., 13 Bom., 252.

the test prescribed by the Specific Relief Act. According to that decision the rule of English law is the converse of the rule prevailing here. There the right to an injunction is the *primâ facie* right: here an injunction is not to be given when the remedy in damages is considered adequate. For a statement of the law in terms more consonant with that which we have to administer I would refer to Lord Westbury's judgment in *Jackson* v. *Duke of Newcastle*(1). This case, decided in 1864, has, with reference to another point, been disapproved in later cases. With regard to that other point the Indian Legislature seems to have followed it nevertheless, and it may well have been present to their minds when the Specific Relief Act was being framed. See Michell's Law of Easements, page 234.

In the present case I am of opinion that the damage proved is comparatively small, and is very far short of rendering the plaintiffs' premises useless. There is no evidence as to the value of the property, but it certainly cannot be assumed that the depreciation caused by the darkening of the windows would amount to any considerable percentage of the selling value of the house. Again, and this I think is most important, no attempt has been made to prove that the plaintiffs cannot, at a moderate expense, so alter or rearrange their premises as to neutralize the effect of the defendants' building. If this is possible, I do not see how the plaintiffs can say that compensation in money will not afford them adequate relief.

For these reasons I think the injunction must be dissolved and if the plaintiffs desire it there must be an enquiry as to the amount of damages.

MOORE, J.—I concur.

[An enquiry as to the amount of damages was asked for and ordered, and a finding was duly returned.]

Barclay, Orr & David.—Attorneys for appellants.

King & John Josselyn.—Attorneys for respondents.

(1) 3 De. G. J. & S., 275 at p. 284.

APPELLATE CIVIL.

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

1898. February 3. July 20, 21. August 3.

VENKATA CHANDRAPPA NAYANIVARU (PLAINTIFF), APPELLANT,

v.

VENKATARAMA REDDI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 12, 48, 244—*Proceeding in execution—Pending suit.*

A suit, according to section 48 of the Code of Civil Procedure, must commence with a plaint, and a proceeding which is capable of terminating in a decree or an order having the force of a decree cannot, on that ground alone, be deemed to be a suit within the meaning of the Code, if it has not commenced with a plaint. Such a proceeding is, *in strictness*, only a proceeding in a suit:

Semble: that a proceeding under section 244 is not a suit within the meaning of section 12 of the Code of Civil Procedure.

APPEAL against the decree of E. J. Sewell, District Judge of North Arcot, in Original Suit No. 35 of 1896.

This suit having come on for settlement of issues, the defendants objected that it was not maintainable because the plaintiff had previously put in a petition under section 244 (*c*) of the Code of Civil Procedure in which the same relief had been claimed. It was contended that the plaintiff must proceed either by petition or by suit, and could not carry on both at the same time. The petition in question (Miscellaneous Petition No. 448 of 1896) had been filed on 29th July 1896, and the suit on 17th September 1896. The petition was posted for final hearing on 27th November and the suit to the same day for settlement of issues. The facts which gave rise to both suit and petition were as follows:—A suit had been brought by three plaintiffs on a mortgage, and a decree obtained, which was executed, and a sale of the mortgaged lands ordered. Pending sale, the defendant died and his representative, then a minor, was brought on the execution proceedings as representing the judgment-debtor, and was represented in them by a legally appointed guardian, appointed by the Court of Wards.

* Appeal No. 110 of 1897.

After various objections, raised on behalf of the minor, the mortgaged property was sold, the purchasers being one out of the three decree-holders and two persons who were not decree-holders. The sale was duly confirmed and possession given to the purchasers. Upon the minor attaining his majority, he filed Miscellaneous Petition No. 448 of 1896 already referred to as a petition in the course of execution of the suit, making the three decree-holders and the two purchasers who were not decree-holders counter-petitioners. The petition alleged that the decree was only a money decree which declared a mortgage lien, that it was executed by attachment and sale of the mortgaged property, that such attachment and sale were void under section 99 of the Transfer of Property Act, and that such void sale occurred while petitioner was a minor, and asked, under section 244, Civil Procedure Code, and section 99 of the Transfer of Property Act, that the sale might be set aside and the property re-delivered to the petitioner with mesne profits. The plaint alleged the same facts, and the relief prayed for in the plaint and in the petition was identical, though the plaint alleged additional grounds upon which that relief should be granted. The petitioner in Miscellaneous Petition No. 448 of 1896 was plaintiff, and the counter-petitioners therein were impleaded as defendants, in this suit.

The District Judge held (1) that the petition under section 244 (*c*), Civil Procedure Code, was a suit for the purposes of section 12, and (2) that the matter in the suit being directly and substantially in issue in the petition the suit could not be tried whilst the petition was pending for trial; and he rejected the plaint.

The plaintiff preferred this appeal.

Hon. *Bhashyam Ayyangar* and *Gopalasami Ayyangar* for appellant.

Mr. *K. Brown* and *Pattabhirama Ayyar* for respondents.

JUDGMENT.—The first point taken on behalf of the appellant was that a proceeding in execution to which section 244 of the Code of Civil Procedure applies is not a suit within the meaning of the section 12 of the Code. No doubt there is authority for the view that the term suit is a very comprehensive one, that it is understood to apply to any proceeding in a Court of Justice by which an individual pursues that remedy in a Court of Justice which the law affords him, that the modes of proceeding may be various, but that if a right is litigated between parties in a Court

VENKATA CHANDRAPPA NAYANIVARU v. VENKATA-RAMA REDDI.

of Justice the proceeding by which the decision of the Court is sought is a suit. Moreover in *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog*(1) cited by the learned counsel for the respondents, Westropp, C.J., and Melvill, J., seemed inclined to hold that a proceeding in execution, in which an order under section 244 is passed, being a proceeding which terminates in a "decree," is a suit within the meaning and intention of the Code of Civil Procedure. But on the other hand some observations of the Judicial Committee in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*(2) would seem to imply that a proceeding under section 244 of the Code of Civil Procedure is not a suit. A suit, according to section 48 of the Code, must commence with a plaint, and a proceeding which is capable of terminating in a decree or an order having the force of a decree could not on that ground alone be deemed to be a suit within the meaning of the Code if it had not commenced with a plaint. Such a proceeding in strictness is only a proceeding in a suit. This is apparently the view of the Legislature, judging by the explanation added in 1892 to section 647 of the Code. It would therefore seem more correct to hold that a proceeding under section 244 is not a suit within the meaning of section 12. However we do not wish to express a decided opinion on the point, since, even if the view just expressed be erroneous, the decision of the District Judge must, with reference to the other point taken on behalf of the appellant, be set aside and the suit remanded for trial, at all events in so far as it is based on the allegation that the debt for which the sale impeached took place was not such as to bind the plaintiff under the Hindu Law. This ground was not raised in the previously instituted execution proceeding which was relied on as precluding the Judge under section 12 from trying the present suit. The identity of matter, directly and substantially in issue, required by that section, being thus wanting in the present instance, the Judge should not have dismissed the suit. The Lower Court's decree is therefore reversed and the suit remanded for disposal according to law. The costs of this appeal will abide and follow the result.

(1) I.L.R., 6 Bom., 54 at p. 62. (2) L.R., 11 I.A., 87 at p. 41.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

RANGASAMI PILLAI (PLAINTIFF), APPELLANT,

v.

KRISHNA PILLAI AND OTHERS (DEFENDANTS NOS. 1 to 14), RESPONDENTS.*

1898. October 5, 6.

Civil Procedure Code—Act XIV of 1882, s. 43—Whole claim in respect of cause of action—Mortgage—Redemption—Mortgage sued on not proved—Admissions by defendants of mortgage right—Subsequent suit on admissions.

In a previous suit plaintiff had sued to redeem a kanom of 1859. The kanom not being established, the suit failed. At the time of bringing the suit, plaintiff was aware that the defendants in possession had in various documents admitted that they were kanomdars under the plaintiff's predecessor in title. On the plaintiff now bringing a suit based on the admissions referred to:

Held, that plaintiff could and should in the previous suit have based his claim in the alternative on the admissions instead of confining that suit to the specific mortgage which he failed to prove. Having chosen to take the course which he did, he was barred from bringing a fresh suit by section 43 of the Civil Procedure Code, as it must be taken that he abandoned or relinquished his claim on the basis of the admissions when he brought his first suit on the kanom specifically alleged.

SECOND APPEAL against the decree of H. H. O'Farrell, District Judge of South Malabar, in Appeal Suit No. 621 of 1896, reversing the decree of B. Cammaran Nayar, District Munsif of Palghat, in Original Suit No. 203 of 1895.

In a suit to redeem a kanom the plaint alleged that defendants held the property on a kanom from plaintiff's predecessor in title; that plaintiff had acquired the equity of redemption in 1856; that the kanom was renewed in 1859; that plaintiff had brought a suit in 1892 for redemption of the renewed mortgage of 1859, which suit was dismissed on the ground that he had failed to prove the mortgage; that on appeal the judgment was reversed on the ground that, though the mortgage of 1859 was not proved, another mortgage had been established; but that decision was reversed on second appeal on the ground that plaintiff having failed to prove the mortgage on which he had sued should not be permitted to fall back on another mortgage. The

* Second Appeal No. 1609 of 1897.

RANGASAMI PILLAI v. KRISHNA PILLAI.

ground upon which plaintiff now based his suit was expressed by the District Judge to be as follows:—

"As I understand the nature of the suit, the plaintiff, having "originally set up that the defendants were holding the plaint "paramba on a kanom of 1859, executed in their favour by his "vendors, and having failed to prove that kanom has now filed "the present suit, alleging that there is a previous kanom, whose "date he was not in a position to give at the time he filed the "plaint, and offering to redeem it."

In his previous suit plaintiff had filed certain exhibits which contained admissions of defendants being kanomdars under plaintiff's predecessor in title. The District Munsif found that the property was, in fact, held by defendants on kanom under plaintiff's predecessor in title; and that the equity of redemption was not time barred. He decreed that plaintiff was entitled to redeem. The District Judge, on appeal, reversed the decree, holding that, in order to succeed, plaintiff was bound to allege and prove a specific mortgage, and that as he had not done so, he was not entitled to take advantage of the admissions of the defendants in order to make out a case for himself.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Subramania Sastri for respondents.

JUDGMENT.—The plaintiff in 1892 sued the defendants to redeem a kanom for Rs. 25 dated 1859. He failed to establish his mortgage, but the lower Courts gave him a decree upon certain documents containing admissions that the defendants held as kanomdars under the plaintiff. In second appeal the High Court reversed the decrees of the lower Courts and dismissed the plaintiff's suit, holding that a plaintiff failing to establish the mortgage on which the suit was based should not be allowed to fall back upon some other mortgage as to which admissions had been made in other proceedings, (*Krishna Pillai* v. *Rangasami Pillai*(1)). Thereupon the plaintiff brought this suit claiming to redeem on a kanom the date and amount of which he was ignorant of and upon identically the same admissions as in the previous suit and got a decree in the Court of the District Munsif. The District Judge set the decree aside and dismissed the plaintiff's suit

(1) I.L.R., 18 Mad., 462.

RANGASAMI PILLAI v. KRISHNA PILLAI.

on the ground that the plaintiff was bound to allege and prove a specific mortgage and the case comes before us in second appeal from this decision. We do not think that the District Judge was right in holding that unless the plaintiff alleged and proved a specific mortgage, he could not get a decree upon admissions made by the defendants. We think, however, that the plaintiff's suit was rightly dismissed as he was barred from bringing this fresh suit by section 43 of the Code of Civil Procedure, as it must be taken that he abandoned or relinquished his claim on the real cause of action when he brought it on a false one. That there was only one cause of action, viz., the right to redeem, is clear and the plaintiff, at the time of bringing his first suit, was aware of the extent of the admissions made by the defendants as they were contained in the documents put in by him and he could and should have sued in the alternative instead of confining his suit to the specific mortgage which he failed to prove. Having chosen to take that course he cannot be allowed to harass the defendants with fresh suits, to prevent which section 43 of the Civil Procedure Code was passed.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

MAYANDI CHETTI (PLAINTIFF), APPELLANT,

1898. August 2, 9.

v.

OLIVER AND OTHERS (DEFENDANTS), RESPONDENTS.*

Evidence Act—Act I of 1872, *s.* 92, *proviso* 4—*'Oral agreement'—Variation of terms of registered instrument.*

The lessor of certain land, held by the lessee under a registered deed of lease, agreed to a reduction in the rent. The agreement was not reduced to writing, but rent was thereafter paid and accepted at the reduced rate. On a suit being brought to recover arrears of rent at the rate reserved in the registered deed:

Held, that under section 92, proviso 4, of the Evidence Act, an agreement to accept a reduced rent cannot be implied or inferred from the acts and conduct of the parties; and an unwritten agreement, if so implied, amounts to an oral agreement within the meaning of the proviso.

* Second Appeal No. 991 of 1897.

MAYANDI CHETTI v. OLIVER.

The word 'oral' is used in section 92, proviso 4, of the Evidence Act, in the sense of being not committed to writing, and the words 'oral agreement' in that section include all unwritten agreements, whether arrived at by word of mouth or otherwise.

SECOND APPEAL against the decree of C. Venkoba Chariar, Subordinate Judge of Tanjore, in Appeal Suit No. 565 of 1896, affirming the decree of J. C. Fernandez, District Munsif of Negapatam, in Original Suit No. 445 of 1895.

Suit to recover arrears of rent. Plaintiff sued as trustee of two temples to recover arrears of rent due under a registered document (filed as exhibit A in the suit), by which a permanent lease of a piece of land was created, which provided for payment, by the late Mr. Frank Oliver, of an annual rent of Rs. 106-4-0. The first defendant, widow of the deceased lessee, contended that the land was taken by her late husband for the purpose of establishing an emigration depot; that the depot had been abolished, and the land was no longer utilised for the purpose originally intended, and that in consideration of these facts the trustee of the temple had agreed to accept the reduced rent of only Rs. 50 from a certain date (namely, fasli 1294), with the sanction of the devastanam committee. In support of this contention she relied on the evidence of one of the members of the devastanam committee, who had held office at the time of the alleged reduction, and on two documents (filed as exhibits I and II in the suit). The first of these was a report by the then panchayat, setting out that, in consequence of the relinquishment of the emigration business, the lessee derived no income from the land and offered to pay a reduced rent of Rs. 50 per annum; and it bore an endorsement by the aforesaid member of the devastanam committee that in consideration of the altered circumstances the trustee should be empowered to receive rent at the said reduced rate. The document bore the signatures of two other members of the devastanam committee signifying their assent thereto, but recommending that a new lease deed, when prepared, should reserve to the temple authorities the right to cancel the same, should it appear that a greater income could be derived for the temple. The fourth issue framed was as follows:—"Whether it is open to first defendant "to set up an oral subsequent agreement of this kind when the "original lease was granted under a registered instrument?" Dealing with this issue the District Munsif said:—"The fact "that no new rent-deed was taken from Mr. Oliver embodying

MAYANDI CHETTI v. OLIVER.

"the new conditions laid down by the members who adopted the "resolution referred to above, cannot, in my opinion, deprive the "lessee of the benefit of the concession allowed to him . . . . "The evidence shows that the lessee paid rent only at the reduced "rent of Rs. 50, subsequent to the adoption of the resolution in "question." And he found the alleged subsequent agreement to reduce the rent to be true, and gave judgment in accordance therewith. Plaintiff appealed on the grounds, *inter alia*, that oral evidence was inadmissible to vary the terms of exhibit A, and that the modification of the terms of exhibit A could not be deemed to be in writing.

The Subordinate Judge, in affirming the decree, held that exhibit I was evidence of a contract to reduce the rent, and further that section 92 of the Evidence Act was no bar to the validity of the said contract; and he gave effect to what he considered to be the real intention of the parties. He did not think it was open to plaintiff to set aside the reduction agreed upon, and in accordance with which for the previous ten years the reduced rent had been paid and accepted.

The plaintiff preferred this second appeal.

Desikachariar for appellant.

V. Krishnasami Ayyar for respondent No. 1.

JUDGMENT.—The late Mr. Oliver, whom the respondents (defendants) represent, took in 1878 a lease of certain land vested in the temple represented by the appellant (plaintiff), under exhibit A, a registered instrument, the annual rent reserved thereunder being Rs. 106-4-0. In 1886 Mr. Oliver requested the then trustee of the temple to agree to a reduction of the rent to Rs. 50 per annum. The trustee agreed accordingly, but the agreement was not reduced to writing. From that time up to the institution of this suit in 1895, Rs. 50 only were paid and accepted as the rent payable per annum. The lower Courts in effect held that the respondents were not precluded by proviso 4 to section 92 of the Evidence Act from proving the agreement to modify the terms of the registered lease in so far as the amount of rent was concerned. In supporting the decision of the lower Courts the learned vakil for the respondents contended, if we understood him correctly, that, in cases like the present, though no express oral agreement rescinding or modifying the terms of a written instrument could be proved, yet that an agreement to be implied from the acts and

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conduct of the parties could be proved, and as, apart from the express agreement of 1886 between Mr. Oliver and the then trustee, an agreement to take rent at only Rs. 50 might and ought to be inferred from the acceptance of rent at that rate for a period of about 10 years, the decree of the lower Courts should be upheld. But we are unable to concur in the view that an unwritten agreement implied from the acts of the parties is not an oral agreement within the meaning of the proviso since we are of opinion that the word 'oral' therein is used in the sense of not committed to writing, and therefore the words 'oral agreement' cover all unwritten agreements whether come to by word of mouth or otherwise.

The decree of the lower Courts must, therefore, be modified by allowing the plaintiff's claim according to the rate due under the registered lease (exhibit A). In the circumstances of the case we direct the parties to bear their own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

1898. August 8, 9, 11. September 8.

RANGASAMI REDDI AND OTHERS (DEFENDANTS), APPELLANTS,

v.

GNANA SAMMANTHA PANDARA SANNADHI (PLAINTIFF), RESPONDENT.*

Ejectment—Defence of right of permanent occupancy—Onus of proof—Defence of special character.

In suits by the trustee of a temple to recover possession of certain lands with mesne profits, defendants set up in defence that they were absolute owners of the land in question, or, at least, were entitled to rights of permanent occupancy. In support of the latter contention they relied, *inter alia*, upon certain pymaesh documents, which contained the word *ulavadai* the use of which term, they contended, established the alleged right of permanent occupancy:

Held, (1) that, where the occupier of land resists a suit for ejectment by setting up a claim of a right of permanent occupancy, the onus of establishing such a right lies on the defendant inasmuch as by it he seeks to derogate from the ordinary incidents of property; and

(2) that the right expressed by the term *ulavadai* (which means an act or right of ploughing or cultivating lands) cannot be assumed to be a permanent right.

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* Second Appeals Nos. 496 to 507 of 1897.

RANGASAMI REDDI v. GNANA SAMMANTHA PANDARA SANNADHI.

SECOND APPEAL against the decree of C. G. Kuppusami Ayyar, Acting Subordinate Judge of Tanjore, in Appeal Suit No. 90 of 1896, affirming the decree of D. K. Virasami Ayyar, District Munsif of Shiyali, in Original Suit No. 139 of 1894.

Suits to recover possession of certain lands with mesne profits. Plaintiff was, in certain of the cases, trustee of the Sri Vythinathasami temple, the defendants being tenants holding lands under that temple. In the other cases plaintiff was trustee of the Sri Chattanadhasami temple, and the remaining defendants held under him. Plaintiff based his right to eject mainly on the terms of a number of muchalkas executed by certain predecessors of the defendants in 1830 to the then Collector of Tanjore, who was at that time in charge of the lands belonging to the Vythinathasami temple. The defendants contended that the lands belonged to them absolutely, and further, that independently of ownership they were in possession with rights of permanent occupancy, otherwise known as ulavadai kudi miras rights. The District Munsif found that plaintiff was owner, and that defendants were paying rent to him. On that finding plaintiff contended that, defendants being tenants from year to year, he was entitled to recover in the absence of any proof of right of occupancy in the defendants; and that the onus of proving rights of permanent occupancy must be on the defendants in a suit for ejectment, where plaintiff's title is admitted or proved. He cited *Achayya* v. *Hanumantrayudu*(1), *Thiagaraja* v. *Giyana Sambandha Pandara Sannadhi*(2), *Appa Rau* v. *Subhanna*(3), and *Ram Ranjan Chakerbati* v. *Ram Narain Singh*(4). The District Munsif held that, *primâ facie*, it is for the defendants to prove the right of occupancy if plaintiff is found to be the owner; but that there may be circumstances in a case which would throw on a plaintiff the burden of proving that the defendants are not tenants with occupancy rights, such as long possession at an unvaried rent; and he referred on this point to *Krishnasami* v. *Varadaraja*(5). He found that the defendants had not discharged the burden of proof and decreed for the plaintiff. On appeal the Subordinate Judge also held that the onus of proving the occupancy right lay upon the defendants, and dismissed the appeal, holding that the existence of the alleged occupancy right had not been established.

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(1) I.L.R., 14 Mad., 269. (2) I.L.R., 11 Mad., 77. (3) I.L.R., 13 Mad., 60.
(4) I.L.R., 22 Calc., 533 at p. 542. (5) I.L.R., 5 Mad., 345 at p. 358.

ANGASAMI REDDI v. GNANA SAMMANTHA PANDARA SANNADHI.

The defendants preferred this second appeal, on the ground, among others, that the *onus probandi* lay on the plaintiff, and they further contended that the use of the word ulavadai in certain pymash documents, which had been exhibited in the suit, established that the holder of the land therein mentioned had a permanent right of occupancy.

Sankaran Nayar, *Sadagopachariar*, and *Krishnasami Ayyangar* for appellants.

Hon. *Bhashyam Ayyangar*, *V. Krishnasami Ayyar*, *Sivarama Ayyar*, and *R. A. Krishnasami Ayyar* for respondent.

MOORE, J.—(after dealing with the facts):—A great deal has been said as to whether the onus of proving this alleged right of occupancy lies on the tenants or the burden of disproving it on the landlord. This question has been recently considered and decided by the High Court (Collins, C.J., and Muttusami Ayyar, J.) in a case which is in almost every particular identical with those now under consideration, and it was there laid down as follows:—"The "claim of an occupancy right as overriding the proprietor's right to "cultivate his own land is of a special character, and as such it is "one which the party seeking to derogate from the ordinary inci- "dents of property is bound to establish. Of course the appellants "are entitled to the benefit of any presumption which may "reasonably arise from length of enjoyment and other special "circumstances of the case. The contention that mere length of "enjoyment in the capacity of tenants or purakudies irrespective of "other circumstances is *primâ facie* proof of occupancy right, cannot "be supported," (*Chidambara Pillai* v. *Tiruvengadath Ayyangar*(1)). What, therefore, has to be considered is how far the tenants have proved the permanent right of occupancy set up by them . . . . The documentary evidence produced to show the relations subsisting between the plaintiff and the four defendants to whom I have referred is very scanty. Certain pymash documents of fasli 1216 (A.D. 1807) have been produced (exhibit A series), and an attempt has been made to found certain arguments on the wording of these documents.

On behalf of the appellants it is pleaded that the use of the word ulavadai in these pymash documents shows that the holder of the land there mentioned had a permanent right of occupancy.

(1) Appeal No. 1 of 1886 (unreported).

ANGASAMI REDDI v. GNANA SAMMANTHA PANDARA SANNADHI.

For the respondent it is maintained that the word ulavadai means simply "extent of cultivation" and that for example when we find in exhibit A, purakudi Alagappen ulavadai followed by certain details as to extent of land and description of crops, it means that the purakudi was one Alagappen and that the extent of land cultivated by him was as there shown. This latter interpretation appears to me to be incorrect. The word used when extent of cultivation is referred to is "sagubadi." I should say that the pleader for the appellants is right in contending that the words purakudi Alagappen ulavadai mean that the purakudi Alagappen has an ulavadai right over the land mentioned, but I cannot hold that it has been proved that ulavadai means a permanent right of occupancy. In Wilson's Glossary, ulavadai is defined as: "the "act or right of ploughing; the right to cultivate the lands." Such right, it is clear, cannot be assumed to be a permanent right.

Reference has been made to the decision in *Chockalingam Pillai* v. *Mayandi Chettiar*(1), and the ruling to be found there that the words "ulavadai mirasidars" used in certain deeds as describing the tenants denoted that they were persons with hereditary right to cultivate. There is, however, a great difference between ulavadai and ulavadai mirasidars. As regards the description of the cultivator in the pymash accounts as a purakudi or parapayir kudi, all that need be said is that the use of this word most certainly raises no inference that the tenant so described had a permanent right of occupancy, but, on the other hand, favours the contention that his tenancy was temporary. (Reference may be made to the definition of the word in Wilson's Glossary and to the papers on Mirasi Rights, pages 93, 96, 130, 137, 213 and 217). . . .

On the record as it stands, it must be held that the defendants have not proved the permanent right of occupancy set up by them. It must further be added that the Subordinate Judge has in paragraph 47 of his judgment held that these purakudis are not shown to have had occupancy right either by custom or otherwise, and that this finding would appear to be one of fact which cannot be questioned in second appeal.

For these reasons I hold that the four appellants above mentioned have failed to make good the case set up by them, and as their case is admittedly much stronger than that of the other appellants, all these second appeals must be dismissed with costs.

(1) I.L.R., 19 Mad., 485.

RANGASAMI REDDI v. GNANA SAMMANTHA PANDARA SANNADHI.

SUBRAMANIA AYYAR, J.—The onus clearly lay on the appellants to prove that they possessed a permanent occupancy right. The Subordinate Judge, upon a careful and elaborate consideration of the whole evidence adduced by the parties, has held that the existence of such occupancy right has not been established. This conclusion is binding upon us. I agree that these appeals should be dismissed with costs.

APPELLATE CIVIL.

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

1898. August 23.

NARAYANAMMA AND OTHERS (PETITIONERS NOS. 2 TO 4), APPELLANTS,

v.

RAMAYYA CHETTI (COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 253—Execution of decree against surety.

A surety entered into a bond, undertaking to produce certain debt bonds in case the defendant in a suit should fail to produce them, or to pay the amount mentioned therein. Upon an application being made that execution should issue against the surety:

Held, that a bond so worded did not make the surety liable for the performance of the decree so as to bring the case within section 253 of the Code of Civil Procedure and that the liability of the surety could not be enforced in execution.

APPEAL against the order of C. Venkoba Chariar, Acting District Judge of Cuddapah, in Civil Miscellaneous Petition No. 317 of 1897 (Miscellaneous Petition No. 465 of 1894 in Original Suit No. 16 of 1888).

During the pendency of a suit for partition, which was subsequently dismissed, the plaintiff applied for an order to the defendant to produce the debt bonds and family accounts. The defendant produced the bonds, which were returned to him upon one R binding himself, by his security bond, to produce the bonds in case the defendant failed to produce them, or pay the amount mentioned therein. R also undertook to lodge in Court any amount if collected by the defendant on the bonds. The defendant having died, the plaintiff applied by Civil Miscellaneous Petition No. 465

* Appeal against Order No. 173 of 1897.

NARAYANAMMA v. RAMAYYA CHETTI.

of 1894, asking for notice to issue to the surety to produce the bonds or their value. Upon hearing the petition the Court ordered that execution should issue for the amount that the surety had rendered himself liable for under his bond; but that order was set aside and on the matter coming on again for disposal, the District Judge held that the surety bond was not worded in such a way as to make the surety liable for the performance of the decree or any part thereof. And inasmuch as it merely contained an undertaking by the surety to produce the bonds or pay their value in case of his failure to produce them, he held that section 253 of the Civil Procedure Code was inapplicable. He therefore dismissed the application for summary process against the surety.

Petitioners Nos. 2 to 4 preferred this appeal.

Sundara Ayyar for appellants.

Hon. *Bhashyam Ayyangar* and *Seshachariar* for respondent.

JUDGMENT.—The wording of the bond does not in terms make the surety liable for the performance of the decree so as to bring the case clearly within the purview of section 253, Civil Procedure Code. It is, however, contended for the appellant that section 253 is applicable to all cases in which it may reasonably be inferred that the real intention was that the surety should satisfy the decree, notwithstanding that the bond does not expressly bind the surety to do so. As illustrations of such a liability, cases of security taken under sections 479 and 485, Civil Procedure Code, but in which the bonds failed to clearly express the liability of the surety in the terms of the Code, were referred to. In such cases, no doubt, the circumstances under which the security was given, and the manifest object of taking the security might be properly considered. But the security in the present case was not taken under any of these provisions of the Code, and we are not in a position to say that the direct object of the Court was to provide for the satisfaction of the decree. Under the terms of the bond it was open to the Court to call upon the surety to perform his undertaking before any decree was passed and irrespective of any decree that was about to be passed. We therefore agree with the District Judge that the case does not fall within the purview of section 253, and the liability of the surety cannot be enforced in execution.

We dismiss the appeal with costs.

PRIVY COUNCIL.

P.C.* 1895. November 16, 17. December 10.

ROBERT FISCHER (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.

ROBERT FISCHER (DEFENDANT), APPELLANT,

v.

ROBERT G. ORR AND ANOTHER (PLAINTIFFS), RESPONDENTS.

[On appeal from the High Court at Madras.]

Separate registration and assessment of a village alienated from a zamindari—Regulation XXV of 1802 (Madras), s. 8—Assessment of Land Revenue Act (Madras)—Act I of 1876—Invalid order of Government—Declaratory decree—Specific Relief Act—Act I of 1877, s. 42—Construction of agreement.

By the effect of sections 5 and 6 of the Madras Act I of 1876 the decision of the Collector, in a case within his jurisdiction, whether for or against separate registration of a portion alienated from a zamindari, when once duly sanctioned as provided by that Act, can only be questioned in a Civil Court.

Under sections 7 and 8, the apportionment of the assessment may be appealed from the Collector to the Board of Revenue, and power is reserved to the Governor in Council to order re-adjustment of the separate assessment if fraud or material error should appear. Separate registration, on the other hand, is a matter of private right.

The grantee of the perpetual lease of a village, alienated thereby from a zamindari, sued for a declaration of the invalidity of an order of the Government, inasmuch as it directed the cancellation of the Collector's order, after sanction by the Board, for the separate registration of the village:

Held, that this declaration should be decreed. The objection that the suit was contrary to the law enacted in section 42 of the Specific Relief Act, 1877, was not sustainable. No further relief could have been required by the plaintiff. The effect of the declaration itself, for which he had sued, would be sufficient to maintain the Collector's original order, which was valid in law, while the order of the Government directing its cancellation was not legal and was void. Nor was the suit defective for want of parties.

Another suit, heard on appeal with the above, having been brought by the lessees of the entire zamindari, against the same grantee, raised the question,—what was the obligation entered into by him in respect of payment of the revenue upon separate registration and separate assessment of the village. This involved the construction of terms in the documents entitling the grantee to the village, and these, according to the plaintiffs, obliged him to pay a fixed sum to the zamindari:

Held, that he was only liable, after the registration and assessment, for burdens lawfully incident to the separate holding, and that they were to be discharged by direct payment by him to the Collector.

* *Present:* The Lord Chancellor of Ireland, Lord HOBHOUSE, Lord MACNAGHTEN, and Sir R. COUCH.

Two appeals, consolidated, of which the first was from a decree (30th April 1896) of the High Court, affirming a decree (23rd July 1894) of the Subordinate Judge of Madura; the second was from another decree (30th April 1896) of the High Court reversing, on second appeal, a decree (19th December 1894) of the District Judge of Madura, who had reversed a decree (25th July 1894) of the Subordinate Judge(1).

In the first of these appeals the question was as to the finality of the order, as far as the executive administration was concerned, when approved by the Board of Revenue, made by the Collector of a District under the Madras Act I of 1876 (to make better provision for the separate assessment of alienated portions of permanently-settled estates) in regard to separate registration of a village alienated from a zamindari under Regulation XXV of 1802, section 8. And the question related to there having been a specific remedy provided in the above Act for persons aggrieved by an order for such separate registration. There were also further questions decided as to the non-joinder of certain parties interested in the zamindari; and whether the claim preferred in the suit accorded with section 42 of the Specific Relief Act, 1877.

In the second of these appeals the question was,—what was the obligation into which the grantee of the alienated village had entered in respect of the revenue, as between himself and the representatives of the entire zamindari interest, when the village should be no longer part of it, after the separate registration;—a question dependent on the construction of the documents constituting the title by the grant.

The first of the suits giving rise to the appeals was instituted in the Court of the Subordinate Judge on the 3rd March 1892 by the plaintiff, who claimed to be the proprietor of the village of Kondagai in virtue of grants of which the last was a permanent

(1) *Fischer* v. *Secretary of State for India in Council*, and *Orr and another* v. *Fischer*, I.L.R., 19 Mad., 292.

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lease, dated the 23rd January 1890, from the zamindar of Shivaganga, the zamindari of which the village was formerly part. The plaintiff having obtained an order on the 13th November 1890 from the Collector of the Madura district for the separate registration and assessment of that village under the provisions of Act I of 1876, sued for a declaration that an order of the Governor in Council of the 14th November 1891, directing the cancellation of the above order, should be declared to be beyond the powers of the Government to make, and of no legal effect. The defence was a denial of the plaintiff's right to the separate registration, and the defendant alleged that the suit was opposed to the provisions of section 42 of the Specific Relief Act, 1877, there having been an omission to ask for the consequential relief to which, if the case had been well founded, the plaintiff would be entitled. It was also objected that the lessees, next here referred to, and the zamindar, had not been made parties.

The second of these suits was brought on the 29th April 1892 in the District Munsif's Court, whence it was transferred to that of the above Subordinate Judge, the plaintiffs being Messrs. Orr and Stranack, the respondents in the second of the appeals, who, on the 23rd May 1887 had become lessees of the whole of the Shivaganga zamindari. Mr. R. Fischer was the defendant. The claim was for the balance of a sum alleged to be annually due from him in respect of the village of Kondagai to the zamindari, that balance being named "poruppu, magamai, and road cess for the fasli year "1300."

The following, among other enacted laws, related to the points in dispute :—

The Madras Regulation XXV of 1802, after declaring the right of proprietors to alienate without the previous consent of the Government, enacts in section 8 that unless their transfers should have been regularly registered at the office of the Collector, and unless the assessment of revenue should have been previously determined on such alienated portions of their land, the transfer should be of no legal force or effect to exempt the zamindar from the assessment on the entire zamindari.

The Madras Act I of 1876, the object of which is stated above, enacts in section 1 that "the alienor or alienee of any portion "of a permanently-settled estate may apply to the Collector . . .

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"for its registration in the name of the alienee and for its separate "assessment."

The Act gives directions for the holding an inquiry, and in section 2 provides:—"If on such inquiry it appears that the "alienation has taken place and that all the parties to such "alienation concur in applying for the separate assessment of the "portion alienated, and if objection is not taken by any person "interested in the estate, or being taken is disallowed by the "Collector, he shall proceed to register the alienated portion in "the name of the alienee, and to apportion the assessment of such "alienated portion in the manner provided in section 45 of Madras "Act II of 1864, subject to the sanction laid down in section 46 "of that Act."

The Act I of 1876 provides in section 5:—"Any person "aggrieved by the fact of the separate registration of such portion "may sue in a Civil Court for a decree declaring that such separate "registration ought not to be made." By section 6, "any person, "aggrieved by the Collector's refusal to register may sue in a Civil "Court for a decree declaring that such separate registration ought "to be made": and in section 7 the Act provides,—"Any person "aggrieved by the apportionment of the assessment under section "2 may appeal to the Board of Revenue within ninety days from "the date of such assessment; and the order of the Board of "Revenue shall be final": lastly, section 8 enacts,—"The Governor "in Council may at any time, if it appears that there has been "fraud or material error in the apportionment of such separate "assessment, cause the same to be re-adjusted."

The provisions of section 42 of the Specific Relief Act, 1877, are:—"Any person entitled to any legal character or to any right "as to any property may institute a suit against any person "denying, or interested to deny, his title to such character or "right, and the Court may in its discretion make therein a declar- "ation that he is so entitled and the plaintiff need not in such suit "ask for any further relief. Provided that no Court shall make "any such declaration where the plaintiff being able to seek "further relief than a mere declaration of title omits so to do."

The first suit was dismissed by the Subordinate Judge on the 23rd July 1894. His judgment was that the Collector had acted without jurisdiction in making his order of the 13th November

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1890, the parties interested, the lessees of the entire zamindari not having concurred in the application.

He decreed, in favour of the plaintiffs in the second suit, Rs. 910, the balance of the annual Rs. 3,500, which, in his view of the case, the defendant had agreed to pay, independently of the future assessment upon the village of Kondagai.

The course of appeal in the second suit was to the District Judge who reversed that decree. The plaintiffs contended that the zamindari was entitled to receive either by direct payment or indirectly by a deduction from the settled peishcush, not less than Rs. 3,500; and that whatever the separate assessment in the future might be, the difference, if it amounted to less than that sum by the year, must be for the benefit of the zamindari; while if the assessment should exceed that sum the excess must be charged against the defendant's village, and not against the zamindari. This brought before the District Judge the question of the validity of the Government order of the 14th November 1891. That order was now held by him to be inoperative, and, being void, was considered by him as leaving the Collector's original order of the 13th November 1890 still subsisting. He was of this opinion on account of the rule, which he thought to prevail, that if a statute gives a particular remedy for enforcing a right which it creates there is no other remedy. He concluded as follows:—

"In the result, I am of opinion that as the Collector's order "of 1890 for separate registration has never been set aside by a "Court of competent jurisdiction, it has full force and effect. No "fraud or material error in the apportionment of separate assess- "ment has been suggested and the order of the Board of Revenue "on the point is final. I have already alluded to the fact, admitted "by the plaintiffs in appeal, that it is immaterial whether the "separate assessment on the village of Kondagai is paid directly "to the zamindari treasury, or, being paid into the Government "treasury, is deducted from the peishcush payable on the zamin- "dari, and I have found that the defendant is not under any "obligation to pay more than the assessment apportioned by the "Collector with the sanction of the Board of Revenue. The "question whether he has paid only the original assessment or the "revised assessment does not arise in this suit and is one which "does not affect the plaintiffs, as the separate registration and

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"assessment relieve the zamindar and his representatives of all "liability in respect of the portion alienated."

The judgment of the High Court, delivered in both cases, which were heard on appeal together, is reported at length in *Fischer* v. *Secretary of State for India in Council*(1). Full particulars are there given of the grants of the village to Mr. R. Fischer, from the first, which was made by the Rani Kattama Natchiar, the zamindarni, in 1872, down to the last, dated the 23rd January 1890, conferring upon him the perpetual lease, which the zamindar ratified. In that judgment also appear the clauses, extracted from the documents of title, containing the terms on which the lessees of the Shivaganga zamindari relied in the second of these suits.

The Judges were of opinion that there was in the first suit no petition in the plaint for consequential relief, unless it could be found in the form asking generally for relief. Even if those words were enough to show what relief was expected when the order of the 14th November 1891 should have been cancelled, the suit was still, in their opinion, defective for want of parties, the lessees of Shivaganga not having been joined. The suit was held by them to be unsustainable with regard to the provisions of section 42 of the Specific Relief Act, 1877, and their decree therefore reversed the judgment of the District Judge in the second suit, and affirmed the decrees of the Subordinate Judge in both suits.

On the first of these appeals, Mr. *J. D. Mayne*, for the appellant, argued that the High Court had erred in their judgment on the following points:—The Collector having made his order for the separate registration and assessment of the village, and that order having been confirmed by the Board of Revenue, the only remedy of which a lessee of the zamindari could avail himself was by a suit in the Civil Court having jurisdiction under section 5 of the Madras Act I of 1876, if he had been aggrieved by the order relating to the separate registration. The powers of the Government were not applicable to the question of separate registration in this case. They could be exercised in regard to the separate assessment of revenue, at the proper stage, under section 8 of the Act, but only on the appearance of fraud or material error.

(1) I.L.R., 19 Mad., 292.

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And separate registration had been dealt with by legislation as a matter of civil right to be decided, if questioned, by the Courts of law. A special mode of relief was provided in sections 5 and 6 of the Act in cases of grievance occasioned by either its grant or refusal. Where a statute created a right and gave a remedy for its infringement that particular remedy could alone be applied. He referred to *Doe* v. *Bridges*(1); *Barraclough* v. *Brown*(2); *Pasmore* v. *Oswaldtwistle Urban District Council*(3). As to the objection made by the defence, resting upon section 42 of the Specific Relief Act, the necessary effect of a declaratory decree, such as that now asked, would be to put all parties into the position in which they were when the original order of 13th November was passed. So that to ask for additional relief was unnecessary. In reference to declaratory suits and consequential relief, he referred to *Rooke* v. *Lord Kensington*(4); *Kathama Natchiar* v. *Dorasinga Tever*(5).

Mr. *A. Cohen*, Q.C., and Mr. *J. H. A. Branson*, for the respondent, in the first appeal, admitted that the order of the Governor in Council, which directed cancellation of the Collector's order of the 13th November 1890, could not be supported. But they contended that the High Court was right in holding that, in reference to section 42 of the Specific Relief Act, 1877, there should be no decree for the plaintiff in the suit against the Government, as framed. The plaintiff was in a position to ask for specific relief, in addition to a declaration of the invalidity of the order of the Government of the 14th November 1891, if he were entitled to that declaration; and he had omitted so to do. What ought to have been asked for was that the order of the 13th November 1890 should be restored. However, in regard to such restoration, if it had been asked, there were other persons interested in the zamindari rights besides the transferor and the transferee. The Court below had not found in favour of the appellant that there was such a concurrence by the lessees of the zamindari in the application for separate registration as would authorize the original order of the Collector; and their absence from the first suit rendered that suit defective. The appellant had been rightly held disentitled to the declaratory decree which he claimed.

(1) 1 B. & Ad., 847. (2) [1897] A.C., 615 at p. 621. (3) [1898] A.C., 387.
(4) 2 K. & J., 753; 25 L.J., Ch., 795. (5) L.R., 2 I.A., 169.

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Mr. *J. D. Mayne* was not heard in reply in the first suit, but in the second proceeded to argue that the agreement between the parties, as shown by the documents of title to the village, had not been rightly understood by the High Court. The appellant, defendant, had undertaken to satisfy the revenue demand in respect of the village of Kondagai, calculated to be, for the purpose of this transaction, covered by the Rs. 3,500 fixed for payment annually to the zamindar. But he had not undertaken to continue that payment after the transfer should have become complete, by the separate registration, and separate assessment having been ordered. The effect of the agreement must be taken to be that its end came on the village ceasing to be part of the zamindari, when the revenue on the village would have become payable direct to the Collector. Upon separate registration, separate assessment would follow; and the plaintiffs would, on their part, be relieved of all liability for the revenue in respect of the alienated village.

In the second suit Mr. *A. Cohen*, Q.C., and *Mr. J. H. A. Branson*, for the respondents, argued that the High Court had rightly construed the contract between the parties. The intention shown by the documents of title was that the fixed sum should be paid until a separate assessment upon the village had been definitely and validly made. That had not been effected. Upon consideration of the objections, that had not yet been met, the liability to the zamindari should remain as provided for by the parties.

Mr. *J. D. Mayne* replied.

Afterwards, on the 10th December 1898, their Lordships' judgment was delivered by Lord MACNAGHTEN.

JUDGMENT.—These two appeals were heard together and argued on the materials contained in one record.

The first appeal, in which alone the Secretary of State is interested, has reference to an order of the Government of Madras by which the Collector of Madura was directed to cancel the separate registration of a certain village belonging to the appellant known as Kondagai and formerly part of the zamindari of Shivaganga. In the Court of first instance the order in question was upheld by the Subordinate Judge. With his judgment before them the learned Judges of the High Court said nothing in approval or condemnation. They passed the matter by as one of "the many difficult questions dealt with by the Courts below" which in their view it was not "necessary to decide or to discuss" in order to

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determine the rights of the parties. But the rights of the parties depended on the validity of the Government order and on nothing else. It was the beginning and the end of the controversy. Mr. Cohen very properly and very wisely admitted that he could not justify the action of the Government. This frank admission relieves their Lordships from the duty of commenting upon what took place in terms which otherwise the occasion would require. At the same time their Lordships cannot help observing that it would have been better if the Government had been wise in time and had recalled their order without suit instead of trying to shelter themselves on technical grounds and under a dilatory plea. There was no room for a defence on the merits. And therefore the whole argument of the learned Counsel for the respondent was directed to show (1) that the suit was demurrable in consequence of the provisions of the Specific Relief Act No. I of 1877, and (2) that even if the suit were not demurrable it would be defective for want of parties.

The question raised in the second appeal is one of more difficulty. It depends on the true construction and effect of the grant under which the appellant's title is derived.

Following the course of the argument their Lordships propose in the first instance to deal with the appeal to which the Secretary of State is a party.

On the 13th of March 1890 the appellant, as proprietor of Kondagai, applied for separate assessment and registration. Notice of the application was duly sent by the Collector to the zamindar and to certain persons who had obtained a lease of the zamindari and who are the respondents in the second appeal. Separate objections were lodged on behalf of the zamindar and the lessees. The Collector disallowed both sets of objections and decided that "separate registration and sub-assessment of the village be ordered "under section 8 of Regulation XXV of 1802 and Act I of 1876." Taking the average income of the zamindari and of the village for the past three years he fixed the peishcush for Kondagai at Rs. 2,757-4-1. The Collector then submitted the case with the records connected with it to the Board of Revenue. By resolution dated the 5th of December 1890 the Board confirmed the separate assessment as proposed by the Collector.

In March 1891 the lessees addressed a petition by way of appeal to the Board of Revenue alleging that the village had been

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"unlawfully sub-divided and the peishcush improperly reduced." They objected to sub-division altogether. They complained of the assessment as inadequate and inequitable, being in their view "based upon figures which did not fairly represent the average "revenue of the village."

The Board of Revenue replied to this petition through the Collector by a resolution of the 21st of April 1891 declaring that the Board "had no power to interfere with the Collector's orders "as to the separate registration of the village which" could "only "be set aside by a suit in a Civil Court (*vide* section 5 of Madras "Act I of 1876)." At the same time they requested the Collector "to report the result of taking a longer period, say of seven or ten "years, instead of the three-year period, on which the calculation "has now been made."

The Acting Collector of Madura reported that taking the income of the village on an average for ten years the peishcush would be Rs. 3,027-2-8. Thereupon the Board of Revenue under section 7 of the Act revised their original order and by resolution, dated the 17th of August 1891, substituted that figure for the former assessment.

So far the proceedings appear to have been perfectly regular. And it was open to the lessees under the express provisions of section 5 of the Act of 1876 if they were "aggrieved by the fact "of the separate registration" of the village to "sue in a Civil Court "for a decree declaring that such separate registration ought not "to be made."

Instead, however, of taking that course Mr. Orr, one of the respondents, in the second appeal, describing himself as resident lessee wrote on behalf of the lessees to the Chief Secretary to the Government complaining of the action of the Collector and the inaction of the Board of Revenue. He stated that the lessees were prepared to sue the Government and that he had in fact served notice on the Collector of their intention to do so. But he suggested that whatever the powers of the Revenue Board might be the Government itself had "complete power" and he prayed "the "Government to exercise that power with the result of saving both "the Government and the lessees the loss of time, trouble and "expense which a suit" would "entail."

The Government did not disavow or disclaim the arbitrary power ascribed to them by Mr. Orr and they seem to have accepted

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readily his view as to the undesirability of the litigation with which they were threatened. By an order dated the 12th of October 1891 addressed to the Board of Revenue they pointed out that "by section 5 of Regulation II of 1803 Collectors were bound to "obey all orders communicated to them by the authority of the "Board of Revenue." They considered (they said) that the Board had "full general authority and power in the event of its deeming "the Collector's action to have been wrong to order him to revise "his procedure." The order however went on to say that his Excellency the Governor in Council desired to be furnished with "a full report on the merits of the case before issuing definite "orders thereon." In their resolution in reply dated the 29th of October 1891 the Board referred the Government to the Collector's original report on the case pointing out that the formalities prescribed by Act I of 1876 were duly observed by the Collector before he decided to register the village separately under the Act. "But" they added "the Board is and at the time it passed its "proceedings was of opinion that his decision was wrong" assigning for that conclusion a reason which seems to have been founded on a misapprehension of their own. Then the reply proceeds as follows:—

"2. Still, even so, as his proceedings had already been passed "and were judicial under the Act the Board was of opinion that it "could not then interfere with them in the absence of a special "provision in the Act enabling it to do so and there is no such "special provision, the remedy by the Act itself against the "Collector's action being by civil suit.

"3. The Board was of opinion that the general control conferred "on them by section 5 of Regulation II of 1803 did not cover the "case."

This remonstrance provoked the following peremptory order dated the 14th of November 1891:—

"His Excellency the Governor in Council is unable to accept the "views of the Board of Revenue expressed in paragraphs 2 and 3 ". . . . A Collector's action in separately registering and "assessing a portion of a permanently-settled estate is not judicial "but purely fiscal. In such matters the Collector's proceedings "are those of a Revenue official and are therefore clearly subject "to the control of the Board and Government under Regulation II "of 1803. The fact that the Collector takes action under an Act "giving him power to do so and that parties aggrieved may sue "in the Civil Courts does not oust this general control.

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"2. In the present case the proceedings of the Collector of "Madura were wrong and the Board should have set them aside "in exercise of its powers under Regulation II of 1803. The "Collector will now be directed to cancel the separate registration "of Kondagai village and its hamlets."

This order was issued without notice to the appellant and without giving either the Collector or the appellant any opportunity of being heard upon the matter. It will be observed that while the order of the 14th of November states that the Collector's proceedings were wrong, it does not attempt to explain in what the alleged error consisted. On receipt of the order which was communicated to him "for information and guidance" the Collector cancelled his order for the separate registration of Kondagai and informed the appellant of the fact.

It is not disputed now that the Government were mistaken in their view of the Act of 1876. It is perfectly plain on the face of the Act and it was conceded by the learned Counsel for the Secretary of State that the decision of the Collector in a case within his jurisdiction whether for or against separate registration when once duly sanctioned as provided by the Act can only be questioned in a Civil Court. As regards the apportionment of the assessment, an appeal limited in time does lie to the Board of Revenue—section 7. But the only power reserved to the Governor in Council is the power unlimited in point of time of requiring re-adjustment of the separate assessment if it appears that there has been fraud or material error in the apportionment—section 8. The apportionment of the assessment is a matter which concerns the Government. It may affect the security of the revenue. Separate registration is a matter of private right with which the Government has no business to interfere.

The sole question therefore now left for decision is the question whether the appellant's claim can be sustained having regard to the nature and extent of the relief sought and the frame of the suit.

The plaint prays that the order complained of may be declared "*ultra vires* and illegal and of no binding effect on plaintiff." It asks no further specific relief. In that, it is said, the plaint sins against the Specific Relief Act, which forbids the Court to entertain

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a suit for a declaratory decree which may be followed by consequential relief unless that relief be asked for specifically—and so it was held by the High Court.

Now in the first place it is at least open to doubt whether the present suit is within the purview of section 42 of the Specific Relief Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of section 50 of the Chancery Procedure Act of 1852, 15 & 16 Vict., cap. 86, as interpreted by judicial decision. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is, in substance, a suit to have the true construction of a statute declared and to have an act done in contravention of the statute, rightly understood, pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind. But even assuming that the Specific Relief Act applies to such a suit as this, what is the result? What further relief can be required? If the so-called cancellation is pronounced void the order of the Government falls to the ground and the decision of the Collector stands good and operative as from the date on which it was made. The vitality of the decision is not impaired or affected merely by destruction or mutilation of the entry in the Collector's book. Cancellation in obedience to illegal commands of the Government can have no more effect than cancellation made at the dictation of a lawless mob which the officer in charge has no power to resist. It does not appear what steps the Collector took when the commands of the Government were communicated to him beyond sending a notification to the appellant. Presumably his proper course would have been to make a note or memorandum against the entry of the decision in his book, to the effect that the decision was cancelled by virtue of an order of the Government of such and such a date, and then, on the determination of a suit such as this adversely to the Government, it would be his duty to make a further note or memorandum to the effect that the cancellation was declared void by the order of the Court in such and such a suit. And so the cancellation or obliteration, if there was actual cancellation or obliteration, would be virtually effaced and the temporary cloud upon the decision cleared away. But then it was

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asked,—what would happen if the Collector ignored the order of the Court? What remedy would the appellant have if he had omitted to ask for specific relief against the Collector? It is highly improbable that any officer of the Government would set the Court at defiance. It is impossible to suppose that the Government would countenance such conduct as that. But the remedy in such a case, if it did occur, would be simple enough. Every order such as that which the appellant asks for carries with it liberty to apply. On a proper application and on proper notice being given it would be found that the arm of the Court would belong enough to reach the offender whatever his position might be.

The suggestion that no order ought to be made in the absence of the zamindar and the lessees will not bear a moment's examination. If the order of the Government which is impeached in this suit is pronounced void and of no effect, how can it have the effect of setting the matter at large and making it incumbent on the appellant to proceed as if the Collector had refused his application for separate registration instead of granting it, as in fact he did?

Their Lordships are of opinion that the Government have been wrong throughout, and that the suit is properly framed and not open to objection under the Specific Relief Act.

They will therefore humbly advise Her Majesty that the appeal ought to be allowed, with costs, in both Courts and that it ought to be declared that the order of the Government of Madras of the 14th of November 1891 is void and of no effect.

The respondent will pay the costs of the appeal.

The respondents in the second appeal are the lessees of the zamindari of Shivaganga. They were plaintiffs in the suit which was brought to recover a sum of money claimed to be due from the appellant to them, as such lessees, under or by virtue of the provisions contained in certain documents of title constituting or connected with the grant of the village of Kondagai.

The question, stated shortly, is this:—What was the measure of the obligation undertaken by the grantee in respect of the Government revenue, in the event of Kondagai being separately registered? Was the proprietor of that village, as between himself and the zamindar of Shivaganga, then to become liable simply for the Government revenue, whatever it might be, or was he to be bound in any event to pay to the zamindari annually Rs. 3,500, a sum

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which might be greater or possibly might be less than the Government revenue assessed upon the village when separately registered?

There are three documents to be considered. The earliest in date is the most important for the purpose of the present controversy. It was made on the 13th of December 1872 between Kattama Natchiar, a Hindu widow, then Rani of Shivaganga, her son and her three daughters of the one part and one Robert Fischer, the appellant's father, of the other part. It purports to be an agreement for the absolute sale of the village of Kondagai to Fischer, the father, in consideration of past and future services but only in case of the happening of some one of several events therein mentioned. The event was not in fact determined, and, according to the decision of this Board in a suit then pending, could not be determined during the Rani's lifetime. The next document was subsequent to that decision. It is dated the 14th of May 1877. By it the five persons, parties to the agreement of the 13th of December, of the first part, purport to grant Kondagai to Fischer, the father, on the terms of that agreement.

On the Rani's death Dorasinga Tevar, the son of an elder sister of the Rani, established his title to the zamindari to the exclusion of the Rani's children. On the 22nd of February 1883 Dorasinga Tevar executed a deed confirming the Rani's grant in favour of Fischer, the father, and thereupon, as was admitted at the Bar, Fischer's title to the village became absolute. In the course of the argument their Lordships were referred to a document which was executed by Dorasinga's successor, but in their Lordships' opinion that document cannot affect the present question.

The deed of the 22nd February 1883 declares that Fischer is to hold the village "under the terms of the deeds dated 13th Decem-"ber 1872 and the 14th May 1877." It does not purport to alter the conditions of the holding in any respect. Nor, in their Lordships' opinion does the deed of the 14th of May 1877 show any intention to depart from the terms of the agreement of the 13th of December 1872.

The deed of the 13th December 1872 is not free from ambiguity. At that time, of course, the village of Kondagai was not assessed separately and provision had to be made for the grantee bearing his proper share of Government revenue. The deed declares that the grantee is to pay "every year to the Circar as "peishcush Rs. 3,500." It is not disputed that until separate

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registration of the village that sum was to be paid to the zamindari as the proper proportionate contribution to the revenue assessed on the whole zamindari. But then, in the very next paragraph, the deed clearly contemplates and provides for the separate registration of Kondagai, and payment, by the proprietor of Kondagai to the Collector, of the peishcush which the Collector was to fix.

On the whole it appears to their Lordships that according to the true construction of the documents in question the sum of Rs. 3,500 was provisionally fixed as a sum sufficient to cover the proportionate amount of the Government revenue attributable to the village of Kondagai until the separate registration of the village, but that the intention was that when the separation was effected it should be a final and complete separation and that thenceforth the proprietor of Kondagai should only be liable for the burthens properly incident to the property and should discharge those burthens in the ordinary way by direct payment to the Collector.

This was the view of the District Judge who reversed the judgment of the Subordinate Judge and was in turn reversed by the High Court.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the suit dismissed with costs in the three Courts below.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitor for the appellant: Mr. *R. T. Tasker*.

Solicitor for the respondent: The Solicitor, India Office.

Solicitors for the respondents in the second appeal: Messrs. *Burton, Yeates & Hart*.

APPELLATE CIVIL.

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

1898. December 2.

TIRUMAL RAO (PLAINTIFF), APPELLANT,

v.

SYED DASTAGHIRI MIYAH AND ANOTHER (DEFENDANTS NOS. 1 AND 3), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 310A—Execution of decrees—Transfer of Property Act—Act IV of 1882, s. 88—Application to set aside sale of mortgaged property.

Section 310A of the Code of Civil Procedure applies where a sale of immoveable property has taken place under a mortgage decree, so as to enable the owner of such property who duly complies with its provisions to have such sale set aside.

Where the owner of immoveable property applies under that section to have a sale of property set aside, he is under a liability to deposit a sum equal to five per cent. on the purchase money, for payment to the purchaser, even where the land has been purchased by the decree-holder.

APPEAL against the order of H. O. D. Harding, Acting District Judge of Kurnool, in Civil Miscellaneous Petition No. 15 of 1898, in the matter of Original Suit No. 11 of 1896.

Plaintiff, having obtained a decree against the defendants for the amount due on a mortgage, applied for execution, and a sale of the mortgaged land was ordered. Plaintiff, by leave of the Court, becoming the purchaser, defendant No. 1, within thirty days thereafter, applied, under section 310A of the Code of Civil Procedure, to have the sale set aside, and deposited in Court the amount of the decree and percentage. The sum, equal to five per cent. of the purchase money referred to in section 310A(*a*) for payment to the purchaser was not deposited, because the Acting District Judge decided (as he subsequently recorded) that such payment was not necessary, the purchaser being the decree-holder. The Acting District Judge held that section 310A was imperative and that the money had been paid within thirty days. He therefore set the sale aside.

The plaintiff preferred this appeal.

* Appeal against Order No. 84 of 1898.

Sundara Ayyar for appellant.—Section 310A of the Code of Civil Procedure does not apply to sales of mortgaged property under the Transfer of Property Act, 1882, (*Kedar Nath Raut* v. *Kali Churn Ram*(1)). [COLLINS, C.J., referred to the conflicting decisions in the Calcutta cases, namely, *Girish Chundra Basu* v. *Apurba Krishna Dass*(2), which was overruled by *Jogodanund Singh* v. *Amrita Lal Sircar*(3); and *Ashruf Ali Chowdhry* v. *Net Lal Sahu*(4) overruled by *Kedar Nath Raut* v. *Kali Churn Ram*(1). The decision in Allahabad also differed from that of Calcutta. Under those circumstances the Court must express its own view.] Secondly, there has been no valid deposit as provided for in section 310A of the Code of Civil Procedure. Clause (*a*) of that section renders it obligatory on the applicant to deposit in Court, for payment to the purchaser, a sum equal to five per cent. of the purchase money. If a decree-holder in a suit on a mortgage purchases with leave of the Court he stands in the position of an independent purchaser and is entitled to the five per cent. "Leave to bid puts "an end to the disability of the mortgagee and puts him in the "same position as any independent purchaser" (*Mahabir Pershad Singh* v. *Macnaghten*(5) per Lord Watson at page 692; see also *Krishnasami Ayyar* v. *Janakiammal*(6)). Moreover, reasonable notice should have been given (*Srinivasa Ayyangar* v. *Ayyathorai Pillai*(7)).

Hon. *Bhashyam Ayyangar* for respondent.—*Srinivasa Ayyangar* v. *Ayyathorai Pillai*(7) is conclusive. The High Court is empowered to frame rules under section 104 of the Transfer of Property Act. In Calcutta, rules have been framed under that section, but the Madras High Court has made no such rules on the Appellate Side. Section 310A of the Code of Civil Procedure is therefore applicable. [COLLINS, C.J.—You must tender the right amount into Court including the five per cent. provided by the Act to be deposited before the sale can be set aside. We have held in another case that where a tender has been made within thirty days, and the office to which the money was tendered was closed or refused to accept the money, it was a valid tender of payment under section 310A of the Code of Civil Procedure.]

(1) I.L.R., 25 Calc., 703 at p. 707.
(2) I.L.R., 21 Calc., 940.
(3) I.L.R., 22 Calc., 767.
(4) I.L.R., 23 Calc., 682.
(5) I.L.R., 16 Calc., 682 at p. 692.
(6) I.L.R., 18 Mad., 153.
(7) I.L.R., 21 Mad., 416.

TIRUMAL RAO v. SYED DASTAGHIR MIYAN.

JUDGMENT.—The appellant first urges that section 310A has no application to sales under a mortgage decree and relies on the authority of the recent Full Bench case of *Kedar Nath Raut* v *Kali Churn Ram*(1). No decision of this Court to the same effect has been brought to our notice, and the decisions of the Calcutta and Allahabad High Courts have not been uniform or settled. In the case of *Srinivasa Ayyangar* v. *Ayyathorai Pillai*(2) the exact question was not expressly discussed, but it was decided by implication that section 310A is applicable to decrees like the present. That decision seems to us to be in accordance with the policy which underlies the amendment of the law made by that section. We are therefore disposed to follow it rather than the decision of the Calcutta High Court to which we have referred. The appellant next urges that section 310A was not complied with since the five per cent. required thereby to be deposited was not, in fact, deposited. It appears from the order of the District Judge, dated 17th June 1898, on Miscellaneous Petitions Nos. 65 and 81 of 1898, that the order of the District Judge now appealed against does not state the facts correctly, that the five per cent. was not, in fact, paid, and that it was not so paid, because the District Judge decided that it was not necessary to pay it in the circumstances of this case.

That decision of the District Judge was, we think, certainly wrong, and we must take it that the judgment-debtor was prepared to pay within the time limited, the whole sum payable under the section, but was virtually prevented from doing so by the decision of the Judge that a smaller sum only was payable. In these circumstances we think that the judgment-debtor must be held to be entitled to the benefit of the section, and that all the parties should now be replaced in the position in which they would have been if the District Judge had not misdirected the respondents. This is in accordance with the view taken in *Makbool Ahmed Chowdhry* v. *Bazle Subhan Chowdhry*(3) and also with the procedure followed by this Court in *Srinivasa Ayyangar* v. *Ayyathorai Pillai*(2).

We therefore set aside the order appealed against as it contains and proceeded on a mistaken view of the facts, and in lieu of it we direct that if the respondents shall have paid into Court the whole

(1) I.L.R., 25 Calc., 703 at p. 707. (2) I.L.R., 21 Mad., 416.
(3) I.L.R., 25 Calc., 609.

amount, including the five per cent., payable under section 310A, within ten days of the lower Court's receipt of this order, then the sale will stand set aside, but if they fail to do so their petition will stand dismissed. If they pay within the time each party will bear his own costs throughout, otherwise, respondents must pay the appellants' costs throughout.

TIRUMAL RAO v. SYED DASTAGHIR MIYAN.

APPELLATE CIVIL.

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

SINAYA PILLAI (DEFENDANT), APPELLANT,

v.

MUNISAMI AYYAN AND OTHERS (PLAINTIFFS), RESPONDENTS.*

1898. November. 1899. January 1

Guardians and Wards Act—Act VIII of 1890, *ss.* 29, 30—*Mortgage by guardians on estate of minor—"Previous permission of the Court"—Contract Act—Act IX of* 1872, *s.* 64—*Transfer of Property Act—Act IV of* 1882, *s.* 35.

Guardians duly appointed under the Guardians and Wards Act, 1890, having mortgaged property belonging to a minor to enable them to discharge debts binding on his estate, the mortgagee sued to recover the amount of principal and interest due. The necessity had been urgent, the terms of the deed fair, and the money had been duly applied; but the guardians had not obtained the sanction of the Court as directed by section 29 of the Guardians and Wards Act, 1890. On its being contended that the mortgage was invalid and incapable of being enforced:

Held, that a mortgage so executed was not void but only voidable; and that the defendant was entitled to avoid the mortgage but only on the condition of restoring any benefit received by him thereunder to the person from whom it had been received. The fact that the person who had received the benefit was the defendant, did not alter his position.

APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Madura (West), in Original Suit No. 6 of 1898.

Suit for money due on a simple mortgage deed, executed in favour of first plaintiff by defendant's guardians. The admitted facts were that the mortgage had been executed for the purpose of enabling the guardians of the defendant, who was a minor, to discharge debts binding on his estate; that there had been urgent

* Appeal No. 144 of 1898.

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necessity for the loan; that the terms of the mortgage were fair; that the money had been duly applied for the purpose for which it had been borrowed; and that the guardians who had executed the deed had been appointed under the Guardians and Wards Act, 1890. The defence was that the said guardians had omitted to obtain the sanction of the Court for the execution of the mortgage, as directed by section 29 of the Guardians and Wards Act, 1890, and that the mortgage was, in consequence, void and incapable of being enforced. The Subordinate Judge decreed in plaintiffs' favour.

The defendant preferred this appeal.

Sivasami Ayyar for appellant.

V. Krishnasami Ayyar and *Srinivasa Ayyangar* for respondents.

JUDGMENT.—The plaintiffs sued for the principal and the balance of interest due on a simple mortgage of the minor defendant's property. The mortgage was executed by the guardians of the defendant appointed under the Guardians and Wards Act (VIII of 1890), but the guardians failed to obtain the sanction of the Court as required by section 29 of the Act. The mortgage was executed to enable the guardians to discharge debts incurred by the minor's late father, which debts were admittedly binding on the minor's estate. There was urgent necessity to borrow the money, as the creditors were pressing simultaneously and would have filed suits and forced a sale of the property. The terms of the mortgage were fair, and the money was actually applied for the benefit of the minor's estate.

All this is admitted before us, but the minor defendant, by another guardian specially appointed *ad litem*, pleaded that the mortgage, not having been sanctioned by the Court, was void and incapable of being enforced.

The Subordinate Judge decreed for the plaintiff, and the defendant now appeals. We have no doubt but that the decree of the Subordinate Judge is right.

The mortgage executed by the guardian without sanction is not void. It is only voidable. This is clear from section 30 of the Act, which must be read with section 29. The minor defendant, through his guardian *ad litem*, desires to avoid the mortgage. He is entitled to do so, but only on condition that he shall restore any benefit which he has received thereunder to the person from

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whom it was received. This principle is acknowledged in section 64 of the Indian Contract Act, in section 35 of the Transfer of Property Act, and generally by the Indian Courts as Courts of equity and good conscience, (*Shurrut Chunder* v. *Rajkissen Mookerjee*(1), *Girraj Bakhsh* v. *Kazi Hamid Ali*(2) and *Raj Lakhi Ghose* v. *Debendra Chundra Mojumdar*(3)). The fact that the person who has received the benefit is the defendant, does not, in our opinion, make any difference, for the mortgage is *primâ facie* one binding on his estate, and he, in effect, says "set it aside, on the "technical ground that it was not sanctioned by the Court."

The minor defendant cannot, of course, be made personally liable for the debt (*Waghela Rajsanji* v. *Shekh Masludin*(4)), but the mortgaged property and his estate generally are made liable by the terms of the instrument of mortgage, and this is all that the decree of the Subordinate Judge also makes liable.

We therefore confirm the decree and dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice), and Mr. Justice Benson.

RAMANAPPA (COUNTER-PETITIONER), APPELLANT,

v.

THE OFFICIAL LIQUIDATOR, BELLARY BRUCEPETTA STOCK AND LOAN TRANSACTING COMPANY, LD. (PETITIONER), RESPONDENT.*

1898. October 21.

Companies Act—Act VI of 1882, ss. 169, 214—Practice—Companies—Winding up—Notice of appeal.

Notice of an appeal from any order or decision made or given in the matter of the winding up of a Company by the Court must, under section 169 of the Indian Companies Act, 1882, be given to the respondent within three weeks after the order complained of has been made, unless such time is extended by the Court of Appeal.

APPEAL against the order of the District Judge of Bellary, in Miscellaneous Petitions Nos. 529 and 576 of 1897.

(1) 15 B.L.R., 350.
(2) I.L.R., 9 All., 340.
(3) I.L.R., 24 Calc., 668.
(4) I.L.R., 11 Bom., 551.

* Appeal No. 93 of 1898.

RAMANAPPA v. THE OFFICIAL LIQUIDATOR, BELLARY BRUCEPETTA STOCK AND LOAN TRANSACTING COMPANY.

Petition by the official liquidator of the Bellary Brucepetta Stock and Loan Transacting Company, Limited, under section 214 of the Indian Companies Act, 1882, praying the Court to order the counter-petitioner to pay Rs. 610 with costs. For the counter-petitioner it was urged that the claim was barred by limitation, and that since his liability was due solely to his having become a surety, he could not be liable to pay under section 214 of the Indian Companies Act. The District Judge rejected both pleas and made the order prayed for.

The counter-petitioner preferred this appeal. The appeal was duly filed, but notice of it was not given as prescribed by section 169 of the Indian Companies Act.

Venkataramana Ayyar for appellant.

Ramasami Ayya for respondent, took the objection that notice had not been given as prescribed by section 169 of the Indian Companies Act. By that section, no appeal shall be heard from any order or decision made in the winding up of a company, unless notice of the same be given within three weeks after any order complained of has been made, in manner in which notices of appeal are ordinarily given under the Code of Civil Procedure, unless such time is extended by the Court of Appeal.

JUDGMENT.—It is objected that notice was not given within three weeks in compliance with section 169 of the Companies Act. The appeal was filed within that time, but the law also requires that notice in the manner provided by the Civil Procedure Code should be given. This was not done. The section has been considered in this Court and in the High Court of Calcutta and Allahabad. One of the cases (*In re Sarawak and Hindustan Banking and Trading Company, Limited*(1)) was actually decided and reported before the present Act was passed. It must, therefore, be assumed that as the Legislature made no change in the wording of that section it did not consider the construction put on the section by the Court wrong. It must be admitted that the requirements of the section press somewhat severely on would-be appellants. But we do not feel justified in differing from the view taken by the District Court.

We must, therefore, dismiss the appeal with costs.

(1) I.L.R., 4 Calc., 704.

APPELLATE CIVIL.

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

MUNISAMI NAIDU (PETITIONER AND PLAINTIFF No. 1), PETITIONER, 1898. December 13.

v.

MUNISAMI REDDI (COUNTER-PETITIONER AND DEFENDANT No. 30), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 206, 551—Amendment of decree—Power of Court of first instance after appeal.

On the hearing of an appeal by a District Court, certain special costs were directed to be paid by the defendant, but, by a clerical error, that direction was omitted from the decree when it was drawn up. Plaintiff applied to the District Judge under section 206 of the Code of Civil Procedure for rectification of the error in the decree, but the Court refused to amend, it appearing that defendant had appealed to the High Court, which had dismissed his appeal and confirmed the decree of the District Court. The appeal had in fact been dismissed under section 551 of the Code of Civil Procedure. Plaintiff then petitioned the District Court to review its order refusing to amend. This was rejected, the District Court holding that the decree, of which amendment was asked, was the decree of the High Court, which a District Court had no power to amend. On plaintiff petitioning the High Court to revise this order of the District Court:

Held, (1) that the case was governed by the ruling of the Full Bench in *Pichuvayyangar v. Seshayyangar* (I.L.R., 18 Mad., 214) where it was held that the jurisdiction of a Court of first instance to amend a decree under section 206 was ousted by the confirmation of that decree on appeal;

(2) that the decision referred to applies equally to second appeals dismissed under section 551 of the Code of Civil Procedure, and to second appeals tried after notice to the respondent.

PETITION under Civil Procedure Code, section 622, praying the High Court to revise the proceedings of A. Venkataramana Pai, Acting District Judge of North Arcot, on Miscellaneous Petition No. 229 of 1898.

Petitioner had been plaintiff in a suit in which, on appeal, the District Judge ordered the defendant to pay the costs of the plaintiff in the appeal, as well as the costs of a hearing on remand. The decree, when drawn up, omitted that portion of the order relating to the payment of costs of the hearing on remand, the omission being due to a clerical error. Petitioner applied to the District Court under section 206 of the Code of Civil Procedure for rectification of the error, but at the hearing it was represented

* Civil Revision Petition No. 366 of 1898.

MUNISAMI NAIDU v. MUNISAMI REDDI.

that there had been an appeal to the High Court in which the District Court's decree had been confirmed, and that in consequence the decree which was in force was that of the High Court, which could not be amended by the District Court. An order to that effect was accordingly made. It appeared that the appeal referred to had been preferred by the counter-petitioner, defendant in the suit, and had been in fact rejected by the High Court under section 551 of the Code of Civil Procedure. Petitioner then prayed the District Court to review the order made on his application under section 206, and to order the amendment of the decree. He submitted that under the circumstances there was no decree of the High Court, and that the District Court alone could rectify the mistake. The Acting District Judge made an order on the review petition, as follows:—"The High Court's decree in express terms "confirms this Court's decree. The decree to be amended is "therefore the decree of the High Court. This Court has no "power to amend it. Petition rejected with costs." Against this order, the petitioner presented this petition.

Seshagiri Ayyar for petitioner, relied upon *Bapu* v. *Vajir*(1), *Royal Reddi* v. *Linga Reddi*(2) and *Uma Sundari Devi* v. *Bindu Bashini Chowdhrani*(3). [COLLINS, C.J., referred to *Pichuvayyangar* v. *Seshayyangar*(4), and *Uma Sundari Devi* v. *Bindu Bashini Chowdhrani*(3) as being opposed to petitioner's contention. There had been an appeal which had been dismissed.]

Sundara Ayyar, for respondent, was not called upon.

JUDGMENT.—Notwithstanding the decision in *Bapu* v. *Vajir*(1), we think that the case is governed by the ruling of the Full Bench in *Pichuvayyangar* v. *Seshayyangar*(4). The view of the Calcutta High Court (*Uma Sundari Devi* v. *Bindu Bashini Chowdhrani*(3)) is directly opposed to that of the Bombay High Court.

The present question was not argued, apparently, when the case of *Pichuvayyangar* v. *Seshayyangar*(4) was decided, but the terms of the decision are general and in our opinion it applies equally to second appeals dismissed under section 551 of the Civil Procedure Code and to second appeals tried after notice to the respondent.

We therefore dismiss this petition with costs.

(1) I.L.R., 21 Bom., 548.
(2) I.L.R., 3 Mad., 1.
(3) I.L.R., 24 Calc., 759.
(4) I.L.R., 18 Mad., 214.

APPELLATE CIVIL.

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

KUNHAYAN (PLAINTIFF), APPELLANT,

1898. December 8, 9.

v.

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

Civil Procedure Code—Act XIV of 1882, *s.* 285—*Execution—Sale—Attachment of same property by different Courts—Sale by both Courts—Titles of the respective purchasers.*

Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, section 285 of the Code of Civil Procedure does not take away the jurisdiction of the inferior Court, and any proceedings by such inferior Court in contravention of that section will be vitiated only where there has been notice of the proceedings in the superior Court.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 166 of 1897, reversing the decree of M. R. Kelappan, Acting District Munsif of Quilandy, in Original Suit No. 129 of 1896.

Suit for possession by plaintiff, who claimed as transferee from a purchaser at a sale by a Munsif's Court. At the time when the said Munsif's Court sale took place, namely, in 1885, the property was under attachment in execution of a decree on the file of the Subordinate Court, which attachment continued till 1886, when the property was sold by the Subordinate Court. The question was whether the auction-purchase by the plaintiff's assignor was, under the above circumstances, valid. The District Munsif held that it was. He distinguished *Muttukaruppan* v. *Mutturamalinga*(1), on the ground that there was no evidence that the Munsif's Court or the parties concerned had notice that an attachment subsisted at the time of the sale; and he followed *Bykant Nath Shaha* v. *Rajendro Narain Rai*(2), as showing that where the decree-holder, the auction-purchaser and the Munsif, are ignorant of a previous attachment by a superior Court, the Munsif is competent to hold a sale in execution of his decree, and such sale confers a

* Second Appeal No. 262 of 1898.

(1) I.L.R., 7 Mad., 47.
(2) I.L.R., 12 Calc., 333.

KUNHAYAN v. ITHUKUTTI.

valid title on the purchaser. The third defendant, who was in possession, appealed; and the District Judge, considering himself bound by *Muttukaruppan* v. *Mutturamalinga*(1), held the sale by the District Munsif's Court to plaintiff's assignor to be null and void.

The plaintiff preferred this second appeal.

Mr. *C. Krishnan* for appellant:—In the case upon which the District Judge relied, namely, *Muttukaruppan* v. *Mutturamalinga*(1), this point was not discussed, and in a subsequent ruling of the High Court in *Subramania Chetti* v. *Ramasami Ayyan*(2), this Court followed the ruling in *Bykant Nath Shaha* v. *Rajendro Narain Rai*(3). The Bombay and Calcutta High Courts have held that such a sale is not invalid; see *Ram Narain Singh* v. *Mina Koery*(4); *Dwarka Nath Dass* v. *Banku Behari Bose*(5); *Obhoy Churn Coondoo* v. *Golam Ali*(6); also *Abdul Karim* v. *Thakordas*(7); *Turmuklal Harkisanrai* v. *Kalyandas Khushal*(8); and *Patel Naranji Morarji* v. *Haridas Navalram*(9).

Ryru Nambiar and *Appu Nedungadi* for respondents:—Under section 285 of the Code of Civil Procedure, as soon as an attachment is made by a superior Court, the jurisdiction of the inferior Court to proceed in execution in continuance of its attachment is at once taken away; and therefore all further proceedings in the Munsif's Court are invalid, being without jurisdiction, and a sale by such Court becomes void. No question of notice arises under section 285 of the Code of Civil Procedure: see *Muttukaruppan* v. *Mutturamalinga*(1) and *Chunni Lal* v. *Debi Prasad*(10); *In re Badri Prasad* v. *Saran Lal*(11); and *Aghore Nath* v. *Shama Sundari*(12). *Muttukaruppan* v. *Mutturamalinga*(1) has not been expressly overruled and should be followed.

JUDGMENT.—The Judge was of course right in taking the case of *Muttukaruppan* v. *Mutturamalinga*(1) as binding upon him. But in that case the point whether there was notice of the proceedings in the superior Court either to the inferior Court or to the parties in the inferior Court was not raised or considered. In *Subramania Chetti* v. *Ramasami Ayyan*(2), the decision in *Muttukaruppan* v. *Mutturamalinga*(1) was distinguished on this ground, and it was

(1) I.L.R., 7 Mad., 47. (2) Second Appeal No. 193 of 1893 (unreported).
(3) I.L.R., 12 Calc., 333. (4) I.L.R., 25 Calc., 46. (5) I.L.R., 19 Calc., 651.
(6) I.L.R., 7 Calc., 410. (7) I.L.R., 22 Bom., 88. (8) I.L.R., 19 Bom., 127.
(9) I.L.R., 18 Bom., 456. (10) I.L.R., 3 All., 856. (11) I.L.R., 4 All., 359.
(12) I.L.R., 5 All., 615.

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held that a sale by the inferior Court was not, *ipso facto*, null and void, and the ruling in *Bykant Nath Shaha* v. *Rajendro Narain Rai*(1) was approved and followed. The most recent decisions in Calcutta (*Ram Narain Singh* v. *Mina Koery*(2)) and in Bombay (*Abdul Karim* v. *Thakordas*(3)) take the same view, holding that section 285, Code of Civil Procedure, does not take away the jurisdiction of the inferior Court, and that any proceeding by the inferior Court in contravention of that section would be an irregularity which would vitiate such proceedings only if there were notice of proceedings in the superior Court. This question of notice could however only arise between the parties in the two proceedings.

Strangers like the first and second respondents are not at all entitled to impeach the proceedings in the inferior Court on the ground that they were in contravention of section 285, Code of Civil Procedure. We must therefore reverse the decree of the District Judge and remand the appeal for disposal on the other points according to law.

Costs will abide and follow the result.

APPELLATE CIVIL.

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

1898. December 5.

VELU AND ANOTHER (DEFENDANTS NOS. 4 AND 5), APPELLANTS,

v.

CHAMU AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1, 2, 3 AND 6), RESPONDENTS.*

Hindu Law—Iluvans of Palghat—Custom relating to partibility of property—Tiyans.

In a suit for partition amongst parties belonging to the caste of Iluvans of Palghat it having been contended that the ordinary Hindu Law relating to partibility of property had no application:

Held, that *Raman Menon* v. *Chathunni* (I.L.R., 17 Mad., 184), relating to the Tiyans, could not be taken to lay down that the rule of partibility does not prevail among the Iluvans of Palghat, even assuming that the Iluvans and the Tiyans had at one time been of one class. Upon the evidence adduced to the effect that

(1) I.L.R., 12 Calc., 333. (2) I.L.R., 25 Calc., 46. (3) I.L.R., 22 Bom., 88.
* Second Appeal No. 86 of 1898.

VELU v. CHAMU.

the former class had for long been treating themselves as separate from the latter and that partition was enforced as a matter of right amongst the Iluvans, the Courts were entitled to find the custom relating to partibility among the Iluvans proved.

SECOND APPEAL against the decreee of the District Judge of South Malabar in Appeal Suit No. 199 of 1897, affirming the decree of A. Venkataramana Pai, Subordinate Judge of Palghat, in Original Suit No. 16 of 1895.

Suit for partition and recovery of plaintiff's one-third share of family property. The parties belonged to the caste of Iluvans of the Palghat taluk following the Makkatayam law of inheritance. The principal issue was whether the plaintiff was entitled to seek compulsory partition according to the custom of the said caste. The Subordinate Judge held that he was. On appeal, the District Judge considered that, on the evidence adduced, no other conclusion could have been arrived at. The rulings of the High Court in relation to the Tiyans of Calicut did not, in his opinion, conclude the case, referring, as they did, to Tiyans of Calicut taluk alone, and it not being certain that the Iluvans now formed a portion of the Tiyan community, or were bound by its customs and laws, even supposing their origin to have been identical. The almost universal prevalence of partition in the Iluvan community, as shown by the evidence which had been adduced, favoured the view that it was compulsory rather than dependent on mutual consent; and this conclusion was supported by the fact that in a long current of judicial decisions from the year 1872, the right to partition had been tacitly assumed. He upheld the finding of the lower Court that the plaintiff was entitled to sue for partition.

Defendants Nos. 4 and 5 appealed on the ground, among others, that the ordinary Hindu Law in regard to partibility of property ought not to have been held applicable to the Iluvans of Palghat.

Sankaran Nayar and *Govinda Menon* for appellants.

Appu Nedungadi for respondent No. 1.

JUDGMENT.—The case of *Raman Menon* v. *Chathunni*(1) cannot be taken to lay down that the rule of partibility does not prevail among the Iluvans of Palghat, even assuming that at one time Iluvans and Tiyans were of one class. The evidence shows, however, that Iluvans have long been treating themselves as a separate class

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

VELU v. CHAMBU.

from Tiyans and that they follow the rule of partibility. This is shown by proof of numerous instances of partition being enforced as a matter of right, and there is no instance in which it was refused. Upon such evidence the Courts were entitled to find the custom proved.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

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

GOWDU MAGATA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

GOWDU BHAGAVAN AND OTHERS (DEFENDANT AND HIS LEGAL REPRESENTATIVES), RESPONDENTS.*

1898. December 6.

Civil Procedure Code—Act XIV of 1882, *ss.* 523, 540—*Agreement to refer—Decision thereon is a decree—Right of appeal.*

In a suit to file an agreement to refer a matter to arbitration, a decision was passed refusing a reference on the ground that the agreement to refer was not proved. On the plaintiff appealing against such refusal:

Held, that a decision passed under section 523 of the Code of Civil Procedure is a decree and an appeal lies therefrom under section 540 of the Code.

SECOND APPEAL against the decree of G. Campbell, Acting District Judge of Ganjam, in Appeal Suit No. 36 of 1896, affirming the decree of G. Raghava Rao, Acting District Munsif of Sompet, in Original Suit No. 437 of 1895.

Suit to file a panchayat muchalka, executed by both parties, in Court, and to send it to arbitrators to partition the property of both parties, which was in possession of the defendant. The District Munsif refused to refer the matter to arbitration on the ground that the muchalka was not proved; and he dismissed the suit. Plaintiff appealed, upon which the defendant contended that there was no appeal, as the proceedings of the lower Court amounted to an order, under section 523 of the Code of Civil Procedure and not to a decree. Upon this objection the Acting District Judge said:—"Section 523 speaks of an order of reference after the agreement

* Second Appeal No. 1279 of 1897.

GOWDU MAGATA v. GOWDU BHAGAVAN.

"is filed, and a proceeding in which an order of reference is refused, "and the filing of the muchalka disallowed, clearly seems to be an "order only. The only orders from which appeals lie are men- "tioned in section 588, and section 523 does not find place there. "See also *Daya Nand* v. *Bakhtawar Singh*(1) and *Bhola* v. *Gobind* "*Dayal*(2)." He found that no appeal lay, and dismissed the appeal.

The plaintiffs preferred this second appeal.

Rangachariar for appellants.

Pattabhirama Ayyar for respondents Nos. 2 to 4.

JUDGMENT.—The contention is that there is an appeal from a decision passed under section 523, Code of Civil Procedure, refusing to refer the matter to arbitration, the ground of refusal being that the alleged agreement to refer was not proved. The decision is one passed in a proceeding which the Legislature enacts shall be a suit, and is obviously an adjudication upon the right claimed by the plaintiff, and it decides the suit. The decision, therefore, clearly falls under the definition of a "decree" in the Code, and is appealable under section 540. The ruling of the majority of the Full Bench in *Daya Nand* v. *Bakhtawar Singh*(1) rests on the footing that the proceeding under section 523 is not a suit, but it seems to us that the plain language of the section cannot be ignored, though the action is begun, not as usual by a plaint, but by an application. The reasoning of the dissenting Judge (Oldfield, J.) in the above case is what we prefer to adopt. The ruling of this Court in *Vikrama* v. *Mallichery Kristnan Nambudri*(3) with reference to section 525 which contains similar language to that in section 523, also rests on the assumption that the proceeding under that section is not a suit, a view which is not consistent with the plain terms of the section. That decision may, however, be supportable on other grounds. There is a clear distinction between the case under section 525 where the Court refuses to file an award, and the case under section 523 where the Court refuses to enforce an alleged agreement to submit to arbitration.

In the former case no right is conclusively negatived, for the award can be enforced by an ordinary suit. In the latter case the right, if not enforced under section 523, cannot be enforced at all (see section 21 of the Specific Relief Act).

(1) I.L.R., 5 All., 333. (2) I.L.R., 6 All., 186. (3) I.L.R., 3 ad., 68.

GOWDU MAGATA v. GOWDU BHAGAVAN.

In such a case, therefore, the only further remedy is by appeal. We must therefore reverse the decree of the lower Appellate Court and remand the appeal to be heard and disposed of according to law. Costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

RAMA SASTRI (DEFENDANT No. 4), APPELLANT,

1898. October 31.

v.

NARASIMHA AYYAR AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1 TO 3), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *s.* 135—*Sale of actionable claim—Mortgagee by assignment—Assignee of prior lien.*

The assignee of a mortgagee obtained a decree for the principal and interest due under the mortgage, subject to a prior lien of the appellant. The appellant's prior lien had also been acquired by assignment, the consideration for which was proved to have been Rs. 575, though it purported to have been a much larger sum. On the appellant contending that section 135 of the Transfer of Property Act did not apply so as to prevent his claiming a lien for the larger sum:

Held, that the appellant was only entitled to a lien for the price paid by him for the assignment.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Appeal Suit No. 55 of 1897, affirming the decree of A. Sambamurti Ayyar, District Munsif of Karur, in Original Suit No. 753 of 1896.

Suit to recover principal and interest due under a registered hypothecation bond executed by defendant No. 1 to plaintiff's assignor. The facts, as found by the District Munsif, were that defendant No. 3 had held a prior lien which she had assigned to defendant No. 4 for Rs. 575, though the assignment purported to have been for a larger consideration. A decree was passed in plaintiff's favour for the principal and interest due, subject to the fourth defendant's prior lien for Rs. 575. The fourth defendant appealed, contending that section 135 of the Transfer of Property Act did not apply and that he was entitled to a prior lien for the

* Second Appeal No. 1977 of 1897.

RAMA SASTRI v. NARASIMHA AYYAR.

full amount of consideration which purported to have passed from him to the third defendant. The District Judge rejected the contention, holding that an actionable claim had been sold; and he confirmed the decree of the lower Court.

Defendant No. 4 preferred this second appeal, on the ground, among others, that a mortgage is not an actionable claim within the meaning of section 135 of the Transfer of Property Act, and that the plaintiff being himself an assignee of a mortgagee was not entitled to the benefit of that section.

Seshagiri Ayyar for appellant.

Sundara Ayyar for respondent No. 1.

JUDGMENT.—Assuming that the object of section 135 of the Transfer of Property Act was, as contended for the appellant, only to protect the party who was originally liable under the actionable claim, that is to say, the mortgagor in cases like the present, that object would be defeated by allowing the appellant more than the amount paid by him as the price for the assignment to him. For in that case the mortgagor would have to pay that amount to the respondent when redemption is sought by the mortgagor from the respondent. We think therefore the lower Appellate Court was right in declining to allow the appellant more than the price paid by him. The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

1898. October 13, 18. November 4.

DHARMAPURAM PANDARA SANNADHI (DEFENDANT No. 3), APPELLANT,

v.

VIRAPANDIYAM PILLAI (PLAINTIFF), RESPONDENT.*

Hindu Law—Inheritance of property left by ascetic—Rules relating to ascetic persons of the Sudra caste.

It being clearly implied by all the authorities that a Sudra cannot enter the order of yathi or sannyasi, the devolution of property left by a deceased person of the caste referred to, who has become an ascetic and renounced the world, is

* Second Appeal No. 1751 of 1897.

regulated by the ordinary law of inheritance, in the absence of proof of any general or special usage to the contrary.

DHARMAPURAM PANDARA SANNADHI v. VIRAPANDIYAM PILLAI.

SECOND APPEAL against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Appeal Suit No. 285 of 1895, reversing the decree of K. Ramachandra Ayyar, District Munsif of Trichinopoly, in Original Suit No. 217 of 1894.

Suit by plaintiff, as the heir of his deceased brother, to recover a house left by him. The second and third defendants claimed the property as representing the mutt into which, as they alleged, the deceased had been admitted as a tambiran or ascetic. They claimed that plaintiff and his brother were divided, and that according to the rules of the mutt and to law and custom governing the devolution of property of deceased disciples, the property of the deceased belonged to the mutt. The District Munsif found that the brothers were divided: and that the probabilities were that the deceased had become a tambiran, andi or sannyasi, and that he had become attached to the third defendant's mutt. In these circumstances, he, relying upon Smriti Chandrika, chapter XI, section VII, held that the property he died possessed of should go to the mutt. The plaintiff appealed to the District Judge, who thought the evidence indicated that the deceased had not entirely cast off the world. He added:—"His case appears to me "to come under the rules regarding ascetics who retain worldly "property the succession to which is regulated by the ordinary law "and not by the special rules of succession applicable to ascetics. "Those special rules, without doubt, were intended to apply to the "property acquired by an ascetic while he held that position, or "such absolute necessaries as he might take with him into his new "state, and orginally applied only to Brahmans (West and Bühler's "Hindu Law, 3rd edition, Introduction to chapter V, page "124). The rule that a bairagi could hold secular property "came later, and is opposed clearly to the original idea of asceti-"cism: hence, probably, the condition that the secular property "goes to the natural heirs. The question in the case of Sudra "ascetics is one really of custom and usage; for the shastraic "law does not apply to them; in this suit, however, the customs "of the tambirans have not been proved, and both sides have "relied on the decided cases and the law of the Smriti Chandrika "quoted by the lower Court. Acting upon that law, it appears to "me that the house never became the spiritual property of the

DHARMA-PURAM PANDARA SANNADHI v. VIRA-PANDIYAM PILLAI.

"deceased, but remained his secular property at his death, and "should go to his secular heir, *i.e.*, to the plaintiff." He allowed the appeal and gave possession of the property as prayed.

Defendant No. 3 preferred this second appeal.

V. Krishnasami Ayyar for appellant.

Sundara Ayyar for respondent.

SUBRAMANIA AYYAR, J.—It is doubtful whether, as alleged on behalf of the appellant, the deceased Tiruchittambalam to whose property the dispute relates, had at the time of his death become an ascetic and completely renounced the world. For, subsequent to the time he is said to have done so, he had litigation with his brother, the respondent, and recovered under a compromise decree the house in question. But supposing Tiruchittambalam had become an ascetic as alleged, it cannot, as urged for the appellant, be held that the case is governed by the rules laid down in the Hindu Law books(1) as to the devolution of the property of a yathi or sannyasi. For Tiruchittambalam was Sudra, and was therefore not entitled to enter the order of yathi or sannyasi. Though some authorities such as the Mitakshara held that it is competent for a Brahman alone to become a sannyasi, and others, as will be seen from the passage in the Nirnaya Sindhu quoted in West and Bühler's Digest of Hindu Law, 3rd edition, page 552, that a Kshatrya and Vysia also can enter that order, yet all the authorities necessarily and clearly imply that a Sudra cannot; nor do we think that the passages in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(2), in which reference is made to the rules regarding the devolution of the property of a spiritual family, as the learned Chief Justice and Muttusami Ayyar, J. expressed it, imply, as was urged for the appellant, that those rules were taken by the learned Judges to govern the descent of the property of Sudra ascetics. It is clear that the learned Judges refer to those rules to show that the usage there established with reference to the relation subsisting between the heads of the two institutions referred to in that case, was somewhat analogous to the relation subsisting between the members of a spiritual family spoken of in the Hindu Law books.

(1) By Whitley Stokes, (Madras Reprint, 1865,)—the Mitakshara, chapter II, section VIII, page 450.

(2) I.L.R., 10 Mad., 375.

DHARMA-PURAM PANDARA SANNADHI v. VIRA-PANDIYAM PILLAI.

The respondent is, therefore, entitled, under the ordinary law of inheritance, to the property in dispute, as no attempt was made to show that any special usage existed with reference to the devolution of the property of Sudra ascetics generally or ascetics connected with the appellant's adhinam or mutt. The decree of the lower Appellate Court is right. The second appeal fails and is dismissed with costs.

MOORE, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

1898. October 27, 28. November 4.

RANGAMMAL (PLAINTIFF), APPELLANT,

v.

ECHAMMAL AND OTHERS (LEGAL REPRESENTATIVES OF THE DECEASED DEFENDANT), RESPONDENTS.*

Hindu Law—Maintenance of son's widow—Self-acquired property—Property inherited from maternal grandfather.

A Hindu died, leaving property with his widow, of which a portion was self-acquired and the remainder had been inherited by him from his maternal grandfather. He had also, by will, devised certain items to his wife. His son, who had pre-deceased him, had also left a widow, who now claimed maintenance from her mother-in-law:

Held, that inasmuch as property inherited from a maternal grandfather is not self-acquired, the rule of non-liability for maintenance relating to self-acquired property ought not to be extended to property of this description, which was therefore liable to the maintenance claimed.

Semble, that the moral obligation to support a son's widow, to which her father-in-law is subject, acquires, on his death, the force of a legal obligation as against his self-acquired assets in the hands of his heir; and that a testamentary disposition of such self-acquired assets, made in favour of volunteers by a person morally bound to provide maintenance, cannot affect the position of a party whose moral claim has become a legal right.

Ammakannu v. *Appu* (I.L.R., 11 Mad., 91) considered.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Appeal Suit No. 111 of 1896, affirming the decree of T. T. Ranga Chariar, District Munsif of Coimbatore, in Original Suit No. 74 of 1895.

* Second Appeals Nos. 1970 and 1971 of 1897.

RANGAMMAL v. BOHAMMAL.

Suit by a widow against her mother-in-law for maintenance. Plaintiff's husband had died while she was still a child. Subsequently his father had also died, leaving a widow, the defendant, in possession of certain property. As to a portion of that property, it was found to have been inherited by the defendant's husband from his maternal grandfather. The District Munsif, relying on *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(1) and *Sivaganga Zamindar* v. *Lakshmana*(2), held this to be family property in the hands of defendant's late husband, in which plaintiff's husband had an interest, though he could not have enforced its partition as against his late father. He also held that the other items of the plaint property were joint family property of the husbands of the plaintiff and defendant; and that the plaintiff was entitled to maintenance. He further held that a devise by will of the defendant's husband of certain items of plaint property to defendant could not affect the plaintiff so as to destroy her right to maintenance. On appeal, the District Judge, with regard to a portion of the property, found that plaintiff had failed to prove that it was ancestral. With regard to that which defendant's husband had inherited from his maternal grandfather, he referred to *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(1), *Sivaganga Zamindar* v. *Lakshmana*(2), Mayne's Hindu Law, 5th edition, at pages 281 and 289, and arrived at the conclusion that plaintiff's husband had not been a coparcener with a right to partition, and that plaintiff could not claim maintenance out of it. He also held that the land bequeathed by will to defendant by her husband was not liable for plaintiff's maintenance. He dismissed her suit.

The plaintiff preferred this second appeal.

Pattabhirama Ayyar and *Raghava Ayyangar* for appellant.

Ramachandra Rao Saheb and *Ganapati Ayyar* for respondents.

SUBRAMANIA AYYAR, J.—*Ammakannu* v. *Appu*(3), relied on, on behalf of the respondents, no doubt lays down that a Hindu is under no legal obligation to maintain his son's widow out of his self-acquired property. There, however, the doctrine adopted in *Adhibai* v. *Cursandas Nathu*(4), *Janki* v. *Nand Ram*(5), *Kamini*

(1) L.R., 9 I.A., 128. (2) I.L.R., 9 Mad., 188 at pp. 190 191.
(3) I.L.R., 11 Mad., 91. (4) I.L.R., 11 Bom., 199.
(5) I.L.R., 11 All., 194.

RANGAMMAL v. BOHAMMAL.

Dassee v. *Chandra Pode Mondle*(1), and *Devi Persad* v. *Gunwanti Koer*(2), cited for the appellant, was not considered. That case, therefore, cannot be taken to preclude our following the view laid down in the latter cases. According to that view, the moral obligation to support the appellant, to which her father-in-law was subject would, on his death, have acquired the force of a legal obligation as against his assets in the hands of his heir. Consequently the appellant must be held entitled to maintenance out of his self-acquired property in the hands of his widow, the deceased defendant, unless the fact that she took the same under his will distinguishes this case from the *ratio decidendi* of the cases cited for the appellant. In one of them, viz., *Adhibai* v. *Cursandas Nathu*(3), Farran, J., appears to have been inclined to hold that in a matter like this a devisee would occupy a better position than an heir. The observations of the learned Judge, however, are *obiter dicta*, and even as such seem not to represent his decided opinion, *Adhibai* v. *Cursandas Nathu*(3). The better conclusion is, perhaps, that the party whose moral claim becomes a legal right would not be affected by testamentary dispositions in favour of volunteers made by the person morally bound to provide the maintenance. No doubt, if the title of the female claiming the maintenance were dependent on the volition of such a testator he could, by his will, have directed that she should get no maintenance out of his estate. But in cases like this, her claim to maintenance, originating from the status acquired by her marriage, becomes a legal right independently of his volition and comes into existence at the same moment as the dispositions in favour of the volunteer become operative. It is consequently difficult to see how the latter could affect the former. It is not, however, necessary to put our decision in favour of the appellant on this ground, since it can well be based on the other ground urged. Now it is shown by the evidence that, in addition to his self-acquired property, the appellant's father-in-law died possessed of considerable property inherited by him from his maternal grandfather, or that which had been acquired with the sale-proceeds thereof. Though such property was not liable for partition at the instance of the appellant's husband, yet, it having been held by the Judicial

(1) I.L.R., 17 Calc., 373. (2) I.L.R., 22 Calc., 410. (3) I.L.R., 11 Bom., 199.

RANGAMMAL v. ECHAMMAL.

Committee that property inherited from the maternal grandfather is not self-acquired property, (*Muttayan* v. *Zamindar of Sivagiri*(1)), the rule of non-liability established by decided cases with reference to self-acquired property ought not to be extended to inherited property of the description just alluded to. In regard to such property the female would have been entitled to claim maintenance even in the life-time of the person inheriting it. This view seems to be warranted, especially as the theory that the right of a widowed female to maintenance is dependent on the possession by the party called upon to provide the maintenance of assets derived from the husband of the female claiming the maintenance appears to have had little or no foundation in the Smritis or commentaries, according to Messrs. West and Bühler (Digest of Hindu Law, 3rd edition, pages 245-252) and Dr. Jolly (History of the Hindu Law, pages 134 and 135). The latter learned author refers to a passage from the writings of Kamalakara to show that it is incumbent on sons and grandsons to maintain indigent widows and daughters-in-law, though no wealth of the father may be in existence. He also explains that the passage in the Smriti Chandrika relied on in support of the contrary view does not really touch the point. He further points out that in the Saraswati Vilasa, section 522, the duty of a father to provide for his son's widow is stated unconditionally (page 135, note).

The decree of the lower Appellate Court cannot therefore be sustained. It is reversed and that of the District Munsif restored, subject to the modification that plaint items Nos. 4, 5 and 6, which had been alienated by the father-in-law several years before his death, be not charged with the appellant's maintenance. The respondents must pay the appellant's costs in this and in the lower Appellate Court.

MOORE, J.—I concur.

(1) I.L.R., 6 Mad., 1 at p. 19.

APPELLATE CIVIL.

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

GOPAL RAO (PLAINTIFF), APPELLANT,

v.

NARASINGA RAO AND OTHERS (DEFENDANTS AND REPRESENTATIVES OF DEFENDANT No. 1), RESPONDENTS.*

1899. January 17.

Civil Procedure Code—Act XIV of 1882, s. 43—Relinquishment by guardian of minor of part of claim—Subsequent suit for part relinquished.

While plaintiff was a minor, his guardian had sued for and obtained a decree for arrears of shrotriem in respect of faslis 1290 and 1291. Having attained his majority, plaintiff now sued for similar arrears alleged to be due in respect of the previous faslis 1287, 1288, and 1289, contending that the relinquishment of a portion of a claim in a suit by a guardian could not preclude a suit for the portion relinquished from being subsequently brought, on the attainment of his majority, by the person on whose behalf the guardian had acted:

Held, that it cannot be said that section 43 of the Code of Civil Procedure has no application to a suit in which the plaintiff is a minor. The acts of a guardian in the conduct of a suit must be upheld unless it be shown that they were unreasonable or improper.

SECOND APPEAL against the decree of E. C. Rawson, District Judge of Vizagapatam, in Appeal Suit No. 78 of 1897, reversing the decree of R. Hanumanta Rao, District Munsif of Rajam, in Original Suit No. 330 of 1896.

Suit to recover arrears of shrotriem in respect of portions of faslis 1287 and 1288 and the whole of fasli 1289. Plaintiff had been a minor under the Court of Wards until the year 1895, and during his minority the shrotriem in respect of the faslis mentioned had fallen into arrears, together with the shrotriem for faslis 1290 and 1291. The agent to the Court of Wards had instituted a suit and obtained a decree against the defendants in 1884 for the shrotriem due in respect of the two last mentioned faslis. Plaintiff, having attained his majority, now sued for the arrears accrued due in respect of the previous faslis, claiming the privilege of section 7 of the Limitation Act. Defendants objected that the suit was barred by section 43 of the Code of Civil Procedure as well as by lapse of time. The District Munsif ruled that the suit was not barred by time; and this ruling was upheld on appeal. He further held

* Second Appeal No. 432 of 1898.

GOPAL RAO v. NARASINGA RAO.

that the privilege accorded to a minor under section 7 of the Limitation Act, might, by analogy, be applied to prevent a suit from being barred under section 43 of the Code of Civil Procedure; and that the right to sue was that of the minor, which could be exercised or not by his guardian, but which, if not exercised, would continue to exist until the minor became qualified to act for himself. The District Judge reversed this ruling. He held that inasmuch as section 43 of the Code of Civil Procedure makes no provision in favour of minors such as is made in the Limitation Act, the present claim should have been included in the previous suit of 1884, the fact that plaintiff was then a minor making no difference. He dismissed the plaintiff's suit as being barred under section 43 of the Code of Civil Procedure.

The plaintiff preferred this second appeal.

Ayya Ayyar for appellant.

Madhava Rao for respondents.

JUDGMENT.—The record in the previous case is not before us, and the circumstances in which the suit was brought are not disclosed in the evidence.

We cannot say that section 43 of the Code of Civil Procedure has no application to a suit in which the plaintiff is a minor. The acts of the guardian in the conduct of a suit must be upheld unless it is shown that they were unreasonable or improper. We must dismiss the appeal with costs.

APPELLATE CIVIL.

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

1898. November 30.

SIVA RAMAYYA (PLAINTIFF), APPELLANT,

v.

ELLAMMA AND OTHERS (DEFENDANTS NOS. 1 TO 6, REPRESENTATIVE OF DEFENDANT NO. 7, AND DEFENDANT NO. 8), RESPONDENTS.*

Champerty—Purchase for an inadequate consideration—Speculative suit not necessarily champertous.

A suit having been dismissed on the ground that a sale upon which it was based had been made for a consideration so inadequate as to support the belief that it was in the nature of champerty:

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* Second Appeal No. 11 of 1898.

SIVA RAMAYYA v. ELLAMMA.

Held, that the elements required to bring the case within the authorities on the law of champertous transactions in this country were wanting. It was not a case in which an improper interest had been acquired in the unrighteous litigation of other people. The fact that a suit may be speculative does not render it champertous.

SECOND APPEAL against the decree of W. G. Underwood, District Judge of Cuddapah, in Appeal Suit No. 146 of 1896, affirming the decree of T. A. Narasimha Chari, District Munsif of Nandalur, in Original Suit No. 473 of 1895.

Suit to establish plaintiff's title to and recover possession of a house and lands from the defendants. Plaintiff had purchased the suit property from first defendant, who, it was said, had acquired it by inheritance and had, prior to plaintiff's purchase, vested it by a deed of gift in second defendant, who had, in turn, sold it to the remaining defendants, some of whom were now in possession. Plaintiff alleged ignorance of these alienations, which, however, was doubted by both the lower Courts. The consideration for the sale to plaintiff was only Rs. 50, which the District Munsif thought so inadequate a price (the house being worth Rs. 150) as to cast a doubt upon the *bonâ fides* of the transaction. He considered that it was an agreement in the nature of champerty; that it was a transfer taken by plaintiff to fight the battle against the defendants who had taken deeds from the second defendant; that the suit should have been brought by first defendant, and then the question of the validity of her right by inheritance might have been gone into. He held, for these reasons, that the sale to plaintiff was champertous and that plaintiff could not maintain the suit on the strength of his sale-deed. The District Judge, on appeal, after dealing with the facts, said:—"The consideration being very "inadequate, the District Munsif believed the conveyance to be "champertous. First defendant ought to have brought this suit "and had the right of her succession investigated. It is argued "that the law of champerty does not apply in India. This is "scarcely a fact, looking to the authorities quoted at pages 16 and "17 of Mr. Justice O'Kinealy's work on Procedure. This suit is "brought on a contract tending to promote unnecessary litigation. "It seems to me that the District Munsif came to a right decision." He dismissed the appeal.

The plaintiff preferred this second appeal.

Seshagiri Ayyar for appellant.

Gurusami Chetti for respondent No. 4.

SIVA RAMAYYA v. ELLAMMA.

JUDGMENT.—The suit has been dismissed on the ground that the basis of the claim was champertous. But according to the authorities on the law of champertous transactions in this country, the elements required to bring this contract within the rulings are wanting. It is not a case in which the plaintiff has acquired an improper interest in the unrighteous litigation of other people nor is there any other circumstance making it champertous. It may be a speculative suit, but that does not make it champertous (*Gopal Ramchandra* v. *Gangaram Anandishet*(1)). The transaction may however be voidable under section 53 of the Transfer of Property Act at the instance of the defendants who are transferees for value. But this will depend upon the facts, which have not been sufficiently gone into. We must therefore reverse the decrees of both the lower Courts and direct that the suit be restored to the file of the Court of first instance for trial and disposal upon the other issues already framed and upon the issue arising with reference to section 53 of the Transfer of Property Act.

Costs hitherto incurred will abide and follow the result.

APPELLATE CIVIL.

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

1898. December 8.

VIRABHADRA GOWDU (DEFENDANT No. 2), APPELLANT,

v.

GURUVENKATA CHARLU (PLAINTIFF), RESPONDENT.*

Hindu Law—Alienation of family property—Right of son whose share is unaffected—Purchaser's equity for refund of purchase money.

There is no equity in favour of the purchaser of property belonging to a Hindu family entitling him to a refund of purchase money paid in respect of a share afterwards held to have belonged to a son and to be unaffected by the sale. The words "on payment" occurring in the last sentence of the judgment in *Sabapathi* v. *Somasundaram* (I.L.R., 16 Mad., 76) do not appear in the original judgment, and are due to a printer's error.

SECOND APPEAL against the decree of K. Ramachandra Ayyar, Acting Subordinate Judge of Bellary, in Appeal Suit No. 45 of

(1) I.L.R., 14 Bom., 72.

* Second Appeal No. 276 of 1896, modifying the decree of V. Suryanarayana Garu, District Munsif of Bellary, in Original Suit No. 834 of 1894.

VIRABHADRA GOWDU v. GURU-VENKATA CHARLU.

Suit for partition of land and to cancel certain alienations of the same made by plaintiff's father in so far as such alienations related to the half share of the plaintiff in the suit land. The District Munsif found that plaintiff's half share was unaffected by the sale, but ordered him to refund his proportion of the sale price of the land to the purchaser, relying on *Koer Hasmat Roi* v. *Sunder Das*(1) and *Sabapathi* v. *Somasundaram*(2). On plaintiff appealing against that order, the Acting Subordinate Judge apprehended that the words "on payment," in the last paragraph of the judgment in *Sabapathi* v. *Somasundaram*(2), must be a misprint, and modified the order by declaring plaintiff entitled to have his half share partitioned and to have the same delivered over to him unconditionally.

Defendant No. 2 preferred this second appeal.

Sivasami Ayyar for appellant.

Raghavendra Rao for respondent.

JUDGMENT.—The authority relied on by the appellant for making the son liable for the purchase money in respect of his half share which has been held unaffected by the sale is *Sabapathi* v. *Somasundaram*(2), but, as the Subordinate Judge has surmised, the words "on payment" occurring in the penultimate sentence of the judgment are not in the original judgment, and are a printer's error.

It has been held in *Sivaganga Zamindar* v. *Lakshmana*(3) that there is no equity for the purchaser in such a case.

The second appeal fails and is dismissed with costs.

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(1) I.L.R., 11 Calc., 396. (2) I.L.R., 16 Mad., 76 at p. 79.
(3) I.L.R., 9 Mad., 188 at pp. 197, 200.

APPELLATE CIVIL.

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

1898. December 6. 1899. January 9.

VENKATA VIJAYA GOPALARAJU (PLAINTIFF), APPELLANT,

v.

TIMMAYYA PANTULU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 220—*Practice—Costs of guardian ad litem—Advance by plaintiff for costs of minor defendants—Contract Act—Act IX of* 1872, *ss.* 68, 70—*Right to recover amount advanced.*

Plaintiff having, in a prior suit, sued the defendants, who were minors, and their father, for specific performance, was ordered by the Court to advance money to the guardian *ad litem* of the minors (who was appointed by the Court), to enable him to conduct their defence. Plaintiff succeeded, but the Court refused to provide, in its decree, for the repayment to plaintiff of the amount so advanced. On the plaintiff bringing this suit to recover that amount:

Held, per SUBRAMANIA AYYAR, J. (1) that the Court in which the prior suit had been brought had power neither to direct the plaintiff to make the advances to the guardian, as had been done, nor to award the amount so paid as costs in the cause. The present suit, therefore, was not unsustainable for the reason that the subject matter of it was one for the Court to have dealt with in the previous suit;

(2) that the circumstances of the case were not such as to render the amount recoverable under section 70 of the Contract Act, inasmuch as the defendants could not be said to have enjoyed the benefit of the expenditure;

(3) that payments or charges connected with legal expenses in which infants are concerned, may, in certain circumstances, come under the head of necessaries within the meaning of section 68 of the Contract Act. Disbursements properly made in defence of the suit by the guardian *ad litem* out of the plaintiff's advances might be allowable if it be alleged and proved that there were reasonable grounds for the defence put forward, though it proved unsuccessful. But that this ground could not now be relied upon on second appeal, inasmuch as it had not been put forward in the Court below, when an issue relating to it could have been framed:

Per DAVIES, J., that a matter of this nature can and should be settled in the suit in which it arises: and that where a plaintiff is successful, a supplementary issue should be framed and tried as to the amount due to him on account of advances made by him to the guardian *ad litem* for conducting the defence, and a decree passed in his favour for the total amount of costs found to have been properly incurred in the case by the guardian out of such advances.

SECOND APPEAL against the decree of E. C. Rawson, District Judge of Vizagapatam, in Appeal Suit No. 138 of 1896, affirming the

* Second Appeal No. 98 of 1898.

decree of P. Lakshmi Narasu Pantulu, District Munsif of Vizianagram, in Original Suit No. 618 of 1894.

Suit to recover, with interest, a sum advanced by order of Court to defendants, who were minors, to enable them to conduct their defence in a prior suit, Original Suit No. 41 of 1892, in which plaintiff had sued them and their father for specific performance of a contract of sale of family property executed by their father in favour of the plaintiff. The father of the defendants having declined to act as their guardian *ad litem*, an officer of Court had been so appointed, and the money now sued for had been advanced by plaintiff, in pursuance of the Court's order, for the conduct of the defence of the minor defendants. The defence (which was to the effect that the debt in discharge of which the property was agreed to be sold was immoral) failed, and specific performance of the contract was ordered. The Court, however, refused to provide, in its decree, for the repayment to plaintiff of the amount advanced by him to the guardian *ad litem* in pursuance of the Court's order, for the conduct of the minors' defence. Plaintiff, therefore, brought this suit to recover the amount of the said advance with interest. On the issue as to whether a separate suit lay for the recovery of such advance, the District Munsif doubted the power of the Subordinate Judge to order plaintiff to make it (referring to *Narayandas Ramdas* v. *Saheb Husein*(1)), and held that at any rate the amount so advanced should have been included by the Court in costs under section 220 of the Code of Civil Procedure. He further held, that, considering the relationship of the parties in Original Suit No. 41 of 1892 and the circumstances under which the money had been advanced, section 70 of the Contract Act had no application, and that a separate suit to recover the amount advanced would not lie. He accordingly dismissed the suit. On appeal by plaintiff the District Judge confirmed the decision of the lower Court.

The plaintiff preferred this second appeal.

Narayana Rao for appellant.

Mahadeva Ayyar for respondents.

SUBRAMANIA AYYAR, J.—The appellant sued, in Original Suit No. 41 of 1892 on the file of the Subordinate Court of Vizagapatam, the respondents and their father for the specific performance of an agreement entered into by the father to sell some lands which

(1) I.L.R., 12 Bom., 553.

belonged to him and the respondents as members of a joint family. The respondents, being minors, were represented in the suit by an officer of the Court who had been appointed as guardian *ad litem*. The suit was defended on their behalf chiefly on the ground that the debts, with reference to the discharge whereof the sale was agreed to be made, had been incurred for immoral purposes. But the defence entirely failed, it having been proved beyond doubt that the debts were proper debts which were fully binding on the sons. The Court thought that the father had caused the above unfounded contention to be set up in the name of his sons and decreed specific performance. In the course of the suit, however, the appellant had, in accordance with an order of the Court, paid from time to time to the guardian *ad litem* sums aggregating to Rs. 923-8-0 for purposes connected, it is said, with the defence of the suit. But the Court refused to provide, in the decree therein, for the repayment to the appellant of the amount paid to the guardian *ad litem*. In the absence of any provision of law in this country similar to order 65, rule 13, under the Judicature Act in force in England, the Court in which suit No. 41 of 1892 was pending had power neither to direct the appellant to make the payments which were made to the guardian *ad litem*, (*Narayandas Ramdas* v. *Saheb Husein*(1), nor to award the amount so paid as costs in the cause. The present suit for that amount cannot therefore be held to be unsustainable for the reason that the matter was one for the Court to have dealt with in the previous suit. The question is whether the appellant is entitled to a decree for the money against the respondents. On behalf of the appellant it was contended that the case came under section 70 of the Indian Contract Act. But the contention is untenable, (*Branson* v. *Appasami* (2)). Assuming that the section is applicable to cases where anything is done for or delivered to a person incapable of entering into a contract, it is clear that, in the circumstances of the case, the respondents cannot, within the meaning of the section, be said to have enjoyed the benefit of the appellant's expenditure. It was next urged that the case came under section 68 of the said Act. No doubt there is authority for the view that payments or charges connected with legal matters in which infants are concerned would, in certain circumstances, come under the head of necessaries. In

(1) I.L.R., 12 Bom., 553. (2) I.L.R., 17 Mad., 257 at p. 259.

Clarke v. *Leslie*(1) it was considered that money, advanced to an infant to procure him liberation from arrest for the price of necessaries or in execution of a decree for a debt for which the infant had made himself liable, would come under that head. In *Ex parte M'Key*(2) a similar view was taken as to rent paid in order to save the estate of a minor from the costs of an ejectment. In *Helps* v. *Clayton*(3) it was held that solicitor's costs, with reference to the preparation of a marriage settlement by the intended husband of an infant (who had no property of her own to settle) under which proper provision was made for her benefit, were costs in respect of necessaries suitable to her estate and condition. *Watkins* v. *Dhunnoo Baboo*(4) and *Sham Charan Mal* v. *Chowdhry Debya Singh Pahraj*(5) are also in point. But turning to the present case it is evident, from the facts already stated, that the defence on behalf of the respondents in Suit No. 41 of 1892 was quite untrue. Nevertheless whatever was properly disbursed by the guardian *ad litem* out of the money received from the appellant, in defending the suit might be allowable if it were alleged and proved that there were reasonable grounds for putting forward such a defence, though it proved unsuccessful. Compare *Brown* v. *Ackroyd*(6). But in the lower Court, section 68 on which stress is now laid not having been relied on, no allegation to the said effect was made and no issue framed as to the point. The appellant cannot be allowed at this stage to raise such an issue, as it would necessitate further enquiry.

The second appeal fails and I would dismiss it but in the circumstances without costs.

DAVIES, J.—I agree in the conclusion of my learned colleague dismissing the second appeal without costs. It seems to me, however, that there is nothing to prevent a matter of this kind being settled in the suit in which it arises and that it ought therefore to be settled. In cases where the plaintiff is successful a supplementary issue should be framed and tried as to the amount due to the plaintiff on account of advances made by him to the guardian *ad litem* for conducting the defence and then a decree given to the plaintiff for the total of the costs found to have been properly incurred in the case by the guardian out of those advances. If this be done, there will be no occasion for a fresh suit.

(1) 5 Esp., 28. (2) 1 Ball & B., 405. (3) 34 L.J., C.P., 1.
(4) I.L.R., 7 Calc., 140. (5) I.L.R., 21 Calc., 872. (6) 25 L.J., Q.B., 193.

APPELLATE CIVIL.

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

1899. March 27.

PAPAMMA (PLAINTIFF), APPELLANT,

v.

SUBBANNA (DEFENDANT), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 9, 50, 51—Tender of patta during fasli—Suit commenced after fasli.

A suit to enforce acceptance of patta under section 9 of the Rent Recovery Act, 1865, may be instituted after the expiration of the fasli to which the patta relates, provided that the patta has been tendered during the continuation of the fasli.

Ramasami Mudaliar v. *Rathna Mudaliar* (I.L.R., 21 Mad., 148) explained.

SECOND APPEAL against the decree of J. H. Munro, Acting District Judge of Godavari, in Appeal Suit No. 37 of 1899, affirming the decree of P. Kershasp, Acting Head Assistant Collector of Godavari, in Summary Suit No. 29 of 1898.

Summary suit under sections 9, 50 and 51 of Act VIII of 1865, to enforce acceptance of patta. Plaintiff had, within the fasli year, namely, on 22nd May 1898, tendered to the defendant a patta in respect of fasli 1307, which ended on 30th June 1898. Defendant had refused to accept the patta so tendered, and to execute a muchalka in respect of the same. The suit was commenced after the expiration of the fasli to which it related, namely, on 12th July 1898. On this ground the Acting Head Assistant Collector dismissed it, holding the decision in *Ramasami Mudaliar* v. *Rathna Mudaliar*(1) to have clearly laid down that a suit must be brought within the fasli to which the patta relates. Though that decision related to section 8 of the Rent Recovery Act he held that the same principle must apply to a question arising under section 9 of that Act. On appeal to the Acting District Judge the decision of the lower Court was upheld, and the suit dismissed.

The plaintiff preferred this second appeal.

Hon. *Bhashyam Ayyangar* and *Subramania Ayyar* for appellant.—A suit to enforce acceptance of patta under section 9 of the Rent Recovery Act is maintainable, even though it be brought after the expiration of the fasli to which it relates, provided

* Second Appeal No. 177 of 1899.

(1) I.L.R., 21 Mad., 148.

PAPAMMA v. SUBBANNA.

that the patta has been tendered within the fasli. Under the section referred to, the cause of action only arises one month after tender of patta: and under section 51, summary suits under the Act must be brought within thirty days from the date of the cause of action. It must, therefore, be possible to bring a suit after the expiration of a fasli if patta has been duly tendered during its continuance. The lower Courts have misunderstood the principle laid down in *Ramasami Mudaliar* v. *Rathna Mudaliar*(1). There, not only had the suit been instituted after the expiration of the fasli, but the demand for patta had also been made after that date. In *Venkatasami Naik* v. *Setupati Ambalam*(2), it is laid down only that tender of patta must be made within the fasli for which rent is sought to be recovered.

Seshachariar for respondent.—The effect of the decision in *Ramasami Mudaliar* v. *Rathna Mudaliar*(1) is to lay down the broad rule that suits under either section 8 or section 9 of the Rent Recovery Act should be instituted before the expiration of the fasli to which the patta relates. [SUBRAMANIA AYYAR, J.—That case merely applies to tenants the rule in force against landlords. It is said that inasmuch as a landlord must tender patta within the fasli for which rent is sought to be recovered, so a tenant must be governed by the same rule, when he demands a patta from the landlord.] The Act does not limit the period during which patta may be tendered. See also *Seshadri Ayyangar* v. *Sandanam*(3). Since a suit under section 9 is only a proceeding to enforce acceptance of patta by the assistance of the Court, if the tender of the patta must be effected during the continuance of the fasli, so should the institution of the suit.

JUDGMENT.—In order to enable a landlord to maintain a suit to enforce the acceptance of a patta the tender should be made within the fasli, a month should have expired from the tender of the patta, and the action should be brought within thirty days from the expiry of the month allowed to the tenant to accept the patta tendered.

We do not think it was intended by the judgment in *Ramasami Mudaliar* v. *Rathna Mudaliar*(1), to lay down the rule that unless the action is brought within the fasli it cannot be sustained. The judgment must be read with the facts, and the reasoning used

(1) I.L.R., 21 Mad., 148. (2) 7 M.H.C.R., 359. (3) I.L.R., 1 Mad., 146.

PAPPAMMA v. RUBBANNA

in the judgment shows that this is so, for the reason given for holding that the suit is barred is that it was 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 nothing more. In the present case, admittedly, the above conditions have been complied with, and the fact that the suit has been brought after the expiry of the fasli is immaterial. We, therefore, allow the appeal and reverse the decrees of the Courts below and remand the appeal for disposal according to law. Costs of this second appeal will abide and follow the result.

APPELLATE CIVIL.

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

1899. January 17.

VENKAYYA (PLAINTIFF), APPELLANT,

v.

RAGHAVA CHARLU (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 230—Execution of decree prevented by "fraud or force" of judgment-debtor—Period of limitation.

Where a judgment-debtor, knowing that a warrant of attachment had been issued against his moveable property, locked up his house and so prevented the moveable property therein from being attached:

Held, that his action amounted to "fraud" within the meaning of section 230 of the Code of Civil Procedure. In order to obtain the benefit of the proviso in that section, it is not necessary that a judgment-creditor should prove that the fraud of the judgment-debtor continued so as to prevent execution of the decree at any time. "Fraud" or "force" on the part of a judgment-debtor gives a new starting point for the period of limitation, and an application for the execution of a decree may be granted at any time within twelve years after the date on which a judgment-debtor has by "fraud" or "force" prevented execution of a decree.

APPEAL against the order of T. M. Saminadha Ayyar, Acting District Judge of Nellore, on Appeal against Order No. 3 of 1894, reversing the order of P. Adinarayanayya, District Munsif of Kanigiri, in Execution Petition No. 144 of 1894, in the matter of Original Suit No. 127 of 1879 on the file of the Court of the District Munsif of Kavali.

(1) 7 M.H.C.R., 350.

* Appeal against Appellate Order No. 50 of 1898.

VENKAYYA v. RAGHAVA CHARLU.

Application for execution under sections 230 to 235 of the Code of Civil Procedure. The petition was presented on 6th February 1894. Final decree had been passed in second appeal by the High Court on 9th January 1882. It was claimed in the petition that though twelve years had expired since the date of the decree in appeal, the judgment-debtor had, with the object of gaining delay, caused objection petitions to be filed, and appeals to be preferred thereon, and had so prevented the execution of the decree. The District Munsif, holding that no specific allegations of fraud were set forth in the petition, dismissed it as barred by limitation. On appeal, the application was remanded for a finding as to whether or not the judgment-debtor had by fraud prevented execution of the decree at some time within twelve years immediately before the date of the application. The finding was that the first application for execution had been made on 13th July 1882 and a warrant issued, under which some immoveable property of the judgment-debtor had been attached and sold. No moveable property had, however, been attached, as the house of the judgment-debtor had been found locked and so continued until 12th August 1882, when the warrant (of which the judgment-debtor was well aware) had been returned unexecuted. There had been other applications for execution of the decree. The District Munsif held that the judgment-debtor had, by so closing his house, prevented execution by fraud. The Acting District Judge, on this finding, reversed the original order and held that the application for execution was not time-barred.

The judgment-debtor preferred this appeal.

Seshagiri Ayyar for appellant:—The averments in the petition do not amount to a charge that the judgment-debtor has by fraud or force prevented the execution of the decree. Petitioner has therefore not fulfilled the conditions required by the proviso to section 230 of the Code of Civil Procedure, and is not entitled to the benefit of that proviso so as to enable him to execute the decree after the expiration of twelve years. Neither is the subsequent finding of the District Munsif, on remand, that the judgment-debtor had prevented execution by fraud by closing his house in 1882, sufficient to entitle the judgment-creditor to the benefit of the proviso. That finding, if accepted, at the most only holds a single act of fraud to be proved; and that shortly after

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the passing of the decree. It is submitted that the judgment-creditor must establish more than this; he must show that by the force or fraud of the judgment-debtor he has been prevented from executing the decree during the whole of the twelve years. A long period is allowed by the section for the execution of a decree and the decree-holder must exercise due diligence and must not be content to rest his application for an extension of time on a single act of *mala fides* on the part of the judgment-debtor. See *Seshachalam Chetti* v. *Rajam Chetti*(1). The decision in *Annamalai* v. *Rangasami*(2), and *Bhagu Jetha* v. *Malek Bawasaheb*(3) do not apply.

Ramachandra Rao Saheb for respondent.

JUDGMENT.—We are of opinion that the order of the District Judge is right. Whatever may be said as to other attempts to execute the decree, we think that there is no doubt but that the action of the appellant in locking up his house and keeping it locked up in August 1882, when he knew that a warrant for the attachment of his moveable property had been issued, was a contrivance or stratagem or "fraud" within the meaning of section 230, Civil Procedure Code, (*Annamalai* v. *Rangasami*(2) and *Bhagu Jetha* v. *Malek Bawasaheb*(3)). In consequence of this conduct of the appellant the warrant had to be returned unexecuted, and the respondent was thus, for the time, prevented from executing his decree by the fraud of the appellant, the judgment-debtor. It is argued for the appellant that the respondent (judgment-creditor) had other opportunities later on for executing the decree, and that section 230, Civil Procedure Code, requires that it should be shown that the judgment-debtor's fraud continued to prevent the execution of the decree right up to the date of the last application for execution. We do not understand this to be the meaning of the section. In the case of *Bhagu Jetha* v. *Malek Bawasaheb*(3), the facts of which are not unlike those of the present case, the application for execution was in June 1882. The fraud complained of was in July 1879, and there is nothing to suggest that the fraud continued to prevent the judgment-creditor from taking other steps to execute the decree. It seems to us that the proviso to section 230, Civil Procedure Code, permits the execution of a decree

(1) Appeal against Order No. 17 of 1898 (unreported).
(2) I.L.R., 6 Mad., 365. (3) I.L.R., 9 Bom., 318.

VENKAYYA v. RAGHAVA CHARLU.

at any time within twelve years after the date on which the judgment-debtor has by fraud or force prevented the execution of the decree on an application, properly made, for execution; in other words, fraud or force gives a new starting point for the twelve years' limitation. The proviso is intended to prevent the twelve years' rule of limitation being an inducement to judgment-debtors to evade execution by fraud or force with a view to obtaining the benefit of the twelve years rule.

This view of the case is not opposed to our decision on which the appellants' pleader relies since in that case the Judge had not found that execution of the decree was, in fact, prevented by the fraud of the judgment-debtor.

In the present case we find that the judgment-debtor did, by fraud (within the meaning of section 230, Civil Procedure Code), prevent the execution of the decree in August 1882, that is, at a time within twelve years immediately preceding the application for execution now before us, and that this application is therefore not barred by the twelve years rule.

We dismiss the appeal with costs.

APPELLATE CIVIL.

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

ZAMORIN OF CALICUT (PLAINTIFF), APPELLANT,

v.

NARAYANAN MUSSAD AND OTHERS (DEFENDANTS AND REPRESENTATIVE OF DEFENDANT No. 17), RESPONDENTS.*

1899. January 20, 23.

Civil Procedure Code—Act XIV of 1882, *s.* 13—Res Judicata—*Suit for land based on plaintiff's title—Prior suit alleging that defendants held on lease from plaintiff—Dismissal of prior suit no bar to subsequent claim.*

In a previous suit in which plaintiff had been a party, it had been attempted to assert plaintiff's title to a piece of land occupied by the defendants by proving that they held the same by virtue of an alleged specific lease. The Court had held that no such lease had been executed. Plaintiff now claimed the land as belonging to his devasom, and sued to recover it on the strength of his title; he also set up the alleged lease once more:

* Second Appeals Nos. 523 and 524 of 1898.

ZAMORIN OF CALICUT v. NARAYANAN MUSSAD.

Held, that though the question of the validity of the lease was *res judicata* plaintiff was at liberty to sue also on the strength of his title, independently of the lease, and he was not estopped from so suing by the fact that the former suit had been based on the lease alone. If the relation of landlord and tenant were shown to have existed prior to the specific lease sued upon, it was for the tenant to prove that such relation had ceased to exist. In the absence of such proof the relation would be presumed to continue, and the tenant's possession in that case could not be adverse.

SECOND APPEAL against the decree of the District Judge of South Malabar in Appeal Suits Nos. 285 and 286 of 1897, reversing the decree of J. A. de Rozario, Acting Principal District Munsif of Calicut, in Original Suit No. 814 of 1895.

Suit to recover land with arrears of rent. Plaintiff claimed the land as belonging to his devasom, and sought to recover it on the strength of his title. In a previous suit (Original Suit No. 1014 of 1893) plaintiff had attempted to assert his title by giving a melcharth to a third person and allowing him to sue upon it. In that suit (the present seventeenth defendant being plaintiff, and the present plaintiff being ninth defendant), it was alleged that the land was held by the present defendants under a specific lease of 1849. An issue was framed and tried thereon and it was found that no such lease had been executed. The same lease was now set up by plaintiff in the present suit. Among the issues framed were the following:—

"(1) Whether the suit is *res judicata* by the decree in suit No. 1014 of 1893?; (2) whether the lease sued on is true?; (3) whether the property is held under the lease sued on?; (5) whether plaintiff has jenm title to the property, and are the defendants debarred by the decree in suit No. 1014 of 1893 from questioning the jenm title of plaintiff to the property?; (6) whether plaintiff's title is barred by adverse possession?"

The District Munsif held that the jenm right of the plaintiff's devasom to the plaint land had been amply made out; that plaintiff had failed to prove the lease; that in any case inasmuch as that lease had been made the basis of the former suit (Original Suit No. 1014 of 1893) and adjudicated upon therein, a second suit upon it was not maintainable; that the suit was not barred by limitation; and that plaintiff was entitled to recover possession on the strength of his proved title as jenmi.

The District Judge, on appeal, held that the suit was barred by limitation, and that the subject matter of it was *res judicata*. It

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appeared to him that the possession of the defendants must be held to be adverse, and since it was not disputed that they had been in possession for a period greatly exceeding the period of limitation, the suit should be dismissed. It was not sufficient, he said, in suits for ejectment, that the plaintiff should show his title to the land at some remote period: he must prove that it subsisted at least within a period of twelve years preceding the suit. Plaintiff had failed to do this, or to show that there had been any distinct admission of his title within that period. The appeal was allowed and the suit dismissed.

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

Appu Nedungadi for respondents Nos. 8 and 9.

JUDGMENT.—We agree with the District Judge that the invalidity of the lease sued upon is *res judicata* by the decision in the former suit, but the District Judge is in error in holding that the plaintiff (appellant) was not at liberty to sue also on the strength of his title, independently of the lease, and that he is estopped from so suing by the fact that the former suit was based on the lease alone (*Kandunni* v. *Katiamma*(1)).

If the relation of landlord and tenant is shown to have existed prior to the specific lease sued upon it is for the tenant to prove that it has ceased to exist. In the absence of such proof it is presumed to continue, and the tenant's possession in that case cannot be adverse.

The failure to prove the lease sued upon is not by itself proof that a prior tenancy did not exist, though the circumstances connected with such failure may well be considered as an element in deciding the question. We must, therefore, set aside the decree of the District Judge and remand the appeal for disposal on the merits. Costs in this Court will abide and follow the result.

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(1) I.L.R., 9 Mad., 251.

APPELLATE CIVIL.

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

1899. January 23, 25.

ADAIKKALAM CHETTI (PLAINTIFF), APPELLANT,

v.

MARIMUTHU AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Parties—Bond in favour of one undivided brother for the benefit of himself and others—Suit by promisee alone—Payment to younger undivided brother—Discharge—Onus of proof.

In a suit on a bond executed by the deceased father of defendants, in favour of the plaintiff, the defendants, while admitting the bond and the consideration for which it had been given, contended that inasmuch as plaintiff had four undivided brothers and the deed had been executed in his name for the benefit of himself and his brothers, the latter should have been joined as plaintiffs, and that plaintiff could not maintain the suit alone. They also pleaded payment to plaintiff's undivided younger brother, which payment they contended was binding on the plaintiff:

Held, that plaintiff was entitled to sue for the family debt without joining his undivided brothers, the contract on which the suit was based being in plaintiff's sole name and not purporting to have been obtained on behalf of any others but himself. And that as to the payment pleaded, if true, plaintiff was, as regards the promisor, the only person *primâ facie* entitled to payment; it therefore lay on the promisor to show that a payment to a third party was binding on the plaintiff, which had not been done. The contention that payment to any member of the family was by itself necessarily binding on the member who took the contract, could not be supported.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in Appeal Suit No. 465 of 1897, reversing the decree of M. Subba Ayyar, District Munsif of Pattukota, in Original Suit No. 351 of 1896.

Suit to recover the amount due on a registered hypothecation bond executed to plaintiff by the deceased father of the two defendants. The defendants admitted the bond and the consideration upon which it had been given; they, however, contended that inasmuch as plaintiff had four undivided brothers, and the deed had been executed in his name for the benefit of plaintiff and his brothers, the latter should have been joined as plaintiffs, and that plaintiff could not sue alone. They further pleaded payment, alleging that the amount due on the bond had been paid to plaintiff's

* Second Appeal No. 675 of 1898.

undivided younger brother and that such payment was binding on the plaintiff. The District Munsif having framed issues on both points, held that, whether plaintiff were undivided with his brothers or not, he alone could maintain the suit, being the eldest, and so, naturally, the managing member of the family, and the plaint bond standing in his name. On the other issue he found that there had been disputes between the plaintiff and his brothers, and he did not believe the payment alleged. He decreed in favour of plaintiff for the amount claimed.

The Subordinate Judge, finding that the debt on the bond was a joint one in favour of plaintiff and his brothers, held that plaintiff could not maintain the suit in his sole name. He found the issue as to discharge by payment to plaintiff's younger brother also against the plaintiff, and reversed the decree.

The plaintiff preferred this second appeal.

Hon. *Bhashyam Ayyangar* for appellant.

Ramachandra Rao Saheb for respondents.

JUDGMENT.—The first question is whether the plaintiff is entitled to sue without joining his undivided brothers, the debt being family property. We think he is entitled to, inasmuch as the contract on which the suit is based is in his sole name and does not purport to have been obtained by him on behalf of any others but himself (*vide Bungsee Singh* v. *Soodist Lall*(1), *Dayabhai Lallubhai* v. *Gopalji Dayabhai*(2) and *Hari Vasudev Kamat* v. *Mahadu Dad Gavda*(3). In the case of this very family it has been previously held by this Court that the plaintiff could sue alone to enforce acceptance of patta of family lands.

The next question is whether the payment, which the Subordinate Judge would appear to have found (though his language is not clear) was made in discharge of the bond, was a valid discharge as against the plaintiff. As the sole promisee under the contract the plaintiff was, as regards the promisor, the only person *primâ facie* entitled to payment. It therefore lay on the promisor to show that his payment to a third party was binding on the plaintiff. No circumstances justifying such payment were put forward. The only plea set up was that the payment to any member of the family is by itself necessarily binding on the member who took

(1) I.L.R., 7 Calc., 739 at p. 745. (2) I.L.R., 18 Bom., 141,
(3) I.L.R., 20 Bom., 435.

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the contract in his own name. There is no authority for such a wide proposition. In this case there was nothing to prevent payment being made to the plaintiff himself, and no explanation is given why payment was not made to him, while the fact that he was quarrelling with his brothers at the time indicates that the payment was not *bonâ fide*. We must therefore reverse the decree of the lower Appellate Court and restore that of the Munsif, with the plaintiff's costs in this and in the lower Appellate Court. Time for redemption is extended to the 1st April next.

APPELLATE CIVIL.

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

1899. January 11, 17.

X (PETITIONER), APPELLANT,

v.

X (RESPONDENT), RESPONDENT.*

Divorce Act—Act IV of 1869, *ss.* 12, 13—*Divorce—Conduct of petitioner conducing to adultery—Just and reasonable cause for desertion—Drunkenness of wife—Leaving wife without provision for maintenance.*

Evidence adduced at the hearing of a petition by a husband for the dissolution of his marriage with his wife showed that the petitioner had left his wife voluntarily on account of her drunkenness; that he had not maintained her or contributed to her support since so leaving her; that he had no reason for believing that his wife had committed adultery during the time he had lived with her; and that she had (if the evidence were believed) been leading an immoral life since the petitioner had so left her. The petition was dismissed, whereupon the petitioner appealed:

Held, that the petitioner having deserted his wife without just or reasonable cause, and without making any provision for her, had conduced to the adultery (if any had been committed), and the petition had been rightly dismissed.

APPEAL against the decree of Mr. Justice Boddam in Original Matrimonial Suit No. 2 of 1898.

Suit by a husband for dissolution of marriage. In his petition, petitioner alleged that he had been "obliged to leave his wife in "consequence of her quarrels and extremely intemperate habits,"

* Original Side Appeal No. 30 of 1898.

X v. X.

and that he believed her to be leading the life of a common prostitute. The suit coming on for settlement of issues, the respondent not appearing, and counsel for the petitioner and evidence adduced on his behalf having been heard, the petition was ordered to be dismissed, the judgment of the Court being as follows:—

"I am of opinion that this petition should be dismissed. If a "man deserts his wife and, without justification, leaves her in a "foreign country to die or get her own living as she can without "doing anything to support her, I do not think he can complain "if she commits adultery. He marries her for better or for worse. "If she drinks, that may perhaps excuse his continuing to live "with her, though I do not think it does; but it certainly does not "justify him in declining or omitting to support her. He has "been guilty of desertion, and even if she is the woman who lived "by prostitution in Chintadripet, he who seeks the assistance of "this Court must come with clean hands which is not the peti-"tioner's case. Petition dismissed."

Against this order the petitioner preferred this appeal.

Mr. *J. H. M. Ryan* for appellant.—The petitioner could have explained the circumstances under which he had left his wife, and the means which she had. Merely leaving a wife under such circumstances does not amount in law to desertion: at any rate, having regard to her intemperance, there was reasonable excuse. No doubt it is the duty of the Court, under section 12 of the Indian Divorce Act, to satisfy itself that the petitioner has not been in any manner accessory to the adultery; and section 13 is imperative in its direction that the petition shall be dismissed if the petitioner shall be shown to have been accessory to or has been conniving at the adultery complained of. But neither section applies to this case, because the act here charged against the petitioner is that he deserted her. Section 14 deals with desertion and wilful separation on the part of a petitioner, but that section is not imperative in its terms like section 13; it gives the Court a discretion by providing that the Court shall not be bound to pronounce a decree if it finds that the petitioner has deserted or wilfully separated from the respondent without reasonable excuse. The facts, as proved before the lower Court, do not justify the exercise of this discretion, and inasmuch as the desertion as now found may operate as a bar to any further petition, although the respondent may continue her

X v. X. immoral life, it is submitted that the decision should be reversed or a new trial granted.

The respondent was not represented.

JUDGMENT.—This is an appeal against a decree dismissing a petition praying for the dissolution of petitioner's marriage with his wife on account of her adultery.

There was no appearance at the trial on the part of the respondent and there was no co-respondent. It appeared from the evidence of the petitioner that he married the respondent (apparently also a European) in Lower Burma in 1887, he being at the time a private soldier (see description in marriage certificate). They lived together in various places until January 1898 when he left her (the place is not stated either in the petition or in the evidence) on account, as he says, of her drunkenness, and has never lived with her since. There was no issue of the marriage, and the petitioner says he has no reason to believe that his wife ever committed adultery during the time they lived together.

Evidence was called by the petitioner which, if believed, proves that, since her husband left her, the respondent has been leading an immoral life. We observe, however, that the second witness, the head constable, speaks to the identity of the respondent from a photograph only—a very unsatisfactory mode of identification—and the other witnesses who allege that they witnessed grave improprieties or actual acts of adultery are persons, with perhaps one exception, of the lowest class. The petitioner in his evidence states that he left his wife voluntarily on account of her drunkenness, that he has not sent her any money or offered in any way to maintain her since he left her, and no further explanation of his conduct in leaving his wife was given. It is not suggested that the petitioner is without means himself; he is holding a respectable position. The learned Judge dismissed the petition on the ground that the petitioner had deserted his wife without just or reasonable cause, had left her in a foreign country, and had declined or omitted to support her, and had thus deprived himself of the right to relief. The appeal is now argued by Counsel who did not appear at the trial, and he contends that the petitioner did not desert his wife, that the mere act of leaving her did not amount to desertion and draws our attention to one of the grounds of appeal,—that petitioner could have proved that the respondent had been left with ample means to live comfortably as a married woman.

X v. X. It appears to us that the fact of desertion is admitted by the petitioner himself; he does not suggest that he intended to return to her. "I left my wife voluntarily," he says, "on account of her "drunkenness." He is not asked if she is an habitual drunkard or any particulars relating to her conduct. It has been held in England that even gross and habitual intemperance combined with violence of temper are not sufficient reasons to justify a husband in going away from his wife, leaving her to support herself and not troubling himself as to how she is living (*Heyes* v. *Heyes*(1)). The petitioner was represented at the trial by Counsel instructed by an English attorney, and it is impossible to believe the attorney would so far neglect his duty as not to have enquired into the circumstances attending the petitioner's leaving his wife and whether or not she had any friends in Madras or at the place he left her to whom she could go, or whether she was in a position to maintain herself respectably, but not a word was asked the petitioner when a witness on these points, or whether she was in possession of property, and, if so, to what amount. It is the duty of the Judge to satisfy himself not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to the adultery, and if he finds he has been accessory to the adultery, he shall dismiss the petition (Act IV of 1869, sections 12 and 13). With regard to the statement in the grounds of appeal that the wife had ample means to live on it is a mere allegation and has not been supported by any affidavit and does not appear to have been even suggested at the trial.

It appears to us that the conduct of the petitioner in leaving his wife without any just or reasonable cause, without providing for her in any way either in supplying her with money or leaving her in the charge of friends, or in fact making any provision for her, shows that the petitioner was utterly careless of what became of his wife and conduced to the adultery of the wife (if she has been guilty as some of the witnesses say), and that the learned Judge was right under the circumstances proved in dismissing the petition.

We dismiss the appeal.

(1) L.R., 13 P.D., 11.

APPELLATE CIVIL.

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

1899. January 17, 27.

PERIANNA SERVAIGARAN (DEFENDANT), APPELLANT,

v.

MARUDAINAYAGAM PILLAI (PLAINTIFF), RESPONDENT.*

Transfer of Property Act—Act IV of 1882, *ss.* 60, 68, 72, 74, 75, 95—*Advance by mortgagee to pay off prior lien on mortgaged property—Suit against purchaser of property to recover amount so advanced—Charge on the mortgaged property.*

Plaintiff's undivided brother had advanced money on a usufructuary mortgage bond to enable the owners of certain property to obtain possession of it from one in whose favour a lien had been decreed to subsist. The money not having been so applied, the holder of the lien attached the property and applied to the Court for its sale. To save the property from being sold, plaintiff's said brother further paid the amount of the lien into Court; and at about the same time the mortgagors sold the property to defendant. Plaintiff's brother had never obtained possession of the property, and had since died. Upon plaintiff suing to recover (in addition to the mortgage amount, liability for which was not disputed,) the amount of the lien so paid into Court to save the property from sale:

Held, that inasmuch as plaintiff could only succeed by showing that by such payment a charge was created upon the land (the money not having been paid at the request or for the benefit of the defendant) the suit must fail. There is no provision in the Transfer of Property Act to support the proposition (involved by the plaintiff's suit) that a second mortgagee may, by a transaction between himself and the first mortgagee, without knowledge or concurrence on the part of the mortgagor, acquire a new right over the mortgaged property.

Per SUBRAMANIA AYYAR, J.—That as against the mortgagors, plaintiff would have been entitled to add the sums paid by him to the prior incumbrancer to the mortgage amount. But as the mortgage was usufructuary and plaintiff had never obtained possession, he had acquired no charge on the mortgaged property for the money recoverable by him under section 68 of the Transfer of Property Act. The amount sought to be added thereto consequently stood on a similar footing, and the plaintiff's contention that a charge in respect of it existed in his favour was unsustainable.

SECOND APPEAL against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Appeal Suit No. 133 of 1896, modifying the decree of T. R. Kuppusami Ayyangar, District Munsif of Kulitalai, in Original Suit No. 890 of 1894.

Suit to recover Rs. 190 due under a usufructuary mortgage deed and Rs. 296–10–0 paid by plaintiff to save the property subject to the said usufructuary mortgage from being sold, and for

* Second Appeal No. 433 of 1898.

interest. The defendant had purchased the mortgaged property from the mortgagors; and no question arose as to the payment of the amount due on the mortgage; he, however, disputed his liability in respect of the sum of Rs. 296–10–0. Two persons named Perumal and Muthayyan had, in 1882, sued Marudai and others for possession of the mortgaged land. The Court found that Marudai had a lien on the land, and in February 1883 decreed for possession as prayed, but subject to a payment by Perumal and Muthayyan, of Rs. 100 to Marudai. To enable them to pay this sum, Perumal and Muthayyan mortgaged the land with possession to plaintiff's late undivided brother, Annasami Pillai for Rs. 190—the mortgage amount now sued for and admitted. The money was, however, not utilised for the release of the land, Marudai having appealed. In the course of that appeal, on 12th December 1883, a compromise was effected, under which Perumal and Muthayyan agreed to pay Rs. 285 instead of Rs. 100; time was given for payment till May 1885; and in default of payment, Marudai was to be at liberty to recover the said Rs. 285, with interest, on the liability of the hypothecated property, and to retain possession of the land until payment. Default was made; and Marudai attached the land, and, in July 1885, made an application for its sale. Thereupon plaintiff's said brother, on 3rd August 1885, prayed the Court to receive the money (which, with interest, then amounted to Rs. 296–10–0), from him, and release the land from attachment; which was done on 14th August 1885. On 8th August 1885, Perumal and Muthayyan sold the land to the present defendant. Plaintiff's brother had never obtained possession in pursuance of his usufructuary mortgage bond. The question was whether the plaintiff could now recover from defendant, as purchaser of the mortgaged land, the sum of Rs. 296–10–0, which had been thus advanced for the purpose of saving the property from the threatened sale.

The District Munsif held that plaintiff was entitled to recover Rs. 190 only—the amount admittedly due under the usufructuary mortgage, and he disallowed the rest of the claim.

The Acting District Judge modified this decree by allowing plaintiff the sum of Rs. 296–10–0 in addition to the mortgage amount. The payment had been made, he said, to save the property from sale, and from a sale of which the result would have been that the original mortgagors would have lost possession of

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the land and their vendee (the defendant), would have been unable to take possession. The plaintiff was usufructuary mortgagee, though at the time unable to take possession; and as such he had paid off the lien holder and saved the property from the threatened sale. He thought the charge was good.

The defendant preferred this second appeal.

Sundara Ayyar for appellant.

V. Krishnasami Ayyar for respondent.

SHEPHARD, J.—The appellant derives title to the land from Perumal and Muthayyan by a conveyance of sale, dated the 8th August 1885. In 1883, these persons obtained a decree for the land against Marudai subject to a payment of money to be made to him. Subsequently in the same year, they mortgaged the land to the plaintiff for Rs. 190. As regards that sum, there is no dispute. On the 3rd August 1885, in consequence of action taken under the decree by Marudai, the plaintiff's brother, Annasami, paid into Court the money due to Marudai. Now he seeks to recover it from the appellant, the purchaser of the land. It is not denied that Marudai, in regard to his decree, was practically in the position of a mortgagee holding an ordinary decree for sale. Now, it being clear that the payment was not made at the request or for the benefit of the appellant, the plaintiff can only succeed by showing that he has a charge upon the land which can be enforced against it in the hands of the appellant. Any such charge possessed by the plaintiff must either have existed at the date when the payment was made or it must have been created on that occasion. It does not suit the plaintiff to urge the former view, for the charge which Marudai held rested on the decree which was satisfied by the plaintiff's payment and the plaintiff is not now seeking to enforce the decree. The contention on the plaintiff's behalf, therefore, is that, independently of the pre-existing charge, a charge was created in the plaintiff's favour, when, by his payment into Court, he saved the land from sale under Marudai's decree. Cases were put in which the second mortgagee paying off the prior incumbrances or one of two mortgagors paying off the entire mortgage debt would, owing to the law of limitation or other reasons, practically be without any remedy other than a personal one, unless he could say that a new charge had been created in his favour. The possibility of hard cases does not account for or explain the right which is

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claimed. The plaintiff's case must be that without knowledge or concurrence on the part of the mortgagor the second mortgagee may, by a transaction between himself and the first mortgagee, acquire a new right over the property. There is nothing in the Transfer of Property Act to support any such proposition. Sections 74 and 75 are concerned with the relations of prior and subsequent incumbrancers. Section 95 relates to the case of one of several mortgagors paying off the whole mortgage money. The language of section 74 makes it clear that the second mortgagee is, by tender of the mortgage money, to acquire no other right than that possessed by the first mortgagee. In effect, there is deemed to be a transfer of the first mortgage to the second mortgagee. The law secures to the latter the interest which he might have acquired by a conveyance. The same principle, as I conceive, applies in favour of the mortgagor who has paid off the mortgage debt, which his co-mortgagors were equally interested in paying. It is to be observed that section 95, Transfer of Property Act, does not deal with this case generally. It states that the rule is to be applied only in the case of the mortgagor, who has paid the money, recovering possession of the property from the mortgagee. The section is evidently taken from Macpherson on mortgage (see Edition of 1877, p. 145). That section, as I understand, like the decree which should be framed in the case of redemption by one of two co-mortgagors or a mortgagor interested in part only of the property (see *Pearce* v. *Morris* (1)) does nothing more than preserve to the mortgagor the right which the mortgagee possessed as against the interest of the other parties in the mortgaged property. There is no question in any of these cases of creating a new charge on the property.

It is otherwise where money is expended by a mortgagee in possession for the purposes indicated in section 72 of the Transfer of Property Act, which provides that money so expended may be added to the mortgage money. That is what the plaintiff in this case is really seeking to do, although it is not pretended that the disbursement made by him is of such a character as to make that provision of law applicable. Even if the plaintiff had been in possession, I think it would be difficult to hold that the provision in the section relating to salvage of mortgaged property applied to the case or that in consequence of the payment by him he acquired

(1) 2 Seton, p. 1728.

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any further or other interest than that which Marudai might have assigned to him.

Inasmuch as the plaintiff is endeavouring to enforce against the land in the defendant's hands a remedy which he could not have enforced against Marudai, I think the suit must fail. The appeal must therefore be allowed and the respondent must pay the costs throughout.

SUBRAMANIA AYYAR, J.—I have arrived at the same conclusion and will add but a few words with reference to the main question, viz., whether the respondent has a lien on the land in respect of the amount to which this appeal relates. There being no statutory provision giving a charge for the payment made in discharge of the amount due to Marudai and others, according to the decree, whereunder they had a lien on the land for that amount, is there any other foundation for the contention that the respondent has a charge for the sum in question? No doubt, as against the persons who mortgaged the land to the respondent he was entitled to add what was paid by him to the prior encumbrancer, Marudai, to the amount advanced as the consideration for the respondent's mortgage, as will be seen from an observation of the judicial committee in *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee*(1), wherein Lord Romilly points out that the plaintiff there, who is not stated to have been a mortgagee in possession, had a right to tack to the mortgage the amount of the revenue paid by her to save the estate. See also *Leslie* v. *French*(2). But as the mortgage to the respondent was purely a usufructuary mortgage and he never obtained possession of the mortgaged property, he has, according to the recent Full Bench decision in *Arunachalam Chetti* v. *Ayyavayyan*(3), no charge on the mortgaged property for the money recoverable by him under section 68 of the Transfer of Property Act. The amount to be added thereto consequently stands also on the same footing and the respondent's contention that he has a charge for it is, therefore, clearly unsustainable. Compare *Anandi Ram* v. *Dur Nujaf Ali Begum*(4).

(1) 11 M.I.A., 241 at p. 259.
(2) 23 Ch.D., 552 at p. 560.
(3) I.L.R., 21 Mad., 476.
(4) I.L.R., 13 All., 195.

APPELLATE CIVIL.

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

MAHOMED ROWTHAN (PLAINTIFF), PETITIONER,

v.

MAHOMED HUSIN ROWTHAN (DEFENDANT), RESPONDENT.*

1899. January 10, 17.

Stamp Act—Act I of 1879, ss. 5, 11, 18, 34—"Chargeable with duty"—Promissory note executed out of British India—Insufficient stamp.

A suit upon a promissory note which had been executed out of British India was dismissed on the ground that the note was insufficiently stamped, and that it could not be admitted in evidence, on payment of the duty chargeable, under section 34 of the Indian Stamp Act. On a petition being preferred for the revision of the order of dismissal:

Held, that section 34 of the Stamp Act did not render the document inadmissible in evidence, that section being applicable only to an instrument which is "chargeable with duty." There is no provision of law which requires a promissory note executed out of British India to be stamped before it is sued on or used in Court, where the holder of the note has not done any of the acts referred to in sections 5 and 18 of the Act, and, in consequence, the obligation to stamp has not arisen.

PETITION under Provincial Small Cause Courts Act, section 25, praying the High Court to revise the proceedings of B. Virasamayya Garu, District Munsif of Mannargudi, in Small Cause Suit No. 226 of 1898.

Suit for the amount due on a promissory note executed by defendant, out of British India, in plaintiff's favour. The District Munsif held that the document was invalid and inadmissible in evidence for want of a proper stamp, and that the invalidity could not be rectified by payment of stamp duty and penalty under section 34 of the Indian Stamp Act. He therefore dismissed the suit. Plaintiff had not done any of the acts mentioned in sections 5 and 18 of the Indian Stamp Act.

The plaintiff preferred this petition.

Natesa Ayyar for petitioner.

The respondent was not represented.

JUDGMENT.—The instrument sued on is clearly a promissory note. It was executed out of British India, and under section

MAHOMED ROWTHAN v. MAHOMED HUSIN ROWTHAN.

11 of the Indian Stamp Act, I of 1879, it must be deemed to be unstamped, inasmuch as the one anna adhesive stamp on it was not cancelled.

The District Munsif refused to receive the document in evidence on the ground that it was not duly stamped, and could not be stamped on payment of penalty, or be admitted in evidence, under section 34 of the Stamp Act, and he therefore dismissed the suit.

We think that the District Munsif was in error in holding that section 34 rendered the document inadmissible in evidence. That section only applies to an instrument which is "chargeable with "duty," but there is no provision of law which requires a promissory note executed out of British India to be stamped before it is sued on or used in Court.

Section 5 of the Act requires every such promissory note to be stamped if it is "accepted or paid or presented for acceptance "or payment, or endorsed, transferred or otherwise negotiated, in "British India," and section 18 requires the first holder in British India to affix the proper stamp and cancel the same before he presents it for acceptance or payment, or endorses, transfers or otherwise negotiates the same in British India. But in this case the holder has not done any of those things and consequently the obligation to stamp the promissory note has not arisen and section 34 is no bar to its admission as evidence.

The same view of the law was lately taken in a very similar case by Shephard, J., in *Ebrahim Routhan* v. *Abdul Rahiman Mahomed* (1) following the case of *Griffin* v. *Weatherby* (2).

We must therefore set aside the decree of the District Munsif, and as the District Munsif has found, against the defendant's plea, that there was consideration for the note, we give judgment for plaintiff for the amount sued for with costs throughout.

(1) Civil Revision Petition No. 375 of 1897 (unreported).
(2) L.R., 3 Q.B., 753.

APPELLATE CIVIL.

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

JIVANNA PANDITHAR (PLAINTIFF), APPELLANT,

1899. January 17.

v.

APPALU (DEFENDANT), RESPONDENT.*

Interest post diem*—Provision in bond for annual payments of interest and repayment of principal sum on day fixed.*

A bond, which had been executed in December 1881, contained a stipulation that interest should be paid on 11th April every year, and that the principal sum borrowed should be repaid in December 1884. Repayment not having been so made, a suit was brought in December 1896 to recover the principal sum together with interest up to the date of plaint:

Held, that inasmuch as the bond contained a stipulation for the payment of interest annually and there was nothing in it to suggest that the liability should cease on the day upon which the principal was repayable, interest could be recovered.

SECOND APPEAL against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 694 of 1887, modifying the decree of B. Virasamayya, District Munsif of Mannargudi, in Original Suit No. 505 of 1896.

Suit to recover balance of principal and interest due under a registered mortgage bond. The bond, which had been executed on 24th December 1881, stipulated that interest should be paid every year, on 11th April, and that the principal sum borrowed should be repaid on 24th December 1884. The document contained no covenant for payment of interest after the latter date. The principal was not repaid on the date specified, and this suit was brought in December 1896 for the recovery of the said principal sum together with interest up to the date of plaint. The defendant contended that, as the bond did not provide for interest *post diem*, such interest could not be recovered. An issue on this point was framed by the District Munsif, who held that interest which had accrued subsequently to the date stipulated for repayment of the principal sum could be recovered at the rate provided for in the bond; and he decreed accordingly. On appeal, the Subordinate Judge held that interest which had accrued subsequently

* Second Appeal No. 414 of 1898.

JIVANNA PANDITHAR v. APPALU.

to the date fixed for the repayment of the principal sum could be awarded only in the form of damages; he referred to *Rama Reddi* v. *Appaji Reddi*(1), *Badi Bibi Sahilal* v. *Sami Pillai*(2), *Thayar Ammal* v. *Lakshmi Ammal*(3) and *Chajmal Das* v. *Brij Bhukan Lal*(4), and in awarding such damages the question of limitation had to be considered. The suit having been filed more than six years from the date upon which the principal sum had been due for repayment, he, relying on the cases mentioned, held that, though the plaintiff was entitled to *post diem* interest as damages, the claim was barred under article 116 of schedule II to the Limitation Act.

The plaintiff preferred this second appeal.

V. Krishnasami Ayyar for appellant.

Pattabhirama Ayyar for respondent.

JUDGMENT.—The bond contains a stipulation for the payment of interest annually and there is nothing in it to suggest that the liability should cease on the day when the principal was made payable. We must reverse the decree of the Subordinate Judge and restore that of the District Munsif allowing, however, three months from this date for payment. The respondent must pay costs in this and the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

1899. January 10.

JAGANNATHA PILLAI (DEFENDANT No. 1), APPELLANT,

v.

SUBBARAYA PILLAI (PLAINTIFF), RESPONDENT.*

Regulation XXIX of 1802 (*Madras*), *s.* 7—*Jurisdiction—Suit for office of karnam—District Munsif's Court.*

A suit to establish plaintiff's right to, and to recover possession of, the office of karnam, and for the restoration of the inam lands, and for damages, was brought in the Court of the District Munsif:

Held, that it was properly so brought.

(1) I.L.R., 18 Mad., 248. (2) I.L.R., 18 Mad., 257.
(3) I.L.R., 18 Mad., 331. (4) I.L.R., 17 All., 511.

* Second Appeal No. 225 of 1898.

JAGANNATHA PILLAI v. SUBBARAYA PILLAI.

SECOND APPEAL against the decree of K. C. Manavedan Rajah, Acting District Judge of North Arcot, in Appeal Suit No. 62 of 1893, affirming the decree of T. A. Krishnasami Ayyar, District Munsif of Arni, in Original Suit No. 428 of 1891.

Suit to establish plaintiff's right, under Regulation XXIX of 1802, section 7, to, and to recover possession of, the office of karnam, and for the restoration of the inam lands and for damages. The defendants, being the karnam in office and the jaghirdar, respectively, objected that the District Munsif's Court, in which the suit was brought, had no jurisdiction. The District Munsif overruled the objection and passed a decree in favour of the plaintiff. The Acting District Judge, on appeal, held that the District Munsif's Court had jurisdiction to try the suit. He said:—

"Two decisions, viz., *Venkatanarasimha* v. *Suryanarayana*(1) "and *Venkatanarayana* v. *Subbarayudu*(2) are cited in support of "the ground of want of jurisdiction. The first was a suit for the "dismissal of the karnam. This was held to be exclusively tri- "able by a District Court. The present suit, however, is not for "dismissal. The second case cited is of the same nature as the "present case. But the simple fact that that suit was tried in the "District Court does not show that the subordinate courts had no "jurisdiction."

Defendant No. 1 preferred this second appeal.

Raghavendra Rao for appellant.

The Advocate-General (Hon. *C. Arnold White*) and Mr. *Joseph Satya Nadar* for respondent.

JUDGMENT.—The plaintiff claimed that by section 7 of Regulation XXIX of 1802 he, as heir of the last karnam, was the proper person to have been appointed karnam and not the first defendant, who, not being an heir, had not been properly appointed. He brought his action in the Court of the District Munsif and succeeded. It is argued that the District Munsif had no jurisdiction and that the only Court which had jurisdiction was the Court of the District Judge. Both the lower Courts held, and we think rightly, that the suit was properly brought in the District Munsif's Court. The only other substantial objection taken before us was that as the plaintiff had stated in the plaint that the emoluments

(1) I.L.R., 12 Mad., 188. (2) I.L.R., 9 Mad., 214.

JAGANNATHA PILLAI. v. SUBBARAYA PILLAI.

of the karnam were the assessment of the lands, he was not entitled to recover the lands themselves, though they were in fact claimed by the prayer of the plaint. Substantially the action was for the office and that which was the proper adjunct of the office. The defendant had got possession of the land as an adjunct of the office of karnam when he was improperly appointed, and it is therefore clear that the statement in the plaint was merely an error, the land, and not the assessment only, passing with the office.

The second appeal is dismissed with costs.

APPELLATE CIVIL.

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

1899. January 16.

SRINIVASA AYYANGAR (DEFENDANT), APPELLANT,

v.

MUNICIPAL COUNCIL OF KARUR (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, arts. 2, 36, 89, 90—Chairman of Municipal Council—Principal and agent—Liability for embezzlement by manager.

During the tenure of his office by the Chairman of a Municipal Council, the manager embezzled sums of money. On the council, within three years, but more than two years thereafter, suing its late chairman to recover the amount lost by reason of the embezzlement on the ground that he was liable as its agent:

Held, that the relation of principal and agent did not exist, and that therefore articles 89 and 90 of schedule II to the Limitation Act did not apply; that the case was governed by article 36 and that the suit was therefore barred by limitation.

SECOND APPEAL against the decree of G. T. Mackensie, District Judge of Coimbatore, in Appeal Suit No. 105 of 1897, affirming the decree of A. Sambamurti Ayyar, District Munsif of Karur, in Original Suit No. 562 of 1896.

Suit by the Municipal Council of Karur against their late chairman, to recover a sum of money that, during his tenure of that office, had been embezzled by the ex-manager of the municipality. It was claimed that defendant, as chairman, was the agent appointed

* Second Appeal No. 871 of 1898.

SRINIVASA AYYANGAR v. MUNICIPAL COUNCIL OF KARUR.

by the municipality, and in that capacity was bound to collect the dues and see that proper accounts were maintained and that he was liable to pay the loss which had occurred by the said embezzlement. Defendant denied that his relationship with the council as its chairman had been that of an agent, and pleaded that the suit was barred by limitation. It was admitted that if the period of limitation were found to be three years, the suit would not be time-barred; but that if it were found to be two years, the suit would be barred. On the question of agency, the District Munsif found that inasmuch as defendant was not appointed by the Municipal Council, and that the latter had no power to remove him, he was clearly not their appointed agent. He however inferred an implied agency from the circumstances of the case. Dealing with the plea of limitation he held that the special period of six months prescribed by section 261 of the Madras District Municipalities Act could not apply to defendant's liability under the general law; nor could the case, in his opinion, be governed by article 2 or article 36 of schedule II to the Limitation Act. He held that article 89 or article 90 of schedule II to the Limitation Act applied, and, after considering the evidence, decreed that defendant was liable to make good the loss to the council. On appeal, the District Judge held that defendant was the agent of the municipality and that the case was governed by article 90 of schedule II to the Limitation Act, under which the period of limitation is three years, and that the suit was therefore not barred. He confirmed the judgment of the lower Court.

The defendant preferred this second appeal.

Sundara Ayyar for appellant.

Mr. *E. B. Powell* for respondent.

JUDGMENT.—We are clearly of opinion that the relation of principal and agent does not exist and therefore articles 89 and 90 do not apply.

Article 36 in our judgment is the appropriate one. This being so the suit is barred by limitation.

The decree must be reversed and the suit dismissed with costs in all Courts.

APPELLATE CIVIL.

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

1899. January 17.

SUBBAYYA (PLAINTIFF), APPELLANT,

v.

RAMI REDDI (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 574 *— Contents of judgment in appeal— Duty of Appellate Court to hear appeal after remand for findings, though no memorandum of objections.*

On the hearing of a plaintiff's appeal against an order dismissing his suit, the District Judge, finding the issues that had been framed futile, struck them all out, substituted others, and remanded the suit for findings after evidence had been taken. On the appeal coming on for hearing after the return of those findings, neither party having filed any objections, the District Judge dismissed the suit on the ground that by his failure to file objections plaintiff must be taken to have consented to the new findings, which were against him:

Held, that the Judge was not absolved from hearing the appeal by reason of the absence of a memorandum of objections.

SECOND APPEAL against the decree of H. O. D. Harding, Acting District Judge of Kurnool, in Appeal Suit No. 120 of 1895, affirming the decree of C. Bapayya Pantulu, in Original Suit No. 451 of 1894.

A suit to recover possession of inam land was dismissed by the District Munsif. On appeal, the District Judge considered that the issues framed were futile, struck them all out, substituted others and remanded the suit to the lower Court for findings after taking evidence. The appeal coming on for hearing after the return of the findings, neither party filed any memorandum of objections, though notices were sent them that objections should be filed by a certain date. It was urged by the defendant that, inasmuch as the plaintiff had not objected to the findings, he had accepted and was bound by them. Plaintiff contended that, having nothing new to put forward in answer to the findings, he had filed no objections, but was entitled to argue his original appeal on the final hearing. The District Judge held that inasmuch as the whole suit had been ordered to be retried on totally new findings, that order terminated plaintiff's original appeal, and that if he failed to file objections to the new findings within the

* Second Appeal No. 422 of 1898.

prescribed time, he must be held to consent to the new findings. He found that the plaintiff was not entitled to the land claimed, on the ground that, knowing that the lower Court had found against him, he had not, when asked to do so, filed his objections to those findings. SUBBAYYA v. RAMI REDDI.

The plaintiff preferred this second appeal.

Mr. *J. G. Smith* for appellant.

Seshagiri Ayyar for respondent.

JUDGMENT.—The Judge was in error in holding that he was absolved from hearing the appeal by the absence of a memorandum of objections. (See *Kunhi Marakkar Haji* v. *Kutti Umma*(1).)

We must reverse the decree and remand the case for disposal. Costs to abide event.

APPELLATE CIVIL.

Before Mr. Justice Shephard (Officiating Chief Justice) and Mr. Justice Benson.

1899. January 17.

KUPPAYAMMAL (COUNTER-PETITIONER), APPELLANT,

v.

AMMANI AMMAL (PETITIONER), RESPONDENT.*

Probate and Administration Act—Act V of 1881, *ss.* 35, 43, 62—*Executrix —Letters of administration with will annexed.*

A petitioner prayed for a grant of probate of her deceased son's will. No executrix had been appointed therein, but the petitioner was directed that out of certain property she should pay certain debts:

Held, that such a direction was insufficient to show an intention on the testator's part that for the general purposes of administration the petitioner should be executrix; and that the petition should have been for letters of administration with the will annexed; that the petition should state all assets likely to come to the petitioner's hands; and that proof of execution and of the consciousness of a testator is insufficient, and that it should be further shown that he knew of and understood the contents of the document which he signed.

APPEAL against the order of G. T. Mackenzie, District Judge of Coimbatore, in Civil Miscellaneous Petition No. 542 of 1897.

Petition under section 62 of the Probate and Administration Act, 1881, by the mother of a deceased, praying the Court to grant probate of a will left by her son. The widow of the deceased

(1) I.L.R., 20 Mad., 496.

* Appeal No. 137 of 1898.

KUPPA-YAMMAL v. AMMANI AMMAL

opposed probate. Attesting witnesses were called who deposed to having seen the testator sign while fully conscious. No executrix was appointed by the will, but certain property was left to the petitioner with a direction that she should pay certain debts. Probate was granted by the District Judge to the petitioner as being named executrix by implication.

The widow preferred this appeal.

Kasturiranga Ayyangar for appellant.

Sivasami Ayyar for respondent.

JUDGMENT.—It is objected that the respondent is not executrix according to the tenor of the will and we think the objection must prevail.

The direction to the respondent that out of a certain property she should pay certain debts is not enough to show any intention on the testator's part that for the general purpose of administration she should be executrix.

As to the direction to give paddy to Ramayammal there is a similar direction addressed to another person, viz., Malayandi Goundan. There being no executor, section 35 of the Probate and Administration Act, which probably the parties had in mind, has no application. Section 43 clearly has no application to the case. Under the circumstances, the petition is altogether wrong. There ought to have been a petition for letters of administration with the will annexed, and the petition ought to state all the assets which are likely to come to the petitioner's hands, not merely such part of them as she chooses to name. The petitioner, moreover, if letters are granted, must give security. We think it is right to allow the application made on behalf of the respondent to amend the petition. Before any grant of letters is made the Judge must require strict proof of the execution of the will. It is not enough for witnesses to say that they saw the testator sign the will and that he was in his senses. It must also be proved that he understood the contents of the paper to which he was putting his signature, and for this purpose it should be shown that the will, if not written by himself, was read over to him. In the present case, there is no such evidence.

If letters are granted, the District Judge will of course adopt the form given in the Act, section 77.

We must reverse the order and send back the case to be dealt with according to law. The respondent must pay the costs of this appeal.

APPELLATE CIVIL.

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

MAYAN PATHUTI AND ANOTHER (PLAINTIFFS) APPELLANTS,

v.

PAKURAN AND OTHERS (DEFENDANTS NOS. 1, 2, and 4 to 6), RESPONDENTS.*

1898. December 1. 1899. January 9.

Transfer of Property Act—Act IV of 1882, s. 99—Civil Procedure Code—Act XIV of 1882, s. 244—Sale by mortgagee in execution of decree.

Property subject to a mortgage having been sold by the mortgagee as holder of a decree against the mortgagors, a separate suit was brought by the mortgagors to set aside the sale as being in contravention of section 99 of the Transfer of Property Act. On objection being taken that the suit was not maintainable, the matter being one for determination in execution proceedings under section 244 of the Code of Civil Procedure:

Held, (1) that although the sale was contrary to the provisions of section 99 of the Transfer of Property Act, that section being for the benefit only of a particular class of persons, namely, those concerned with a right to redeem mortgaged property, such a sale was not void but voidable;

(2) that the question being one arising between the parties to the suit wherein the sale was made, and relating to execution, could not be raised and decided in a suit, but should be raised and tried only in execution proceedings taken under section 244 of the Code of Civil Procedure, and the sale set aside if such relief were not, for any reason, barred;

(3) that the sale having been confirmed, such confirmation was final, and precluded the mortgagors from seeking the relief to which they would otherwise have been entitled; and

(4) that, notwithstanding such sale and confirmation, the mortgagors might not be precluded from suing to redeem the mortgaged property on payment of the amount given credit for by the mortgagee in respect of the sale.

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 313 of 1897, reversing the decree of P. T. Itteyerah, District Munsif of Cannanore, in Original Suit No. 161 of 1897.

Suit to set aside a sale of property held in execution of a decree obtained by first defendant against plaintiff and others in a prior suit. First defendant had been plaintiff in that suit and the present plaintiffs, defendants. Plaintiffs contended that the sale was invalid, in that it contravened the provisions of section 99 of the Transfer of Property Act, the property having been sold

* Second Appeal No. 22 of 1898.

MAYAN PATHUTI v. PAKURAN.

subject to a mortgage in first defendant's favour. First defendant pleaded that the suit was not maintainable, the matter being one for determination in execution under section 244 of the Code of Civil Procedure. It was admitted that the sale had been confirmed. The District Munsif considered that the question whether an execution sale is liable to be set aside or not is not one directly relating to the execution, discharge or satisfaction of a decree, within the meaning of section 244, and held the suit to be maintainable. As it was admitted by defendants that the property had been sold by the decree-holder subject to a mortgage right in his favour, the District Munsif set the sale aside under section 99 of the Transfer of Property Act. The District Judge, on defendants' appeal, held on the authority of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(1), that a separate suit could not be brought by a party to a former suit to set aside an auction sale held in execution of the decree in that suit, and he accordingly reversed the decree and dismissed the suit.

Plaintiffs preferred this second appeal.

Mr. *C. Krishnan* for appellants.

Govinda Menon for respondent No. 1.

SUBRAMANIA AYYAR, J.—The sale which is impeached is doubtless contrary to the provisions of section 99 of the Transfer of Property Act. The first point for determination is whether, as contended for the appellants—the mortgagors— the sale is altogether null and void. The argument that in allowing the sale to take place against the provisions of the said section the Court acted without jurisdiction is obviously unsustainable. Still, if the above section were enacted for the protection of public interests and the law were to be regarded as laying down a rule of general policy rendering the prohibition absolute, the sale would be void; but if the section in question has been introduced for the benefit only of a particular class of persons the sale would be but voidable (compare Hardcastle on the 'Construction of Statutes,' 2nd edition, pages 285–7, and the cases cited therein; see also Maxwell on 'Interpretation,' 3rd edition, pages 544–9). That it is of the latter description is apparent, the object being to protect only persons concerned with the right to redeem mortgaged property. The sale cannot therefore be held to be void. The next

(1) I.L.R., 19 Calc., 683.

MAYAN PATHUTI v. PAKURAN.

point for determination is whether the appellants are now entitled to the relief claimed, *i.e.*, to have the sale set aside. The question, being one arising between the parties to the suit wherein the sale was made and relating to execution, cannot be raised and decided in a suit. It should be raised and tried only in execution proceedings taken under section 244 of the Code of Civil Procedure. However, as the Court in which this suit was brought is the tribunal wherein the execution proceedings should be taken, we can, following *Biru Mahata* v. *Shyama Churn Khawas*(1), allow the plaint to be treated as an application under section 244, Code of Civil Procedure, and set aside the sale if it be possible to do so now. But it is not. The sale has been confirmed. The order confirming the sale is final and concludes the appellants from seeking the relief to which they would have been otherwise clearly entitled. As regards *Durgayya* v. *Anantha*(2), I observe that there the purchaser did not take the point that the order confirming the sale, if allowed to become final, debars the judgment-debtors from subsequently impeaching the sale altogether. In my view, therefore, the appellants are not entitled to the relief which they seek. I should, however, not omit to say that I am not to be understood to lay down that they will be precluded from redeeming the property or taking proceedings for that purpose. For, notwithstanding the confirmation, it may be that the sale in question cannot affect that right of the appellants owing to the impossibility of the respondent, as the mortgagee, freeing himself by such a sale and purchase from the liability to be redeemed (*Martand* v. *Dhondo*, (3).) It may be added that while the respondent may, notwithstanding his purchase, have to submit to be redeemed, he would be entitled to claim at the time of redemption, payment of what he gave credit for out of the decree debt due by them in consideration of the purchase in question. Neither of these questions arises in the present suit.

The second appeal, in my opinion, fails, and I would dismiss it but without costs.

DAVIES, J.—I concur.

(1) I.L.R., 22 Calc., 483. (2) I.L.R., 14 Mad., 74. (3) I.L.R., 22 Bom., 624.

APPELLATE CIVIL.

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

1899. January 27.

SRIDEVI (DEFENDANT), APPELLANT,

v.

VIRARAYAN (PLAINTIFF), RESPONDENT.*

Kanom—Suit for sale of mortgaged property—Rights of kanomdar.

A kanomdar having sued to recover the amount of his kanom and for sale of the mortgaged property in default of payment:

Held, that such a suit is unsustainable; that a kanom, in the mortgage aspect of it, is a usufructuary mortgage; and there is no authority to support the contention that it is a simple mortgage apart from an observation in *Ramunni* v. *Brahma Dattan* (I.L.R., 15 Mad., 366 at p. 379).

SECOND APPEAL against the decree of O. Chandu Menon, Acting Subordinate Judge of South Malabar, in Appeal Suit No. 54 of 1898, affirming the decree of A. Srinivasa Ayyangar, Acting Additional District Munsif of Calicut, in Original Suit No. 403 of 1897.

Suit to recover the amount due on a kanom, and for sale of the mortgaged property in default of payment. Defendant contended that a kanomdar had no right to bring the property to sale, and that the suit was a novel one and not maintainable. The District Munsif relying on *Narayana* v. *Narayana*(1) and *Ramunni* v. *Brahma Dattan*(2) cited for the plaintiff, held that a kanom is a simple mortgage, and that the kanomdar is entitled to recover the kanom amount just as any other simple mortgagee can recover. He ordered the defendant to pay into Court within three months the kanom amount: and, in deafult of such payment, the property to be sold.

The Acting Subordinate Judge following the judgment of Muttusami Ayyar, J., in *Ramunni* v. *Brahma Dattan*(2), held that plaintiff could sue for sale, as he had done, and confirmed the decree.

The defendant preferred this second appeal on the ground, among others, that plaintiff, as kanomdar, was not entitled to institute a suit to recover his kanom from the jenmi by sale of the mortgaged property.

* Second Appeal No. 771 of 1898.

(1) I.L.R., 8 Mad., 284.

(2) I.L.R., 15 Mad., 366 at p. 379.

SRIDEVI v. VIRARAYAN.

Sundara Ayyar for appellant.

Sankaran Nayar for respondent.

JUDGMENT.—In the instrument sued upon there is no covenant to pay, nor was there any evidence that a promise to pay was one of the incidents of a "kanom" according to usage. It has been uniformly held that a "kanom" in the mortgage aspect of it is a usufructuary mortgage, and except an observation of the late Muttusami Ayyar, J., in *Ramunni* v. *Brahma Dattan*(1) that it is both a simple and a usufructuary mortgage, there is no authority in support of the view that it is a simple mortgage; nor do we see anything in the character of the transaction or its incidents to make it a simple mortgage. We are, therefore, unable to hold that it is so. In this view, the present suit for the recovery of money and sale of the mortgaged property in default of payment was unsustainable. We must, therefore, reverse the decrees of both the Courts below, and dismiss the plaintiff's suit but without costs, as the point is a novel one.

APPELLATE CIVIL.

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

1899. January 19.

RATHNA MUDALIAR (DEFENDANT No. 3), APPELLANT,

v.

TIRUVENKATA CHARIAR (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, arts. 120, 144—Emoluments of hereditary office—Interest in immoveable property.

A suit to recover a sum of money due by custom as an emolument of an hereditary office is not one for the possession of an interest in immoveable property.

In 1888 a sum of money became payable, as marriage dues, to the holder of certain offices connected with a temple. Upon a suit being brought more than six years thereafter, namely in 1895, to recover the amount, it was objected that the claim was barred by limitation:

Held, that such a claim is governed by article 120 of schedule II to the Limitation Act, and must, in consequence, be enforced within six years of the accrual of the right..

(1) I.L.R., 15 Mad., 366 at page. 369.

* Second Appeal No. 467 of 1898.

RATHNA MUDALIAR v. TIRUVENKATA CHARIAR.

SECOND APPEAL against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Appeal Suit No. 140 of 1896, affirming the decree of A. David Pillai, District Munsif of Srirangam, in Original Suit No. 80 of 1895.

Suit to recover a sum of money due to plaintiff as fees or emoluments of certain hereditary offices held by him. The offices in question were connected with the temple of Srirangam, and entitled the holder thereof to receive marriage dues. Payment of the marriage dues sued for had become due on 24th May 1888, and this suit had been filed in 1895. Upon a plea of limitation being raised, the District Munsif held that article 144 of schedule II to the Limitation Act applied, and that the plaintiff, having twelve years in which to bring his suit, was not barred.

The District Judge, on appeal, upheld that ruling. He thought that, inasmuch as the allowances were customarily attached to plaintiff's office, they must be held to form an interest in immoveable property, and that the claim was therefore governed by article 144.

Defendant No. 3 preferred this second appeal.

Rangachariar and *Tirunarayanachariar* for appellant.

Narayana Ayyangar for respondent.

JUDGMENT.—The suit is not one to establish the plaintiff's right to receive the customary dues of an hereditary office, but to recover a specific sum of money alleged to have become due and payable to the plaintiff in 1888 as a fee due to him as the holder of an hereditary office.

We have not been referred to any decision in support of the conclusion of the District Judge that the period of limitation in such a suit is twelve years under article 144 of the second schedule of the Indian Limitation Act, but the respondent's vakil refers us to the decision in *Chhaganlal* v. *Bapubhai*(1). That was a decision under the former Act XIV of 1859, and it was dissented from in *Raoji* v. *Bala*(2). We do not think that such a suit as the present can be brought within the terms of article 144. It cannot be called a suit for the possession of an interest in immoveable property. It is a suit to recover a certain sum of money which became due and payable more than six years ago as an emolument

(1) I.L.R., 6 Bom., 68. (2) I.L.R., 15 Bom., 135.

of the office due by custom. We do not think that it is a suit provided for by any other article of the Limitation Act, and it therefore falls under the general article No. 120. The period of limitation is therefore six years and the suit is barred. We set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

RATHNA MUDALIAR v. TIRUVENKATA CHARIAR.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

RAJAH ESWARA DOSS AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

BABU RAJAN (PLAINTIFF), RESPONDENT.*

1899. January 20.

Rent Recovery Act (Madras) —Act VIII of 1865, *s.* 4—*Validity of patta—Omission to sign by landholder.*

A suit was brought to set aside a sale of lands on the ground, among others, that a patta which had been tendered was illegal. One of the clauses objected to in the patta contained an erroneous reference to punja lands which had inadvertently not been erased: another provided only in an indirect manner for the rent payable in respect of any other land that might be cultivated. The patta was not signed or sealed:

Held, that the clauses referred to were unobjectionable: and the fact that the patta tendered had not been signed by the landlord, did not necessarily render it invalid.

SECOND APPEAL against the decree of J. Hewetson, District Judge of Chingleput, in Appeal Suit No. 418 of 1896, affirming the decree of T. T. Ranga Chariar, District Munsif of Poonamallee, in Original Suit No. 100 of 1895.

Suit to set aside a sale of certain lands brought by the pattadar against the landholder thereof. Plaintiff claimed that defendant had caused the lands to be sold fraudulently and without tendering a patta or other notice of demand for arrears due; and that the sale was liable to be set aside. It appeared that a patta had been tendered, but it was contended that it was illegal, the following clauses, in particular, being objected to:—

"3. If wet crops should be raised on the undermentioned dry lands, you should continue to pay excess tirwa therefor according

* Second Appeal No. 573 of 1898.

RAJAH ESWARA DOSS v. BABU RAJAN.

to the last class tirwa of wet land fixed in the respective kuppams

"4. If garden crops should be raised on the undermentioned lands, you should continue to pay excess tirwa for each fasli in respect of such garden land as follows:—nanja beriz including the tirwa in respect of nanja karinilam (uncultivated land) and second crop for the nanja land—and uncultivated land tirwa of fourth class nanja prevailing in the respective kuppams for the dry land.

"5. If you cultivate any other land than those mentioned below, you should continue to pay the cash beriz according to the class now fixed therefor.

"7. You should besides the aforesaid merai, &c., continue to pay then and there the other swatantram, &c., pertaining to tookiri (village watchman) and vetti."

Dealing with paragraphs 3 and 4 the District Munsif said that the reference therein to punja lands being erroneous (as plaintiff held no punja land), should have been erased from the printed forms; that the omission to erase them was due to inadvertence, and that such defects were not fatal to the validity of the patta. He also regarded the condition in paragraph 4 unobjectionable. Referring to paragraph 5 the District Munsif accepted the evidence of the karnam of the village, as to the existence of a record containing the classification of soil and the appropriate rents fixed for each class,—which removed all uncertainty respecting the conditions contained in that clause. He referred to *Alagirisami Naiker* v. *Innasi Udayan*(1) which he understood to decide that any provision in a patta making the tenant liable for lands not held by him was illegal, on the ground that it did not contain the local description and extent as contemplated by section 4 of the Rent Recovery Act. But he considered that decision inapplicable to the present case. He also decided that paragraph 7 of the patta was unobjectionable, as, though the rates of payment were not therein referred to, they were fixed by long-standing custom. But inasmuch as the patta was not signed or sealed, and on that ground alone, he held it to be invalid, and that the plaintiff was not bound to accept it. He, therefore, set aside the sale as prayed.

(1) I.L.R., 3 Mad., 127.

RAJAH ESWARA DOSS v. BABU RAJAN.

The District Judge, on appeal, held that section 4 of the Rent Recovery Act does not require a patta to be signed by the landholder, but he upheld the District Munsif's judgment on other grounds. He found the patta bad in two other respects. He said:—"In paragraph 5 it is laid down that plaintiff is to pay rent according to the taravari beriz if he cultivates lands other than those included in the patta. There is evidence that the assessment has been fixed on waste lands in the village; in *Alagirisami Naiker* v. *Innasi Udayan*(1) this very point was raised but not decided by the High Court though from the head-note it would appear to have been expressly decided: the High Court assume that the patta tendered was not a proper one in order to answer the question put by the District Munsif and expressly say that the Munsif has not decided the question as to the propriety of the patta. *Ramanjulu* v. *Ramachandra*(2) and *Ramasami* v. *Rajagopala*(3) proceed rather on the ground that the rent to be paid was left uncertain, and at the pleasure of the landholder: that ground does not apply in the present case, but I think that the point raised in this and in *Alagirisami Naiker* v. *Innasi Udayan*(1) is a good objection, for, as regards lands to be taken up at a future date, it is impossible to give the local description and extent or the amount of the rent. As regards the merais too, no rate is entered: the Munsif says this is not material as the rate depends on usage but the landlord and tenant may differ as to the usual rate; and to prevent this the rates should be entered in the patta. The patta is also vague in that, after specifying the merai to two village officers, it goes on to speak of 'other merais' which are not defined in any way."

He accordingly confirmed the order setting the sale aside.

The defendants preferred this second appeal.

Mr. *N. Subramanyam* for appellants.

Rama Rao and *Sivasami Ayyar* for respondent.

JUDGMENT.—We cannot see that clause 5 of the patta is objectionable or that anything of the sort was decided in *Alagirisami Naiker* v. *Innasi Udayan*(1), and with regard to the other objections to the various clauses of the patta, we agree with the view of the District Munsif. So far as paragraph 7 of the patta is

(1) I.L.R., 3 Mad., 127. (2) I.L.R., 7 Mad., 150. (3) I.L.R., 11 Mad., 200.

RAJAH ESWARA DOSS v. BABU RAJAN.

concerned, it does not provide for any payment to the landlord, but merely leaves the tenant to deal with the village officers. As to the objection that the patta tendered was not signed by the landlord, we agree with the District Judge that that fact does not necessarily make the patta bad.

We must allow the appeal and reverse the decrees of the Courts below and dismiss the plaintiff's suit with costs throughout.

APPELLATE CIVIL.

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

1899. January 17.

SAMINATHA PILLAI AND ANOTHER (PETITIONERS AND DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

MANIKKASAMI PILLAI (COUNTER-PETITIONER AND ASSIGNEE-PLAINTIFF), RESPONDENT.*

Hindu Law—Decree for mesne profits of her late husband's land in favour of his widow—Assignment of decree—Execution proceedings by assignee—Validity of assignment.

The widow of a deceased Hindu, having been kept out of possession of land forming portion of her late husband's estate, obtained a decree for possession thereof and for mesne profits. She assigned the decree for mesne profits and subsequently died. Upon the assignee attempting to execute the decree in respect of mesne profits the reversionary heirs contended that he had no right to do so on the ground that his assignor, the widow, could not alienate the mesne profits so as to enure beyond her life time:

Held, that the right to mesne profits under a decree is not immoveable property and that the decree was validly assigned.

APPEAL against the order of C. G. Kuppusami Ayyar, Subordinate Judge of Tanjore, in Civil Miscellaneous Petition No. 1724 of 1897, in the matter of Original Suit No. 12 of 1893.

Application under section 244 of the Code of Civil Procedure praying the Court to order that the counter-petitioner had no right to execute a decree for mesne profits arising from certain land. The decree in question had been assigned to the counter-petitioner by a Hindu widow, since deceased. The petitioners, who were the reversionary heirs and against whom the decree had been

* Appeal against Order No. 21 of 1898.

SAMINADHA PILLAI v. MANIKKASAMI PILLAI.

passed, contended that the deceased, as a Hindu widow, could not alienate the mesne profits so as to enure beyond her lifetime, and that the assignment could not therefore take effect as against the petitioners. For four years subsequent to the death of her husband the deceased had been kept out of possession of the lands forming a portion of his estate and was entitled, under the decree, to possession thereof and to mesne profits. It was the decree for these mesne profits that had been assigned by her to counter-petitioner. There was no evidence that she had treated the accretions as part of her husband's estate. On these grounds, the Acting Subordinate Judge held that the counter-petitioner was entitled to execute the decree.

The petitioners preferred this appeal.

Sundara Ayyar for appellants.

Pattabhirama Ayyar for respondent.

JUDGMENT.—The right to mesne profits under a decree is not immoveable property.

It was validly assigned. The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

1899. January 25, 26. February 7.

SESHAYYA (DEFENDANT), APPELLANT,

v.

NARASAMMA (PLAINTIFF), RESPONDENT.*

Hindu Law—Will—Disposition in favour of a widow and an adopted son—Nature and extent of widow's interest thereunder.

By his will a Hindu testator, after providing for various bequests, dealt with the residue of his estate as follows:—"My daughter-in-law and grand-daughters shall receive half of my whole estate, and my wife and my adopted son shall receive the other half." On the question as to what was the nature and extent of the interest to which the testator's widow was entitled thereunder:

Held, that having regard to the rule of construction which has been repeatedly applied to gifts by Hindus in favour of their wives, the intention of the testator was not that his wife should take an absolute estate. The supposition

* Appeal No. 87 of 1898.

SESHAYYA v. NARASAMMA.

is that a Hindu donor intends to act in accordance with the ordinary notions and wishes of Hindus regarding the devolution and enjoyment of property among the members of his family. Though it was competent for the testator to provide for his wife in such a way that she should have absolute control over the property given her, that is not the provision which the Hindu Law makes for a widow. The language of the will was not inconsistent with an intention on the part of the testator that the son, with his adoptive mother, should take a moiety with the incidents attaching to property held by an undivided family. Upon the true construction of the will, therefore, the widow was not intended to take any other estate than she would have taken if there had been an intestacy.

APPEAL against the decree of U. Achutan Nayar, Acting Subordinate Judge of Nellore, in Original Suit No. 66 of 1897.

Suit by a widow to recover from the adopted son of her late husband a fourth share of the self-acquired property left by the deceased. By his will, Gurumurti, plaintiff's late husband, after providing for various bequests, dealt with the residue of his estate as follows:—"My daughter-in-law and grand-daughters shall receive half of my whole estate, and my wife and my adopted son shall receive the other half." Defendant having taken possession of the property, plaintiff claimed that she was entitled under the will to a moiety of the half share of the residue. Defendant resisted her claim and denied the right of the testator to create in his widow a right to a share contrary to the principles of Hindu Law. The Acting Subordinate Judge considered that there was nothing in the will to show that the testator intended that his widow should remain under the defendant's protection and control, and that she should not claim anything more than maintenance: and held, on the authority of *Jogeswar Narain Deo* v. *Ram Chandra Dutt*(1), that plaintiff was entitled to a half of the moiety.

The defendant preferred this appeal.

Hon. *Bhashyam Ayyangar* for appellant.—The Court should not have held, on the true construction of this will by a Hindu testator, that the widow is entitled to a distinct and separate share of the deceased's estate. Having regard to the Hindu Law and usage to which the testator was subject, it ought not to be said that his intention was to bequeath to his widow such distinct and separate share. It must have been the testator's intention that plaintiff should live with, and under the protection

(1) I.L.R., 23 Calc., 670.

SESHAYYA v. NARASAMMA.

of, the adopted son (the defendant) and that she should be maintained out of the residuary estate dealt with by the will. If that were the intention, then plaintiff had no right to the share claimed by her. Even if it were held that such a share did pass under the will, plaintiff's interest in it ought to be held to be no more than the estate of a Hindu widow in her husband's property, namely, an estate for life. Having regard to the custom obtaining among Hindu testators that must be taken to have been the intention of the deceased and the will should be construed accordingly.

Pattabhirama Ayyar for respondent.—The effect of the construction urged by the appellant would be that the widow would take no more under the will than she would have taken if her husband had died intestate. Had the testator intended that his widow should be benefited only to the extent that she could have claimed as of right without a will, he would not have included the specific directions relating to the disposal of the residuary estate in her favour. The directions must be taken to have some object and meaning, and, in the absence of any limitation to the disposition in the widow's favour, the will must be construed as conferring absolutely an equal share upon her and upon the adopted son, respectively, in the moiety of the residue which had been left to them.

Hon. *Bhashyam Ayyangar* in reply.

JUDGMENT.—The plaintiff is the widow, and the defendant the adopted son of one Gurumurti, who died leaving a will dated the 19th October 1891. The defendant appeals against the decree which is in the nature of a decree for partition. An objection was taken on the defendant's behalf as to the non-joinder of persons interested in the property to which the decree refers. We did not think that objection could be allowed to prevail, nor do we think there is any doubt as to the correctness of the finding regarding the defendant's adoption. The real question in the case is as to the construction of Gurumurti's will. The family of Gurumurti at the time when the will was made consisted of his wife, his adopted son, aged about eighteen, the widow of a deceased son and her two daughters, and some other female relations. By the will he gives legacies to various persons and then directs that the whole of his estate shall, after his death, be kept in the possession of his son and the amount due to each of them shall be given.

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This direction apparently refers as well to the legacies as to the gift of the residue which comes in the earlier part of the will. The residue is to go, one moiety to his daughter-in-law and his grand-daughters, the other moiety to his widow and adopted son. What is the nature and extent of the interest taken by the widow —is the question.

Having regard to the rule of construction which has been repeatedly applied to gifts by Hindus in favour of their wives, we think it is quite clear that the testator did not intend his wife to take an absolute estate (*Mahomed Shumsool* v. *Shewukram*(1)). But the reasons for the rule suggest in the present case the further conclusion that he did intend his widow and son to enjoy the property after the manner of an ordinary Hindu family. The supposition is that a Hindu donor intends to act in accordance with the ordinary notions and wishes of Hindus regarding the devolution and enjoyment of property among the members of his family. It was competent to the testator to provide for his wife in such a way that she should have absolute control over the property given to her, or that she should for her lifetime enjoy a separate share of his estate. But that is not the provision which the Hindu Law makes for a widow. For his daughter-in-law and her children, if he desired that they should have a part of the property to themselves, it was requisite that he should make special provision, and it was natural that he should do so, although it may be that, according to Hindu Law, they would have been entitled to maintenance. We are asked to say that the testator's intention must have been to place his widow with regard to one moiety in the position in which the daughter-in-law was to stand with regard to the other moiety, and it is argued that, on the construction advocated on the defendant's behalf, the testator might as well have made no disposition at all in favour of his wife and son.

It is apparent that the testator desired to make his daughter-in-law quite independent of his wife and son, but we do not think it follows that he meant his wife to hold property independently of the son. It would be quite unnatural for a Hindu who set himself to make a will deliberately to contemplate an intestacy as to a portion of his property or to omit mention of persons on

(1) L.R., 2 I.A., 7.

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whom he wished it to devolve. He was obliged, as he would think, to name at least his adopted son, and the association of his wife with the son was only natural. In the normal condition of things they would live together, and there is no evidence to show that they were not likely to do so. The language of the will is certainly not inconsistent with the intention that the son with his adoptive mother should take the moiety with the incidents attaching to property held by an undivided family. In Malabar cases this Court has held that a gift by a man to his wife and children must be considered as a gift to the group of persons forming a tarwad or taveli (*Kunhacha Umma* v. *Kutti Mammi Hajee*(1)), and that the property of the tarwad being impartible, no member of the group can claim a share of the property so given. The present case is, in our opinion, not dissimilar. Upon the true construction of the will we think the widow was not intended to take any other estate than that which she would have taken if there had been an intestacy, and that therefore the suit should have been dismissed. The appeal is allowed and the suit and the memorandum of objections dismissed with costs throughout.

APPELLATE CIVIL.

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

TIRUVENGADATH AYYANGAR (DEFENDANT NO. 3), APPELLANT,

v.

SRINIVASA THATHACHARIAR (PLAINTIFF), RESPONDENT.*

1899. January 12, 16, 27.

Religious Endowments—Devastanam Committee—Grounds for removal from office—Errors of judgment on part of committeeman.

Mere error in judgment on the part of a member of a devastanam committee is not sufficient to disqualify him from continuing to hold such office. To justify the removal of such an office-holder, it must be shown that the further holding by him of the office is incompatible with the interests of the temple under the charge of the committee of which he is a member.

(1) I.L.R., 16 Mad., 201.

* Appeal No. 84 of 1898.

TIRUVENGADATH AYYANGAR v. SRINIVASA THATHACHARIAR.

The duty of a devastanam committee consists, primarily, in seeing that its endowments are appropriated to their legitimate purposes and are not wasted. It is not a part of the duty of such a committee to interfere with the trustees in matters relating to rituals.

APPEAL against the decree of R. D. Broadfoot, District Judge of Tinnevelly, in Original Suit No. 1 of 1894.

Suit by a vadagalai Brahman to remove the third defendant from the Vishnu devastanam committee, on grounds of alleged misfeasance and non-feasance as a member of such committee. Issues Nos. 4, 5 and 9, framed by the District Judge, related to disputes between the tengalais and vadagalais at Srivilliputtûr. Plaintiff, as a person interested in the proper management of the temple, complained that defendant had sanctioned expenditure from temple funds in payment of fines and costs of tengalais in disputes between the two factions, that the festival of Desikar had been stopped for several years, and that the vadagalais had been excluded from the temple unless they had first undertaken not to recite certain hymns therein. It was admitted that the disbursements complained of had been made, and the District Judge held that they were not legitimate charges on the temple funds. The stoppage of the festival to Desikar was also admitted, the defence being that the trustee and the committee had always been ready and willing to perform it if the vadagalais would consent to a tengalai namam being affixed to the forehead of Desikar. The District Judge found that, in sanctioning the enforcement of this condition by the trustee, defendant had acted improperly and had committed misfeasance; and that his contention that he had acted *bonâ fide* could not protect him from the consequences of his mistake. He held that these findings on issues Nos. 4, 5 and 9 justified the removal of defendant from office, though he acquitted him of moral blame. Plaintiff further complained that three of defendant's fellow committeemen had contracted loans from the temple funds with a view to misappropriating the same, while the temple had been under the management of one Kumarasami. There was no direct evidence of connivance on defendant's part, but a suit to recover the deficit had, upon the death of the said Kumarasami, been instituted against his sons, when the true nature of these transactions had been exposed. It was complained that defendant had taken no steps to recover from his fellow committeemen the sums so advanced even after the facts were exposed, and on this charge the District Judge held defendant technically guilty of non-feasance. He passed a decree removing third defendant from office.

TIRUVENGADATH AYYANGAR v. SRINIVASA THATHACHARIAR.

The third defendant preferred this appeal.

Mr. *E. Norton* and *Sadagopachariar* for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—The District Judge has found, with reference to the fourth, fifth and ninth issues, that the appellant has been guilty of misconduct or breach of duty so grave as to involve his removal from office.

The charge relating to Kumarasami's dealings with temple funds the District Judge does not consider a very grave one. He thinks, however, that the appellant's conduct in the matter shows that he took no interest in the welfare of the temple and that, therefore, he is guilty of non-feasance. The evidence on this point has been discussed before us, and though there is no doubt that Kumarasami made improper use of the temple funds and some of the appellant's colleagues received advances from them, we can see no sufficient evidence to prove any connivance on the appellant's part. It is not shown that the appellant became aware of his colleague's dealings with Kumarasami till the latter's son put in his defence. Nor is it shown that the temple suffered by any negligence on the appellant's part. The fourth and the ninth issues relate to the eternal disputes between tengalais and vadagalais. In this matter, we think that the appellant went beyond the duties which devolve upon him as a member of the committee. It is not part of the duty of the committee to interfere with trustees in matters of rituals. The business of the committee is primarily to see that the endowments are appropriated to their legitimate purposes and are not wasted.

The appellant cannot be seriously blamed for mistaking the scope of his duties, but his conduct in the matter is open to the charge of partiality towards the trustee of his own sect. His sanction of the expenditure of temple funds for the liquidation of a fine inflicted on the trustee is certainly censurable.

Although, however, we think the appellant cannot be altogether acquitted, there is, in our opinion, an entire absence of proof of such misconduct as to render his removal from office necessary in the interests of the institutions which the committee controls.

TIRUVENGADATH AYYANGAR v. SRINIVASA THATHACHARIAR.

We cannot agree with the District Judge in the view that mere error in judgment is sufficient to disqualify an office-holder in the position of the appellant. To justify removal from such an office, it must be shown that the further holding of it is incompatible with the interests of the temple under the charge of the committee.

We therefore reverse the decree, but we allow no costs.

APPELLATE CIVIL.

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

1899. March 6.

PARAMESHRAYA (DEFENDANT No. 4), APPELLANT,

v.

SESHAGIRIAPPA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 206—Finding in judgment not embodied in decree—Amendment of decree—Appeal against amended decree—Time how calculated.

In a suit for a declaration of title to land and for possession, which was based upon a will alleged to have been made in plaintiff's favour, the Subordinate Judge, finding the document to be a forgery, dismissed the suit. The fourth defendant had been made a party inasmuch as he claimed a portion of the land as alienee. Though the case for the plaintiff failed, the Subordinate Judge, on the above finding, dealt in his judgment with an issue which had been framed regarding the validity or otherwise of the alleged alienation to the fourth defendant. He held that it had been made for no consideration and found the issue against the fourth defendant. The decree dismissing the suit, which bore date the 22nd of June 1896, contained no reference to the finding against the fourth defendant on that issue. The fourth defendant applied for a review of the judgment, complaining that as the suit had been dismissed, the reference in the judgment to the alleged alienation in his favour was unnecessary, and might, if permitted to stand, operate against him as *res judicata* in any subsequent suit that might be brought; and praying that the finding might be either expunged or modified in his favour. Upon this being refused, fourth defendant applied, under section 206 of the Code of Civil Procedure, that the decree might be brought into conformity with the judgment, and an order was made on 27th October 1896, adding to the decree a clause to the effect that the issue referred to had been found against the fourth defendant. On 12th December 1896, fourth defendant preferred an appeal against the decree of the Subordinate Judge, but the District Judge rejected it as being out of time:

* Letters Patent Appeal No. 74 of 1898.

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Held, that the decree being in conformity with the judgment, the Subordinate Judge had no power to vary it; and that the words which had been added must be expunged, and the decree restored to its original state. Also, that the finding on the issue against the fourth defendant was, in fact, no finding except with regard to the question of consideration.

Per SUBRAMANIA AYYAR, J.—That where a decree which is at variance with the judgment is brought into conformity with the latter under section 206 of the Code of Civil Procedure, the date of the rectification is immaterial with reference to the calculation of the time in which any appeal may be preferred against such decree. But where a decree is wrongly varied, a party affected by such variation should be entitled to calculate the time during which an appeal may be preferred as commencing from the date of the variation.

SECOND APPEAL (No. 1709 of 1897) against the proceedings of H. G. Joseph, District Judge of South Canara, in the appeal presented by defendant No. 4 against the revised decree of U. Achutan Nayar, Subordinate Judge of Mangalore, in Original Suit No. 24 of 1891.

Suit for a declaration of plaintiff's title to certain properties and for possession thereof and mesne profits. Plaintiff's claim was based upon a will alleged to have been duly made in his favour. The first defendant, widow of the alleged testator, denied the genuineness of the will; and an issue having been framed on that point, the Subordinate Judge found the document to be a forgery. The sixth issue framed by the Subordinate Judge related to the validity of an alienation (exhibit IX) of a portion of the land alleged to have been made by the first defendant in favour of the fourth defendant, who had, in consequence thereof, been made a party to the suit. The Subordinate Judge in his judgment held that there was no consideration for this alienation, and found this issue against the fourth defendant. The plaintiff having failed to prove the will, the suit was dismissed. The decree, which bore date the 22nd of June 1896, comprised a simple order of dismissal, no reference being made to the finding against the fourth defendant on the sixth issue. On 14th September 1897 the fourth defendant filed an application for a review of the judgment under section 623 of the Code of Civil Procedure. In this he contended that inasmuch as the suit had been dismissed on the sole ground that the will sued on was a forgery, any finding in the judgment on the sixth issue as to the validity or otherwise of his alleged title as alienee under the said exhibit IX was unnecessary; that he could not prefer an appeal against such finding since the decree, as drawn up, was in his favour; but that the finding that his title

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under exhibit IX was invalid might, if allowed to stand as a portion of the judgment, operate against him as *res judicata* in any subsequent suit that might be brought. He therefore prayed that the finding on the sixth issue might either be expunged from the judgment or modified in his favour. The Subordinate Judge passed an order stating that findings on all issues had been recorded to obviate any necessity for a remand, and that they could not be expunged simply because there was no appeal; and he rejected the petition. The fourth defendant then applied under section 206 of the Code of Civil Procedure that the decree might be amended so as to be in conformity with the judgment. The Subordinate Judge, on 27th October 1896, passed an order adding the following clause to the decree:—"The sixth issue relating to "the validity or otherwise of exhibit IX is found against the fourth "defendant." In doing this he followed *Niamut Khan* v. *Phadu Buldia*(1) and *Jamaitunnissa* v. *Lutfunnissa*(2).

On 12th December 1896 the fourth defendant appealed to the District Court against the decree of the Subordinate Judge dated 22nd June 1896, contending that his notice of appeal was in time inasmuch as the time for its presentation should be reckoned from the date of the order amending the decree, which bore date the 27th of October 1896. The District Judge held that the contention was not good. Referring to *Joykishen Mookerjee* v. *Ataoor Rohoman*(3), he said it was apparent from the judgment (at page 24) that had the amendment in that case been made under section 206 of the Code, the time for limitation could not have been held to be extended by the order which had been made. He also held that an order of a Subordinate Court (after refusing a review), making an amendment of its decree under section 206 for the express purpose of rendering an appeal already long barred by limitation admissible, was not justified. He rejected the appeal as being out of time.

Defendant No. 4 preferred this second appeal.

Narayana Rao for appellant.

Ramachandra Rao Saheb for respondents.

SUBRAMANIA AYYAR, J.—In this case the first respondent (plaintiff) sued for the recovery of certain property alleged to have

(1) I.L.R., 6 Calc., 319. (2) I.L.R., 7 All., 606.
(3) I.L.R., 6 Calc., 22.

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been left to him by a will of the late husband of the second respondent (first defendant) and made the appellant (fourth defendant) a party, as he claimed some of the property sued for as a vendee under a conveyance executed by the second respondent after her husband's death. The first respondent being a reversioner might as such have impeached the sale under the Hindu Law. But he has made no such claim in the present suit. The Subordinate Judge found the alleged will to be a forgery and dismissed the suit. With reference to the title on which the suit is entirely based, it was not necessary for him to enter into the question whether the sale to the appellant is valid or not. Nevertheless he expressed it as his opinion that the sale was invalid; but this opinion was not inserted in the decree. Subsequently, however, on the application of the appellant himself, the Subordinate Judge altered the decree by adding such a declaration. It is clear that even upon the authority of the cases, *Niamut Khan* v. *Phadu Buldia*(1) and *Jamaitunnissa* v. *Lutfunnissa*(2), that declaration ought not to have been inserted in the decree. The appellant's appeal to the lower Appellate Court against so much of the decree as related to the alienation was rejected on the ground that it was presented out of time. In so rejecting it the lower Appellate Court held that the decree, even in so far as it affected the appellant, was not to be taken as of the date on which the alteration was ordered to be made. No doubt, where a decree which is at variance with the judgment is brought into conformity with it under section 206 of the Code of Civil Procedure, the date on which the decree is so rectified is immaterial with reference to the calculation of the time for appeal against such decree. But here the decree, as it was framed first, was in conformity with the judgment, notwithstanding that the latter contained an expression of opinion upon the question of the validity of the sale—an opinion absolutely irrelevant to the case and therefore, as already stated, rightly excluded originally from finding a place in the decree. In these circumstances the Subordinate Judge was not empowered under section 206 to alter the decree as he did. And as against the party affected by the alteration, it would be manifestly unjust and unwarranted to treat the decree except as of the date on which it was so altered; (compare *Joykishen Mookerjee* v. *Ataoor Rohoman*(3)). Taking the decree to be of that date, the

(1) I.L.R., 6 Calc., 319. (2) I.L.R., 7 All., 606. (3) I.L.R., 6 Calc., 22,

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appeal to the lower Appellate Court was in time, and the order rejecting the appeal cannot be sustained, and must, in my opinion, be set aside. How then is the case to be disposed of? The question whether the opinion of the Subordinate Judge as to the validity of the sale is right or wrong, cannot, of course, be gone into as the point does not rightly arise here. At the same time we would not, I think, be justified in declining to interfere altogether, though the erroneous order of the Subordinate Judge was passed in accordance with the prayer of the appellant himself. For he and the Subordinate Judge both intended that the alteration should enable the former to seek for a reversal on the merits of the finding against him if he can claim such remedy in appeal. That relief, no doubt, cannot be given to him. But he ought not to be allowed to be prejudiced by the error of the Subordinate Court as he would be if the decree be left as it stands. I would therefore set aside the order of the lower Appellate Court and the order permitting the alteration of the decree and direct that it be restored to what it was before the alteration, the appellant, however, being made to bear his own costs and to pay those of the first respondent incurred from the date of the application for the alteration of the decree till now.

MOORE, J.—On the 22nd June 1896, the Subordinate Judge of South Canara dismissed Original Suit No. 24 of 1891 on his file. In the judgment it was held on the sixth issue that a certain sale-deed relied on by the fourth defendant was not valid or genuine, but in the decree, as it originally stood, nothing was entered as to this. The plaintiff's suit was simply dismissed with costs. The fourth defendant applied, under section 623 of the Civil Procedure Code, for a review of the judgment, but his application was dismissed on the 14th September 1896. He then requested that the finding on the sixth issue might be expunged or modified in his favour, but his application was rejected. He then applied under section 206, Civil Procedure Code, that the decree should be brought into conformity with the judgment by the insertion in the former of the finding on the sixth issue. The Subordinate Judge on the 27th October directed that this should be done on the authority of the rulings in *Niamut Khan* v. *Pladu Euldia*(1) and *Jamaitunnissa* v. *Lutfunnissa*(2), and the following clause was added to the decree :—

(1) I.L.R., 6 Calc., 819. (2) I.L.R., 7 All., 606.

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"The sixth issue relating to the validity or otherwise of exhibit IX "is found against the fourth defendant." The fourth defendant then appealed against the decree as thus modified, but the District Judge decided that his appeal was out of time, and against that decision he has appealed here.

It is now urged that the application on which the order of the 27th October 1896 was passed should be held to have been an application for review under section 623, that the order amending the decree should be considered to have been passed under Chapter XLVII of the Code, and that consequently the decree bears date from the order amending it and is therefore in time. This is not, in my opinion, a valid contention. The application under section 623 was rejected. The petition on which the order of the 27th October was passed was put in under section 206, and the prayer there made was that the decree should be brought into conformity with the judgment—a relief which can be granted under that section only. The Calcutta decision quoted by the Subordinate Judge does, no doubt, permit of a decree being amended as in the present case, but on reference to that judgment it will be seen that the learned Judges were of opinion that this should be done on an application made to the Court to bring the decree into conformity with the judgment, and it must be presumed that, although no section is mentioned in the judgment, the intention of the learned Judges must have been that the amendment should be made under section 206, there being no other section under which it could be made. In *Jamaitunnissa* v. *Lutfunnissa*(1) also mentioned by the Subordinate Judge, the view taken by a majority of the Court is that in cases such as the present the only remedy is to apply under section 206 to have the decree brought into conformity with the judgment. On the ground therefore that the present appellant's application for review under section 623 had been rejected, that his application to make the decree in accordance with the judgment was presented under section 206, and that that section was the only one under which the relief prayed for could have been granted, I must hold that the Subordinate Judge's order of the 27th October 1896 was passed under section 206 of the Code of Civil Procedure, and that he by it did not and could not alter the date of the original decree, and that consequently the appeal to

(1) I.L.R., 7 All., 606.

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the District Judge was long out of time and was therefore rightly rejected.

This appeal should, in my opinion, be dismissed with costs.

[The judgment of Mr. Justice Moore prevailing under section 575 of the Code of Civil Procedure, the decree of the lower Appellate Court was confirmed and the second appeal was dismissed with costs.]

Defendant No. 4 having then appealed under section 15 of the Letters Patent, the case was set down for re-argument before the Bench constituted as above, the parties being represented as before.

Narayana Rao for appellant.—Defendant No. 4, claiming as an alienee from the first defendant, was made a party to the suit. The plaintiff's claim was, however, based upon a will, and the Subordinate Judge having found against him on the will dismissed the suit solely on that ground. On the suit so failing, it became unnecessary for the Subordinate Judge to record any finding in his judgment relating to the validity or otherwise of the alleged alienation to the fourth defendant. But the finding having been recorded, the fourth defendant desired to have it set aside. He therefore applied for a review of the judgment, and, upon that being refused, that the decree might be amended so as to be in conformity with the judgment, so that he might appeal. The Subordinate Judge ultimately ordered that the finding relating to the alleged alienation to fourth defendant should be embodied in the decree, and this was done. [COLLINS, C.J.—The portion of the judgment which you objected to was inserted in the decree on your application.] The course pursued is suggested by *Niamut Khan* v. *Phadu Buldia*(1). See also *Jumaitunnissa* v. *Lutfunnissa*(2). [SHEPHARD, J.—The decree bears two dates; is it contended that there are different periods during which appeals could be presented by the different parties?] Section 623 of the Code of Civil Procedure contemplates a necessity such as this arising for the review of a judgment by any person considering himself aggrieved. [SHEPHARD, J.—What power had the Subordinate Judge to alter the decree?] Sections 206 and 623 give him power. The finding against the fourth defendant should have been included in the original decree and so rendered it subject to appeal; otherwise

(1) I.L.R., 6 Calc., 319. (2) I.L.R., 7 All., 606.

PARAMES RAYA v. SESHAGI APPA.

the question might have become *res judicata*, although the fourth defendant had no power to appeal; see *Avala* v. *Kuppu*(1) which sanctions the procedure which has been taken; also *Nanda Lal Rai* v. *Bonomali Lahiri*(2), in which the High Court expunged such findings from the record where the suit was dismissed for misjoinder. In the latter case, as in this, the suit had been dismissed, and the appeal was preferred by one of the defendants. Upon fourth defendant preferring his appeal against the amended decree, the District Court held that it was out of time. The time should be computed as from the date when the finding was inserted in the decree; in other words, from the date upon which the decree was altered so as to become operative as against the fourth defendant. The application on which the order varying the decree was passed may be treated as one under section 623, and the order amending the decree may be taken to have been passed under Chapter XLVII of the Code of Civil Procedure, in which case the amended decree would properly bear the date of the order amending it. The applications for review and for rectification of the original decree were filed within the time allowed for appeal. *Joykishen Mookerjee* v. *Ataoor Rohoman*(3), which will be cited against my contention, does not affect the position. I submit that the appeal preferred by the fourth defendant to the District Court was filed in time.

Ramachandra Rao Saheb for respondents.—It is a question of limitation. [COLLINS, C.J.—The Subordinate Judge had no power to add the words to the original decree, and we can expunge them.] [SHEPHARD, J.—No doubt the time for appealing must be reckoned from the date of the original decree, and not from the date of the amendment; but we can strike out the words which were added; no petition for revision is necessary.] *Suppayya Konar* v. *Appusami Konar*(4) clearly lays down the time from which the period of limitation should be computed; see also *Pydel* v. *Chathappan*(5). It is not a case for revision; an appeal being allowed, that is the proper remedy.

JUDGMENT.—Although it is said that the sixth issue was found against the fourth defendant, there was in fact no finding except with regard to the question of consideration. We are of opinion that the decree was in conformity with the judgment and that

(1) I.L.R., 8 Mad., 77. (2) I.L.R., 11 Calc., 544. (3) I.L.R., 6 Calc., 22.
(4) Appeal No. 256 of 1897 (unreported). (5) I.L.R., 14 Mad., 150.

PARAMESH-RAYA v. SEMMAGIRI-APPA.

therefore the Subordinate Judge had no power to vary the decree in the manner suggested by the appellant's vakil. This being so, the words added must be expunged, and the decree restored to its original state. In other respects this appeal is dismissed with costs.

APPELLATE CIVIL.

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

1898. December 9, 12. 1899. January 9, 23, 24. February 14.

MUTHURAMAN CHETTI (DEFENDANT No. 4), APPELLANT,

v.

ETTAPPASAMI AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1 TO 3), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, s. 99—Civil Procedure Code—Act XIV of 1882, s. 244—Mortgage of annuity—Sale of attached property at instance of mortgagee—Right of son not party to suit to redeem his share—Hindu Law—Rights of Hindu debtor's son after attachment and sale.

In 1848 an annuity had been settled on plaintiff's ancestor and his heirs in consideration of his withdrawal from a suit for partition then pending. In 1878, plaintiff's father and others then enjoying the annuity executed a bond for money due by them, mortgaging their rights under the said annuity. Instalments due under the bond having fallen into arrears, a suit was brought, in 1889, in respect of them, and a decree obtained, which contained a provision that the right to the annuity should be liable to be proceeded against for the amount so due. Plaintiff was born in 1891. In 1893 an application was made for the issue of a proclamation of sale, and a sale ensued and a certificate was given to the purchaser, who was the decree-holder. Plaintiff having instituted this suit to set aside the said sale or to have it declared that it did not affect his right under the said annuity:

Held, (1) that if there was in fact a decree for sale, plaintiff, as son of the judgment-debtor, born after the date of the decree, though before the sale, could not question the sale; nor would any right of redemption be left to the plaintiff;

(2) that inasmuch as the decree was, on its true construction, not a decree for sale, the case was one of attached property being sold at the instance of the mortgagee in execution of a money decree, and so within the prohibition of section 99 of the Transfer of Property Act. The conditions under which a sale of mortgaged property is permissible under that section are not satisfied unless there is a decree for sale; and in the absence of such decree the sale is prohibited;

(3) that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained;

(4) that the rights of a Hindu debtor's son may be concluded by a proper mortgage decree and sale thereunder, or, if there is no mortgage, by a decree for money and sale of the attached property, but they are not affected by a sale brought about in defiance of section 99;

(5) that the suit was not barred by section 244 of the Code of Civil Procedure; and that plaintiff was entitled to a decree for the redemption of his share.

* Second Appeal No. 82 of 1898.

MUTHU-RAMAN CHETTI v. ETTAPPA-SAMI.

SECOND APPEAL against the decree of R. D. Broadfoot, District Judge of Tinnevelly, in Appeal Suit No. 301 of 1896, affirming the decree of U. Ittinikanda Panikar, District Munsif of Satur, in Original Suit No. 336 of 1895.

Suit to set aside a Court-sale, or for a declaration that such sale did not affect plaintiff's share under the right sold. In 1848, the brother of the zamindar of Vadimitta sued for and obtained a decree for the partition of the zamindari, and other properties. Pending an appeal by the zamindar against the said decree a settlement was arrived at, whereby the younger brother renounced, on behalf of himself and his heirs, his rights under the decree in consideration, *inter alia*, that an annual payment should be made to him and his heirs of Rs. 950, charged on the revenue of certain specified villages belonging to the zamindari. The aforesaid agreement had ever since been acted upon. In 1878, the plaintiff's paternal grandmother, his father, and the mother and guardian of his uncle, then a minor had executed a bond (as persons beneficially entitled under the agreement of 1848), for moneys due by them, mortgaging the right to the Rs. 950 payable annually under the said agreement. Some of the instalments of the debt due under the bond having fallen into arrears, a suit was instituted for the recovery thereof, and a decree passed in 1889, against plaintiff's father, which contained a provision to the effect that the right to the allowance should be liable to be proceeded against for the amount due. Of the allowance of Rs. 950, an uncle of the male judgment-debtors was entitled to Rs. 280, and with regard to the balance an application was, in 1893, made for the issue of a proclamation of sale, and a sale ensued and a certificate was given to the purchaser, who was the decree-holder. Plaintiff, who was born in the early part of 1891, brought this suit, praying either that the whole sale might be set aside or that his share of the allowance might be exonerated therefrom. The District Munsif cancelled the entire sale; and, on appeal, the District Judge, though for different reasons, upheld the decree.

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The decree-holder preferred this second appeal.

The appeal having been heard by SUBRAMANIA AYYAR and DAVIES, JJ., and there being a difference of opinion between their Lordships, and neither conclusion being in accordance with that of the lower Courts, SHEPHARD, J., was appointed, under Rule No. 2 of the High Court, to hear and decide the point in question, and the case came on for re-hearing before the Court constituted as above.

Ramachandra Rao Saheb, Hon. *Bhashyam Ayyangar* and *Ranga Ramanujachariar* for appellant.

Pattabhirama Ayyar and *Kuppusami Ayyar* for respondents.

SHEPHARD, J.—In 1889 the plaintiff's father was indebted to a certain Chetti in respect of a bond under which money was payable by annual instalments "out of the Rs. 950 which we (the "executants) annually receive from generation to generation "under the razinama, &c." A question is raised as to the construction of this bond, as to the nature and extent of the security which it created. In May 1889 a decree was obtained on this bond against the plaintiff's father. A second question arises upon the construction of this decree. In 1893 application was made for the issue of a proclamation of sale and a question has been raised as to the meaning of the words used by way of description of the property to be sold. A sale ensued and the certificate given to the purchaser, who was the decree-holder, is another document as to the construction of which doubts have been raised.

A careful translation of the two last-mentioned documents having been made, I believe we are agreed that the intention was to effect a sale outright of the judgment-debtor's right to receive the annuity mentioned in the bond. That is to say, in satisfaction of a claim not exceeding Rs. 1,200 it was intended to sell an annuity the capital value of which could hardly be less than Rs. 10,000. I suppose it did not occur to the District Munsif or the pleaders who represented the judgment-debtor that this sacrifice of property could be avoided by the simple expedient of appointing a receiver, and that it did not occur to the officer who conducted the sale to adjourn it and report matters to the District Munsif before knocking down the property to the decree-holder at the absurd price of Rs. 1,200. The case is a striking instance of the manner in which, in consequence of carelessness in the conduct of proceedings after decree, the property of judgment-debtors is sacrificed. Several points were

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raised on behalf of the plaintiff. In particular it was urged that as he was in existence before the application for sale was made he ought to have been made a party or had notice of it and could not otherwise be prejudicially affected by the sale. Assuming that the decree directed a sale of the annuity, I do not think the plaintiff, as son of the judgment-debtor, born after the date of the decree but before the sale, could question the sale. As at present advised I see no reason to alter the opinion expressed by me in *Ramasamayyan* v. *Virasami Ayyar*(1), but here the facts are stronger because before the birth of the son the mortgage had been executed for a pre-existing debt and *ex hypothesi* a decree for sale had been passed. Under these circumstances I think it is impossible to hold that any right of redemption is left to the plaintiff. The question remains whether in reality there was a decree for sale and whether, if there was no such decree, the actual sale has any efficacy as against the plaintiff. There have certainly been instances in which decrees somewhat similar to the present in language have been treated as decrees for sale. It may have been right at a time when the provisions of the Transfer of Property Act were novel and unfamiliar to the Courts to put an indulgent construction on their decrees. But the decree in the present case was made as late as May 1889 and the wording of it is singularly defective if the intention of the Court was that a sale of the annuity should take place. The elements which are requisite to make a proper decree for sale at the suit of a mortgagee are wholly wanting. There is not a word about sale in the decree, no time for payment is given and even the designation of the property is obscure. The decree rather resembles a decree declaring a charge. I see no reason for putting on it an interpretation favourable to the party whose business it was to see that he got a proper decree.

From the petition in pursuance of which the proclamation was issued it does not appear whether the property sold had been attached or not. But the proclamation itself refers to the attachment. It was attached property that was advertised for sale. This is consistent with the view that the decree was not treated as a decree for sale. The case thus being one of attached property sold at the instance of the mortgagee in execution of a money decree is clearly within the mischief at which section 99 of the Transfer of

(1) I.L.R., 21 Mad., 222.

Property Act was aimed. It may be that the deed of hypothecation and the plaint would have justified a decree for sale. That, I think, it is unnecessary to consider. It appears to me that the conditions under which, according to section 99, the sale of mortgaged property is permissible, are not satisfied unless there is a decree for sale, and that in the absence of such decree the sale is prohibited (*Chundra Nath Dey* v. *Burroda Shoondury Ghose*(1)). It follows that the sale of October 1893 was made in contravention of the law. It is argued that any such objection ought to have been raised as a question relating to the execution of the decree and could not be made the subject of a separate suit. The object of the section no doubt was to prevent the confusion and uncertainty which arose in cases in which mortgaged property was put up for sale by the mortgagee in execution of a decree for money. The cases reported before the Act came into force show what complications could arise in cases in which there were several mortgages of the same property or the property was sold at execution sales more than once. The Courts were not agreed as to the position of the purchaser as against incumbrancers subsequent to the one who had caused the property to be sold (see cases collected in Macpherson on Mortgages, page 482 and see Commissioner's report, page 35, and Introduction to the Act in Stokes' Anglo-Indian Codes, Substantive Law). Moreover, the practice of selling mortgaged property otherwise than under a mortgage decree was open to the objection that it deprived the mortgagor of his rightful privileges regarding the equity of redemption (*Martand* v. *Dhondo*(2)). The remedy devised by the Legislature was to insist on the mortgagee bringing a mortgage suit, in which all persons interested in the property should be joined, as a condition precedent to any sale by the Court of the mortgaged property. Such being the purpose of the Legislature I think it is clear that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained. It was for their benefit as much as for that of the mortgagor himself that the section was enacted and they could not be prejudiced by any waiver on his part. In several cases decided in this Court it has been considered that the section has the effect of invalidating a sale as against persons who,

(1) I.L.R., 22 Calc., 813. (2) I.L.R., 22 Bom., 624 at p. 628.

while not parties to the decree, would otherwise be bound by it (*Sathuvayyan* v. *Muthusami*(1); *Durgayya* v. *Anantha*(2); *Vigneswara* v. *Bapayya*(3)). In those cases no reference is made to section 244 of the Civil Procedure Code; but in a more recent Bombay case, where that section must have been present to the mind of the Court, it was also held that the plaintiff, a member of the mortgagor's family, bound by the decree obtained against the manager, was, notwithstanding the sale of the property and purchase by the mortgagee, entitled to assert his right of redemption (*Martand* v. *Dhondo*(4)). According to the judgment of Farran, C.J., it would be correct to say that the effect of the section was to preserve the right of redemption to a person circumstanced as the plaintiff was in that case, in the same way as it is preserved to a person interested in the equity of redemption who is not made party to a suit in other respects properly instituted under section 67 of the Transfer of Property Act and is not, as the member of a Hindu family, bound by the decree made against the father or manager. The rights of the Hindu debtor's son may be concluded by a proper mortgage decree and sale thereunder or, if there is no mortgage, by a decree for money and sale of the attached property, but they are not affected by a sale brought about in defiance of section 99. In this view of the law it seems clear that it cannot rightly be said that the present suit is barred by the provisions of section 244 of the Code.

To hold that the plaintiff is precluded from bringing a suit because his father might have taken the objection in the course of the execution of the decree, would be to defeat one of the main objects of the section 99, and it is not explained how, in the circumstances of this case, it would have been legally possible for the plaintiff to intervene.

For these reasons I think the appeal must be allowed except to the extent of the plaintiff's share. I agree to the terms of the decree proposed by Mr. Justice Subramania Ayyar.

SUBRAMANIA AYYAR, J.—Nothing put forward on behalf of the appellant at the second argument in this case has led me to change the view that the suit fails even with regard to the first respondent's share of the annuity. As to that share, though what

(1) I.L.R., 12 Mad., 325. (2) I.L.R., 14 Mad., 74.
(3) I.L.R., 16 Mad., 436. (4) I.L.R., 22 Bom., 624 at p. 628.

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was urged on behalf of the appellant convinces me that the reasons given in my former judgment for the conclusion that the said respondent is entitled to redeem the share are not sustainable, yet the conclusion itself is sustainable for the reasons stated in the judgment of my learned colleague SHEPHARD, J. I agree, therefore, that the appeal be allowed and the suit dismissed except as to the first respondent's share and that as to that share the respondent should have a decree for redemption on the terms stated in my previous judgment, the costs being borne by each party throughout.

DAVIES, J.—At the re-hearing of this appeal, amended and correct translations of the application for sale and the sale certificate were put in, and from these it is clear that what was actually sold (however irregularly) was the annually recurring right to receive Rs. 670. My former judgment must therefore be cancelled, and I now concur in the conclusion of my learned colleagues.

The time for redemption should be on the day six months from date of our judgment.

APPELLATE CIVIL.

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

1899. February 3, 6.

RANGA RAO AND OTHERS (DEFENDANTS NOS. 1 to 3), APPELLANTS,

v.

RAJAGOPALA RAJU AND OTHERS (PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS NOS. 4, 5, 10, 11, 13 TO 18), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 462—Compromise of suit by guardian ad litem—Leave of Court not obtained—Withdrawal from compromise by guardian—Inability of Court to enforce it.

The guardian *ad litem* of three minors having agreed to compromise a suit and having signed a petition embodying the terms arrived at, undertook to present the petition at the next sitting of the Court. Leave of the Court had not been obtained; and at the time appointed the guardian declined to present the petition and opposed a decree being passed in its terms. Upon the plaintiff seeking to have the compromise enforced:

Held, that inasmuch as leave of the Court had not been asked for, and the guardian had objected to the Court passing a decree in terms of the compromise,

* Appeal No. 126 of 1898.

the Court had no power to enforce the compromise, even though the terms of it might appear to be beneficial to the minors.

RANGA RAO v. RAJAGOPALA RAJU.

APPEAL against the decree of M. D. Bell, District Judge of Gódávari, in Original Suit No. 12 of 1896.

Suit to enforce an alleged arrangement under which a certain estate was agreed to be apportioned, and, in the alternative, for partition. The estate in question was formerly owned by four brothers, of the eldest of whom the first three defendants were the minor children. Plaintiffs alleged that the guardian of the said three minors had by letter, prior to the suit, agreed to a division of the property on their behalf. This was denied by the guardian and by the minor defendants, all of whom opposed the proposed division. During the pendency of the suit several adjournments were granted, to enable the parties to arrive at a compromise, with the result that a petition was drawn up embodying the terms of a compromise, which was signed by the guardian *ad litem* of the minor defendants Nos. 1, 2 and 3. The guardian retained this petition, undertaking to present it to the Court at the next hearing of the suit. When that time arrived, however, she declined to present the petition. Leave of the Court had not been asked for or obtained by the guardian under section 462 of the Code of Civil Procedure. The plaintiffs sought to have the terms of the compromise enforced, but the guardian objected to a decree being passed in terms thereof. Additional issues were accordingly framed as to whether such a compromise had in fact been effected, and if so, whether it was valid and binding on the first three defendants. The District Judge found that the compromise had been effected. Dealing with the question of its validity he said:—"The grounds put forward by defendants Nos. 1, 2 and 3 for declaring the alleged compromise to be not binding upon them are:—(1) that the permission of the Court was not obtained and the compromise is accordingly invalid under section 462 of the Code of Civil Procedure; and (2) that the alleged compromise is contrary to their interests. Section 462 of the Code of Civil Procedure lays down that the sanction of the Court is necessary to the compromise. It does not mean that the fact of sanction not having been obtained before the compromise was effected renders the compromise null and void. Before according sanction the Court must have the terms of the compromise before it. I see no reason to suppose that the arrangement is not a fair one . . . .

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I find the compromise is valid and binding on defendants Nos. 1, 2 and 3." He decreed for the plaintiffs in the terms of the compromise.

Defendants Nos. 1 to 3 preferred this appeal.

Rama Rao and Hon. *Bhashyam Ayyangar* for appellants.

V. Krishnasami Ayyar, *Seshagiri Ayyar*, *Ramachandra Ayyar*, and *Nagabhushanam* for respondents.

JUDGMENT.—Assuming that the appellants' guardian did, as urged for the respondents, agree to compromise the suit on the terms alleged, was it competent to the Court in the circumstances of the case to enforce the compromise as against the appellants? Now, leave to enter into such compromise was never asked for on behalf of the appellants, and their guardian *ad litem* has all along been objecting to the Court passing a decree according to the compromise. In the face of such opposition on the part of the person representing the appellants in the litigation the Court had clearly no power to enforce the compromise, even though it appeared to the Court that the terms of the compromise were beneficial to the appellants (compare *In re Birchall*, *Wilson* v. *Birchall*(1)).

The appeal must, therefore, be allowed, the decree of the District Court reversed and the suit remanded for disposal according to law.

The costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

1899. February 17.

PALLAMRAJU AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

BAPANNA (PLAINTIFF), RESPONDENT.*

Succession Certificate Act—Act VII of 1889, *s.* 4—*Hindu Law—Suit by person claiming property of undivided family by right of survivorship—Succession Certificate.*

Where a plaintiff claimed by right of survivorship to recover money due on a mortgage bond which had been executed by the defendants in favour of the former managing member of the plaintiff's undivided family:

(1) L.R., 16 Ch. D., 41.

* Appeal No. 190 of 1898.

PALLAMRAJU v. BAPANNA.

Held, that the Succession Certificate Act did not apply and that plaintiff need not produce a succession certificate under that Act.

APPEAL against the decree of P. S. Gurumurti Ayyar, Acting Subordinate Judge of Cocanada, in Original Suit No. 39 of 1897.

Suit for money due under a mortgage bond which had been executed by the first and second defendants in favour of plaintiff's late junior paternal uncle as managing member of the joint family to which plaintiff belonged. The defence chiefly relied upon was that inasmuch as plaintiff's late uncle had left two sons him surviving, plaintiff had no right to the mortgage sued upon: and further that plaintiff could not maintain the suit without obtaining a succession certificate in respect of the debt. The Acting Subordinate Judge found that plaintiff had taken the suit bond at a division of the family property and was therefore entitled to maintain the suit; and he held that as the relief sought was against the mortgaged property no succession certificate was necessary.

Defendants Nos. 2 and 3 preferred this appeal.

Hon. *Subba Rao*, *V. Krishnasami Ayyar* and *Gopalasami Ayyangar* for appellants.

Sundara Ayyar for respondent.

JUDGMENT.—We see no reason to differ from the Subordinate Judge on the facts.

As to the certificate of heirship, seeing that the family was admittedly undivided and that the plaintiff claimed by survivorship, we do not think the Succession Certificate Act applied. We follow the decision in *Subramanian Chetti* v. *Rakku Servai*(1). The same view was adopted in *Kuppa Thevan* v. *Rathnasami Nadar*(2) and *Haji Yacoob Khadir Diva Sait* v. *Ismail Sait*(3).

The appeal is dismissed with costs.

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(1) I.L.R., 20 Mad., 232.
(2) Second Appeal No. 1212 of 1891 (unreported).
(3) Civil Revision Petition No. 25 of 1892 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

1899. January 27.

SMITH (PLAINTIFF), APPELLANT,

v.

COELHO AND OTHERS (DEFENDANTS), RESPONDENTS.*

Suit on foreign judgment—Judgment not for an ascertained sum of money — Maintainability of suit.

Plaintiff, having obtained a decree in a District Court in the province of Mysore, applied to that Court, in execution of the said decree, for an account of certain proceeds alleged to be due to him under the decree. The application having been refused, and the refusal being upheld by the Chief Court of Mysore, plaintiff now brought a suit for an account in the District Court of South Canara:

Held, that as the foreign judgment on which the action purported to be brought was not a judgment for an ascertained sum of money, it constituted no foundation for an action.

APPEAL against the decree of H. G. Joseph, District Judge of South Canara, in Original Suit No. 82 of 1897.

Suit for an account. Plaintiff had, in 1890, filed a suit against a person since deceased (of whom the defendants were executrix, executor and widow, respectively) in the District Court of Shimoga in the Nagar division of the Province of Mysore, for foreclosure. A decree was passed therein in 1891, in terms agreed upon by the parties, plaintiff obtaining an order for foreclosure and it being declared that the proceeds of a crop of coffee for the years 1890 and 1891 should belong absolutely to him. In 1894, plaintiff presented an application in execution of the said decree praying the Court at Shimoga for an account of the proceeds of the crop of coffee for the year 1890. That petition was dismissed; as also was an appeal to the Chief Court of Mysore at Bangalore from the order of dismissal, though the Appellate Court disagreed with the lower Court as to the meaning of the expression "crop of 1890 and "1891." Plaintiff now sued the executors and other representatives of the defendant in the former suit for an account of the crop which was gathered in 1890, contending that both the Courts in Mysore had misconstrued the consent decree; and that since the latter was merely declaratory, neither Court could have legally

* Appeal No. 113 of 1898.

SMITH *v.* COELHO.

decided the question in execution proceedings; and that their judgments were therefore no legal bar to this suit.

The District Judge held that plaintiff was precluded from now questioning the jurisdiction of the Mysore Courts; that the question raised was one that should be decided in execution, and the suit was therefore barred; and that the subject-matter of it was *res judicata*.

The plaintiff preferred this appeal.

Mr. *K. Brown*, Mr. *R. A. Nelson* and *Narayana Rao* for appellant.

Pattabhirama Ayyar, *K. P. Madhava Rau*, *Ayya Ayyar* and *Srinivasa Ayyangar* for respondents.

JUDGMENT.—The action purports to be brought on a foreign judgment. The judgment on which the plaintiff proceeds is not a judgment for an ascertained sum of money and therefore affords no foundation for an action (*Sadler* v. *Robins*(1)).

The appeal must be dismissed with costs.

PRIVY COUNCIL.

SRI RAJA RAO VENKATA SURYA MAHIPATI RAMA KRISHNA RAO BAHADUR (PLAINTIFF), APPELLANT,

v.

THE COURT OF WARDS, AND VENKATA KUMARI MAHIPATI SURYA RAO (DEFENDANTS), RESPONDENTS.

P.C.* 1898. November 23, 24. 1899. February 24.

[On appeal from the High Court at Madras.]

Hindu Law—Impartible zamindari—Alienation by the owner by his will—Adopted son's claim—False description of the legatee—Designated person.

A zamindari in Madras, by custom descending to a single heir by primogeniture, and impartible, is not inalienable in virtue only of its impartibility, in the absence of proof of a custom having the force of law, or of some tenure attaching to the zamindari, rendering it inalienable. *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (L.R., 15 I.A., 51; I.L.R., 10 All., 272), a case which is applicable in Madras, decides that where there is an impartible estate descending by primogeniture, and in other respects the Mitakshara governs the rights of the parties, the

(1) 1 Camp., 253.

* *Present*: The Lord CHANCELLOR, Lord HOBHOUSE, Lord MACNAGHTEN, Lord MORRIS and Sir R. COUCH.

SRI RAJA RAO VENKATA SURYA MAHIPATI RAMA KRISHNA RAO BAHADUR v. THE COURT OF WARDS.

eldest son does not become a co-sharer with his father; and decides that the inalienability of the estate would depend upon custom which must be proved, or in some cases upon the nature of the tenure attaching to the zamindari:

Held, that there was no proof in this case of a custom which the Courts could *recognize, as having the force of law, not resting on the Mitakshara*, but argued to have been established by a long course of decision in the Madras Courts, against the validity of absolute alienation of an impartible zamindari:

Held, also, that this was not a case to which should be applied the doctrine that where there is a long course of decision that course should be supported, and the law not altered:

And *held*, that, inasmuch as here there was no coparcenary subsisting *between the zamindar and any member of his family, in the estate*, the zamindar had power to alienate it; and that he might exercise that power by will.

A Hindu adopting a son does not thereby deprive himself of any power that he may have to dispose of his property by will. There is no implied contract, on the part of the adopter, in consideration of the gift of his son by the natural father, not to make a will.

A bequest was made to a person whom the testator falsely described as his "aurasa," or "naturally-born" *son*. *This false* description, not involving any condition that the legatee should be the testator's son, did not invalidate the bequest to the designated person. *Fanindra Deb Raikat* v. *Rajeswar Dass* (L.R., 12 I.A., 72; I.L.R., 11 Calc., 463) distinguished.

APPEAL from a decree (3rd November 1896)(1), reversing a decree (21st December 1894) of the District Judge of Godavari.

The plaintiff, appellant, was the adopted son of Gangadhara Rama Rao, late Raja of the Pittapur zamindari in the Godavari district, which had been granted to his ancestor in 1647 A.D. by the ruling power, and of which a sannad had been granted by the British in 1802. The zamindari was an impartible estate descending by lineal primogeniture on a single heir. The Raja, who had succeeded on the death of an elder brother in 1854, died on the 22nd July 1890. On the 28th September 1873 he adopted the appellant, who was one of the sons of the Raja of Venkatagiri; and on the 1st October following he executed a document to the latter stating the adoption, and that he had constituted the adopted son heir to the zamindari and all his other properties. On the 5th October 1885 it was announced that the senior of the Raja's wives, whom he had married in 1861, had given birth to a son. This alleged son, Venkata Kumari, a minor, was the second defendant, by his guardian.

The Raja afterwards executed four wills set forth in the report of this case on appeal below. The last of them was dated the 17th

(1) I.L.R., 20 Mad. 167.

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March 1890. They were to the effect that all his property should go to his "aurasa," or natural son, the adopted son receiving an allowance in money. In 1890, on the death of the Raja, the Court of Wards took possession of his estate, and having declined to recognize the title of the adopted son became the first defendant in this suit. This was brought on the 1st April 1891 for a declaration of the plaintiff's title as the adopted son, denying that the second defendant was the late Raja's son or was entitled to inherit, or to take as legatee.

The Court of Wards answered that they were not necessary parties to the suit. The minor, admitting the adoption, alleged himself to be the Raja's son, and set up title under the Raja's will, as well as by inheritance.

There was no special family custom, as was admitted, rendering the inheritance inalienable. Except as to the impartibility, or descent to a single heir, the parties were governed by the Mitakshara law as prevailing in Southern India.

The principal question was whether the zamindari could be alienated by the Raja by his will. With this was connected whether the law declared in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(1) was applicable to Madras. Also whether there was a custom, in regard to impartible zamindaris, effective to restrain the zamindar from alienating for more than the period of his own life. Other points were in dispute,—whether the adoption of the plaintiff had precluded the Raja from bequeathing as he had done; and whether it was a condition in the will that the legatee should have been the Raja's son to enable him to take.

The District Judge found on the evidence that the minor defendant was not the son of the late Raja, nor of his wife. He was of opinion that the Raja was precluded by the adoption, and the deed *accompanying it, from* bequeathing his estate away from the adopted boy; that the will was conditional on the legatee being his son; and that the will was ineffectual to confer the impartible estate *held by the Raja which was inalienable*. He decreed that the plaintiff was entitled to possession.

On appeal, the High Court (SHEPHARD and DAVIES, JJ.,) reversed that decision; but the finding that the second defendant was not the son of the late Raja was not impugned before them.

(1) L.R., 15 I.A., 51; I.L.R., 10 All., 272.

They were of opinion that, independently of that, there was an effective disposition in the Raja's will in his favour. Their judgment is set forth in full at page 179 of I.L.R., 20 Mad.

Following *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(1), they held that the estate being impartible there was no right in any one to restrain the Raja from exercising his power to alienate it. As he was capable of making a gift of the estate in his lifetime, so also he could make a disposition of it by will.

On this appeal, preferred by the plaintiff, Mr. *J. D. Mayne* and Mr. *J. H. A. Branson* for the appellant:—The effect of the adoption of the appellant, and of thec ontract with his natural father, contained in the deed of the 1st October 1873, was to constitute the adopted son the Raja's heir, whose right of succession was to be subject only to the rights of such son as might afterwards be born to the Raja. The bequest of the testator's immoveable property to the second respondent was an attempt to deprive the appellant of his lawful claim to inherit; and was invalid, also, as being in breach of the contract made with the father of the adopted boy. Reference was made to Sir F. Macnaghten, 'Considerations on Hindu Law,' page 228; *Purshotam Shama Shenvi* v. *Vasudev Krishna Shenvi*(2).

It was argued, next, that the High Court Judges were wrong in the construction of the will. They should have construed the will not merely as one in favour of a designated person, but as a will containing a conditional bequest to the "aurasa son." The legatee not in fact answering that description, on that account the bequest should have been held void. Reference was made to *Fanindra Deb Raikat* v. *Rajeswar Dass*(3). The essence of the bequest was that it was made in favour of a legitimate natural-born son, and there being no one who could fulfil that condition, there was therefore no one who could take under the will.

On the principal question it was argued that this zamindari could not be alienated by the will of the zamindar. In *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(1) the decision was upon an appeal from the North-West Provinces, relating to the law of the Mitakshara as there administered. The High Court of Madras, in judgments which preceded the decision now appealed from, had

(1) L.R., 15, I.A., 51; I.L.R., 10 All., 272. (2) 8 Bom. H.C.R., (O.C.J.), 196
(3) L.R., 12 I.A., 72; I.L.R., 11 Calc., 468.

expressed the opinion that in reference to the Mitakshara, the unity of family rights was not altogether broken up where a joint and undivided estate was combined with the fact of the family inheritance being subject to customary impartibility. The view had been taken that, 'although only one member could hold the estate, others had an interest in it, as instanced by the succession to which each had a 'chance' of becoming entitled as a survivor. Reference was made to *Pareyasami* v. *Saluckai Tevar*(1). In the present case the High Court had followed the Allahabad decision, and it was submitted to be still a matter open to argument whether the law in the two provinces was so far identical as to render it right that the latter decision should give the law to Madras without a further judgment applying it thereto. However, reliance was mainly placed on there having existed in Madras a custom having the force of law, and not resting on the Mitakshara, to the effect that the ancient, impartible, zamindari of the province was inalienable by the holder except under restrictions. This custom had been upheld by a series of decisions in the Madras Courts, forming the best evidence of its prevalence. To pass on the estate with no permanent detriment to the interest of his successor was incumbent. The series commenced with two cases in 1804, referred to in *Rajah Enooyunty Sooriah* v. *Rajah Vencata Neeladry Rao*(2) decided in 1821. The latter case was reported in a note to *Raja Vencata Niladry Row* v. *Vutchavoy Vencataputty*(3). It was true that the case of 1821 proceeded upon the Regulation XXV of 1802; but, in that case, a grant made by the owner of an impartible zamindari was treated as valid as against himself, with an opinion expressed in the judgment that the grant would not be valid as against his successors. The regulation was thus regarded as protecting the previous usage.

Afterwards followed *Viswasu Ramaya* v. *Vahidally Beg*(4), *Sree Sree Ramachendra Sur Harishendana* v. *Jaganada Gajapati Narraina Deo*(5), *Subbarayulu Nayak* v. *Rama Reddi*(6), *Chintalapati Chinna Simhadriraj* v. *Zamindar of Vizianagram*(7), *Syed Ali Saib* v. *Zamindar of Salur*(8), *Muttu Viran Chetty* v. *Rani Kattama Natchiyar*(9),

(1) 8 M.H.C.R., 157. (2) 3 Knapp., at p. 27 Note.
(3) 3 Knapp., 23. (4) Mad. Dec., (Sud. Ad.), 1849, p. 51.
(5) Mad. Dec., (Sud. Ad.), 1861, p. 162. (6) 1 M.H.C.R., 141.
(7) 2 M.H.C.R., 128. (8) 3 M.H.C.R., 5.
(9) 4 M.H.C.R., 463, at p. 471.

Gavuridevamma Garu v. *Ramandora Garu*(1), *Vitla Butten* v. *Yamenamma*(2), *Pareyasami* v. *Saluckai Tevar*(3), *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru*(4). And lastly a decision which followed the Allahabad case was arrived at in *Beresford* v. *Ramasubba*(5). The list showed a continuous course of decision from the year 1804 to 1881 in favour of the view which the committee was now asked to take.

As to the effect given in the English Courts to a long series of judgments maintaining a view of the law in some degree contrary to later opinion reference was made to *Davidson* v. *Sinclair*(6), *Sailing Ship "Blairmore" Company* v. *Macredie*(7), and as showing how a different course of decision might long be pursued in different Presidencies of India to *Thumbasawmy Mudelly* v. *Mahomed Hossain Rowthen*(8). It was not contended for the appellant that an authoritative ruling like that issued in reference to the Mitakshara in the Allahabad case should be set aside, but the contention was that effect should be given to a custom in another province.

As to what constituted a valid custom reference was made to *Perumal Sethurayar* v. *Ramalinga Sethurayar*(9), *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(10), *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*(11). Lastly, it was contended that, even if the decision in the Allahabad case should be considered binding in Madras, it only applied to alienations for, and during, the life of the holder, and not to the devise of an impartible estate by him. The property might be impartible, and according to that decision alienable, yet it would remain joint family property of the type as to which the right by survivorship would take priority over a title derived under a bequest. It was submitted that the succession would be regulated by the law of survivorship; and that presupposed a joint and undivided interest in the members of the family, which would give a title taking precedence over a title under a will. The true doctrine was that separate property went to heirs whose title a will might defeat; but joint property, even where impartible, went

(1) 6 M.H.C.R., 93, at p. 105.
(2) 8 M.H.C.R., 6.
(3) 8 M.H.C.R., 157.
(4) I.L.R., 4 Mad., 250, at p. 266.
(5) I.L.R., 13 Mad., 197, at pp. 203, 208.
(6) L.R., 3 App. Cas., 765, at p. 787.
(7) [1898] App. Cas., 593, at p. 605.
(8) L.R., 2 I.A., 241; I.L.R., 1 Mad., 1.
(9) 3 M.H.C.R., 75.
(10) 14 M.I.A., 570.
(11) L.R., 17 I.A., 128; I.L.R., 18 Calc., 151.

by survivorship, a right which prevailed over the testamentary one, as it took effect before the latter could operate. Reference was made to *Vitla Butten* v. *Yamenamma*(1), and *Lakshman Dada Naik* v. *Ramchandra Dada Naik*(2). Also to *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*(3), *Periasami* v. *Periasami*(4), *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*(5).

Mr. *A. Cohen, Q.C.*, and Mr. *A. Phillips*, who appeared for both the respondents, were not called upon.

JUDGMENT.—The suit in this appeal was brought by the adopted son of the late Raja of Pittapur against the Court of Wards and the second respondent, who is the minor son of the late Raja. The plaint stated that the second respondent was not the son of the late Raja or of his wife; it also disputed his title to succeed under any wills left by the late Raja and alleged that a will said to have been made by him in favour of that defendant as his natural born son contravened the contract made at adoption; that the will was void by law and custom; and that the properties dealt with by it were inalienable and could not pass by it. The plaint prayed for a declaration that the second respondent was not the son of the late Raja and that the will was invalid. The Court of Wards in its answer denied that the plaintiff had a cause of action against it, and said that it was not liable to be sued. The second respondent admitted the adoption, asserted that he was the begotten son of the late Raja, that the will was absolute and unconditional, that certain property left by the Raja was impartible descending to the begotten son alone, and that the plaintiff as the adopted son was entitled only to one-fifth share of the self-acquired property. The suit was tried by the District Judge of Godavari, who made a decree which declared that the second respondent was not the son of the late Raja and that the will in his favour was wholly ineffectual and invalid. The defendants appealed to the High Court which reversed the decree of the District Court and dismissed the suit. The present appeal is from that decision. The conclusions which the High Court came to in favour of the appellant on the other

(1) 8 M.H.C.R., 6.
(2) L.R., 7 I.A., 181; I.L.R., 5 Bom., 48.
(3) L.R., 17 I.A., 128; I.L.R., 18 Calc., 151.
(4) L.R., 5 I.A., 61, at p. 70; *sub nom Sivagnana Tevar* v. *Periasami*, I.L.R., 1 Mad., 312.
(5) 13 M.I.A., 333.

questions in the appeal to it made it unnecessary for it to decide the issue whether the second respondent was the son of the late Raja, and that question was not determined by the Court.

As to the contention that there was a contract which prevented the Raja from making a will which would defeat the rights vested in the appellant by the adoption, their Lordships do not feel any difficulty. The agreement relied upon after stating that the Raja had adopted the appellant and given him the name which he now has and constituted him heir to his zamindari of Pittapur, &c., and to all other properties moveable and immoveable, says:—"I (the "Raja) agree in compliance with your request to your retaining "with my adopted son the thirty servants you have been retaining "and changing them from time to time and to permit you or any "one of your family to see him whenever you or they may come "to see him." There is nothing about the Raja not exercising any power which he might have by law of making a will. Saying he had constituted the appellant heir to his property means only that he had given him the same right of inheritance as a natural son would have. Mr. Mayne's argument, if their Lordships rightly understood it, that there was an implied contract not to make a will, the consideration for it being the giving of the son by the natural father is a novel one and without any authority to support it. If it were right an adopted son would be in a higher position than a natural son. A Hindu would be unable to adopt a son without depriving himself of any power which he might have by law of alienating his property or at least of disposing of it by a will.

Another contention for the appellant was that the will could not have effect in favour of a person who was not the natural son of the Raja. On the 16th February 1889 he made two wills—one in the Telugu language and the other in English. The difference between the translation in the record of the former and the English will is of no importance and the former may be used. Its terms are:—"Though it is not specially necessary according to Hindu law "that (property) should be passed to the aurasa son by means of a "will, I have written this will to declare my opinion to all people "that I have according to Hindu law passed the property to my "aurasa son without (property) being disturbed. It is hereby "settled that my entire property should go to my aurasa son "Kumara Mahipati Venkata Surya Rao and that cash (allowance) "settled already to be paid to my adopted son Venkata Mahipati

"Surya Rama Krishna Rao, the second son of the Raja of Venkata-"giri, according to his desire should continue to be paid." On the 7th September 1889 the Raja made another will by which, after saying it had been his intention to give all his moveable and immoveable property to his aurasa son (again naming him), he gave him his self-acquired properties and other immoveable property which he had got in pursuance of the will of his paternal aunt and also the whole of his moveable property. On the 17th March 1890 he made another will by which he confirmed the gifts to his aurasa son and the allowance to the adopted son. As the District Court decided that the second respondent was not the natural son of the Raja, and the High Court deemed it unnecessary to determine this issue, it must, for the present purpose, be assumed that he is not. Their Lordships are of opinion that there is a gift by the will to the second respondent and that the false description which must at present be assumed does not vitiate it. The case of *Fanindra Deb Raikat* v. *Rajeswar Dass*(1), which was referred to in the argument for the appellant, is distinguishable. The words of the angikarpatra, upon which the decision was given, are stated at page 89 and differ materially from the words in the Raja's will.

The third and really important question in the appeal is whether the Raja had power to alienate the impartible estate. It is stated in the case for the appellant that for the purposes of this appeal the appellant admits that the property was not inalienable by virtue of any special family custom or tenure attaching to the zamindari.

In *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(2), a suit was brought by the respondent to set aside a deed of gift, which the Raja appellant had executed, of seventeen villages, part of an ancestral impartible raj descendible to a single heir by the rule of primogeniture, in favour of his younger wife on the ground that, according to the provisions of Hindu law and the prescriptive and recognised usage, the Raja had no right under any circumstances except to enjoy the estate during his lifetime and use its income, leaving the whole estate at his death to his successor. The respondent was the mother and guardian of the minor son of the Raja. The Courts below held that the estates of the raj though impartible were in the

(1) L.R., 12 I.A., 72; I.L.R., 11 Calc., 463.
(2) L.R., 16 I.A., 51; I.L.R., 10 All., 272.

nature of joint family property, and were therefore, according to the law of the Mitakshara, inalienable except for necessary objects, that the evidence did not establish the customary right alleged by the Raja of alienating, and consequently the alienation in question was void and must be set aside. Whether the alienation would be valid during the lifetime of the Raja does not appear to have been considered. It was held to be wholly void. The defendant appealed to Her Majesty in Council. In the judgment given in the appeal their Lordships, after referring to the passages quoted by the Judges of the High Court in support of their view, referred to other decisions of this Committee on the same subject and also to *Thakoor Kapilanauth Sahai Deo* v. *The Government*(1), where the plaintiff alleged that the descent of the estate was governed by Mitakshara law, that the estate was impartible and descendible according to the law of primogeniture to the male heirs of the original grantee, and it was held that the estate was not on the case stated shown to be inalienable. They then held this to be the correct view and that where the Mitakshara law prevails and there is the custom of primogeniture the eldest son "does not "become a co-sharer with his father in the estate, the inalienability "of the estate depends upon custom which must be proved or it may "be in some cases upon the nature of the tenure."

Mr. Mayne, in his able argument for the appellant that this decision should not be held to be binding in the Madras Presidency, contended that there was a custom co-extensive with the province of Madras with regard to every impartible zamindari, and that a long course of decisions in the Courts of that province, not resting on the Mitakshara law, had established a custom of inalienability. It is therefore necessary to examine these decisions.

The earliest reported case is a judgment of the Sudder Adawlut in *Rajah Enoogunty Sooriah* v. *Rajah Vencata Neeladry Rao*(2). The marginal note to it is:—"A grant made by a zamindar in "1804 of part of his zamindari which he held at that time under "an eight years' lease and which was afterwards confirmed to him "upon the permanent settlement is valid as against himself. "*Semble* such a grant would not be valid against his successors or "against Government." The judgment is founded on section 8 of Regulation XXV of 1802. It says:—"Section 8 provides for the

(1) 13 B.L.R., 445.

(2) 3 Knapp., at p. 27 Note.

"payment of the public assessment on all separated portions of "a zamindari by a grantee if the transfer be regularly made "and, if otherwise, by the grantor, and as a protection to the "heirs the validity of the transfer is made to depend on its being "conformable to the law of the parties and the regulations of the "Government;" and by section 12 zamindars are declared absolutely incompetent without the previous consent of Government to make any appropriations intended for the purpose of effecting a permanent reduction of the permanent assessment on their zamindaris. It is then said by the Court:—"The clear and "obvious intent of the restriction in question as well as of the cor-"responding legislative enactments being to defeat improper "alienations to the prejudice of the rights of the Government or of "the successor to the estate, it follows by a common rule of con-"struction that such alienations are voidable on the determination "of the interest of the person who makes them." This is right if it applies only to alienations, which are not "conformable to the law "of the parties or the Regulations of the Government or not made "with its consent." If it goes beyond that it is in their Lordships' opinion erroneous and not justified by the sections referred to, the object of the regulation being apparently to keep the assessment permanent. There is no rule of construction which authorises it. This judgment was given in 1822. The next was in 1849. It is *Viswasu Ramaya* v. *Vahidally Beg*(1). It was in a special appeal from a decision of the Civil Judge of Nellore, heard by one Judge of the Sudder Court. The claim in the suit was for the recovery of an allowance under two grants originally made by the defendant's grandfather and subsequently renewed by the succeeding inheritors. The Civil Judge had reversed the decision of the Munsif in the plaintiff's favour and the Sudder Court confirmed his decision saying:—"In a somewhat similar claim"—which appears from the note in the margin to be the case before noticed—"to the one "under consideration, in which the same principle was involved, "the Court of Sudder Adawlut decided that as the obvious intent "of the laws in force was to defeat improper alienations of land or "the produce of land to the prejudice of the rights of the Govern-"ment or of the successor to the estate it follows by a common "rule of construction that such alienations are voidable on the

(1) Mad. Dec., (Sud. Ad.), 1849, p. 51.

"determination of the interest of the person who makes them." There is a similar decision in *Sree Sree Ramachendra Sur Harishendana* v. *Jaganada Gajapati Narraina Deo*(1). In 1862 the question came before the High Court of Madras in a special appeal (*Subbarayulu Nayak* v. *Rama Reddi*(2)). The Court, after considering sections 8 and 12, decided it in the same way, saying that this construction of the Regulations was supported by the observations of the Court in *Rajah Enoogunty Sooriah* v. *Rajah Vencata Neeladry Rao*(3) in giving judgment on the point for decision in that case which was different from the present. There are two other cases in the same volume (*Malavaraya Nayanar* v. *Oppayi Ammal*(4) and *Narayana Devu* v. *Harischendana Devu*(5)) in which the decision was followed, the whole appearing to rest upon the supposed rule of construction. The next case is *Chintalapati Chinna Simhadriraj* v. *Zamindar of Vizianagram*(6). In that it was held by the High Court of Madras that the *ratio decidendi* of all the cases down to the two latest clearly was that a zamindar under the permanent settlement had really an estate analogous to an estate tail as it originally stood upon the statute *de donis*. This was introducing into the law of the Madras Province what is said in *Juttendromohun Tagore* v. *Ganendromohun Tagore*(7) to be "a novel mode of inheritance, inconsistent "with the Hindu law." In the next case (*Syed Ali Saib* v. *Zamindar of Salur*(8)) it was held (Holloway, J., *dissentiente*) that, where a zamindar alienated a part of the zamindari and the terms of Regulation XXV of 1802, section 8, were not complied with, the alienation was invalid against his grandson. Mr. Justice Holloway said, with reference to the decisions of Sudder Court, that they professed to be based upon the decision of 1821 (1822 ?) and that the Court held the settlement to be in the zamindar for his life with remainder to his heirs and successors in perpetuity. "They held the words "'heirs and successors,' as an English real property lawyer would "say, to be words of purchase and not of limitation." The next case referred to by Mr. Mayne (*Muttu Viran Chetty* v. *Rani Kattama Natchiyar*(9)) was a case of self-acquired property, and has no application to the present. After this the doctrine of the estate

(1) Mad. Dec., (Sud. Ad.), 1861, p. 162.
(2) 1 M.H.C.R., 141.
(3) 3 Knapp., at p. 27 Note.
(4) 1 M.H.C.R., 349.
(5) 1 M.H.C.R., 455.
(6) 2 M.H.C.R., 128.
(7) L.R., I.A., Sup. Vol., 47 at p. 74.
(8) 3 M.H.C.R., 5.
(9) 4 M.H.C.R., 463.

tail seems to have been abandoned, for in the next case decided in 1867 (*Gavuridevamma Garu* v. *Ramandora Garu*(1)) the High Court held that it was clearly the law that the usage of succession to zamindaris in the Presidency of Madras by a single heir by primogenitureship did "not interfere with the general rules of "succession further than to vest the possession and enjoyment of "the corpus of the whole estate in a single member of the family "subject to the legal incidents attached to it as the heritage of an "undivided family—that being all that the purpose of the usage, "namely the preservation of the estate as an impartible raj, renders "necessary. The unity of the family right to the heritage is not "dissevered any more than by the succession of co-parceners to "partible property, but the mode of its beneficial enjoyment is "different." This was taking a very different ground from what was taken in the previous cases. According to it, the holder of the zamindari has not a life estate in it, the zamindari, although he is in sole possession of it, being by a kind of legal fiction the property of the family and each member of it having a share in the property although he can do no act as proprietor. The next case is *Pareyasami* v. *Saluckai Tevar*(2) where a similar opinion is stated. It is said (page 177) of the holder of an impartible estate descending to a single heir who was a member of an undivided family subject to the law of the Mitakshara, that the estate held by him, although subject to the peculiar incidents of such an estate and possessed by him free from co-parcenary rights in others, was not entirely at his disposal; that "he should be regarded as possessing only the "qualified powers of disposition of a member of a joint family with "such further powers or it may be with such restrictions as spring "from the peculiar character of his ownership and that these powers "fall short of a right of absolute alienation of the estate." It is to be noticed that here the estate is said to be possessed free from co-parcenary rights in others. This is not consistent with the view in the former case that the estate, whilst in the possession and enjoyment of one person, is still the property of the family in which each member of it has a share. There is a remarkable divergence of views in these judgments which, their Lordships think, deprives them of much authority. In the case of *Beresford* v. *Ramasubba*(3) the alienability of an impartible zamindari came

(1) 6 M.H.C.R., 93.
(2) 8 M.H.C.R., 157.
(3) I.L.R., 13 Mad., 197.

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again before the Madras High Court on appeal from the decision of a Judge sitting on the original side. He had followed the decisions in *Muttu Viran Chetty* v. *Rani Kattama Natchiyar*(1) and *Gavuridevamma Garu* v. *Ramandora Garu*(2) and made a decree declaring a mining lease by the owner of an impartible zamindari void. The two Judges of the Appellate Division of the High Court held that they were bound by the decisions of this committee in *Rajah Udaya Aditya Deb* v. *Jadub Lal Aditya Deb*(3), and *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(4) and remanded the case to try whether by family custom the zamindari was inalienable for purposes other than those warranted by the Mitakshara law. This decision was in 1889. In the present case the High Court has said it is bound to act upon the doctrine laid down by the Judicial Committee and refers to the distinction made by the Judicial Committee between a matter of succession by inheritance and a question of alienability. It is not necessary now to dwell upon this as in the argument of this appeal an entirely new view of the question was taken. Mr. Mayne said that there was a custom co-extensive with the province of Madras with regard to every impartible zamindari, that a course of decisions had established a custom, a long series of decisions not resting upon the Mitakshara law. Their Lordships have felt a difficulty in appreciating this argument. It assumes that throughout the province of Madras the law laid down in those decisions which, until they were reversed by the higher authority, were the law of Madras, was obeyed. The supposed custom followed the law. Their Lordships were referred to *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(5) as showing what was a valid custom. There it is said in the judgment with reference to long established usages existing in particular districts and families in India that it is of the essence of special usages modifying the law of succession that they should be ancient and invariable. This custom now relied upon did not modify the law. It had no force independently of the law. There is no proof here of any custom or usage against alienation, which the Courts in India should recognise as having the force of law.

One more question remains. It was argued that the decision in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(4) did not extend to a

(1) 4 M.H.C.R., 463.
(2) 6 M.H.C.R., 93.
(3) L.R., 8 I.A., 248; I.L.R., 5 Calc., 113.
(4) L.R., 15 I.A., 51; I.L.R., 10 All., 272.
(5) 14 M.I.A., 570 at p. 585.

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will and *Vitla Butten* v. *Yamenamma*(1) was referred to. That was a case of an admitted co-parcenary between the maker of the will and his adopted son and the latter would take as the surviving co-parcener, a title which was held to be a prior title to that by devise. It is not applicable here, where co-parcenary between the Raja and the adopted son is not admitted but the contrary is held. In the present case, according to the decision in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(2) the appellant did not become a co-parcener with the Raja. If the Raja had power to alienate he might do it by will, and the title by the will would have priority to the title by succession. In *Raja Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund Mansingh*(3) referred to by Mr. Branson it was a question of succession by an illegitimate son to the legitimate son of his father. There was no question of the power of alienation. The language used was intended to apply only to the succession to the estate. It is true that prior to 1889 there was a series of decisions in the Madras Courts beginning, as far as appears, in 1822, but the reasons given for them are not consistent. At first they were made to depend upon the construction of Regulation XXV of 1802, afterwards upon the rights of the members of an undivided family under the Mitakshara law. In 1889 the Madras High Court held itself to be bound by the decision of this Committee, and overruled those decisions. The contention for the appellant now is that the decision of the High Court in 1889 should be overruled, and it should be held that the decision in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(2) should not be held to be the law in the province of Madras. In their Lordships' opinion this is not a case to which they should apply the doctrine that where there is a long course of decisions they ought not to be reversed and the law be thus altered. The argument for the appellant has failed to convince them that the judgment appealed from ought not to be affirmed, and they will humbly advise Her Majesty to affirm it and to dismiss the appeal. The appellant will pay the costs of the second respondent, the Court of Wards not asking for their costs.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Frank Richardson & Sadler*.

Solicitor for the respondents—*The Solicitor, India Office*.

(1) 8 M.H.C.R., 6.
(2) L.R., 15 I.A., 51; I.L.R., 10 All., 272.
(3) L.R., 17 I.A., 128; I.L.R., 18 Calc., 151.

PRIVY COUNCIL.

P.C.* 1898. February 11, 15, 16. 1899. March 11.

SRI BALUSU GURULINGASWAMI (PLAINTIFF), APPELLANT,

v.

SRI BALUSU RAMALAKSHMAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.

[On appeal from the High Court at Madras.]

P.C.† 1898. July 6, 18. 1899. March 11.

RADHAMOHUN (REPRESENTATIVE OF BENI PRASAD, DECEASED PLAINTIFF) APPELLANT,

v.

HARDAI BIBI AND ANOTHER (DEFENDANT), RESPONDENTS.

[On appeal from the High Court for the North-Western Provinces at Allahabad.]

Hindu Law—Validity of the adoption of the only son of his natural father.

On the general question as to the validity by Hindu Law of the adoption of an only son of his natural father, decided in one judgment upon these two appeals:

Held, that such an adoption is not contrary to Hindu Law, but valid.

The authority of a widow, in reference to adoption, not being identical in different schools of Hindu Law, it was *held*, on a question peculiar to the appeal from Madras, that it is there established in regard to the giving of a boy in adoption by the widowed mother that unless there has been some express prohibition by the husband, the wife's power, with the concurrence of sapindas, where that is required, is co-extensive with the power of the husband. The adoption of an only son is not an act so improper but that a widow has power to effect it with the assent of the sapindas in the absence of express power from her husband.

THE first appeal heard on the 11th, 15th and 16th February 1898, was from a decree (20th September 1894) of the High Court at Madras(1), affirming a decree (20th September 1893) of the District Judge of Godavari.

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* *Present at the hearing of the appeal from Madras:* Lords HOBHOUSE and MACNAGHTEN, and Sir RICHARD COUCH.

† *Present at the hearing of the appeal from the North-Western Provinces*, decided in the same judgment with the above: Lords HERSCHELL, WATSON, HOBHOUSE and MACNAGHTEN, and Sir RICHARD COUCH.

NOTE.—An abridged report is here given of the appeal from the North-Western Provinces. The full report of it will be found in its place in the I.L.R., 21 All for 1899.

(1) (1894) I.L.R., 18 Mad., 53.

SRI BALUSU GURULINGASWAMI *v.* SRI BALUSU RAMALAKSHMAMMA. — RADHAMOHUN *v.* HARDAI BIBI

The decree from which this appeal was preferred affirmed a decree of the original Court which dismissed the suit of the plaintiff-appellant. The suit was brought to have set aside an adoption made on the 10th November 1888 by the first defendant, respondent, Ramalakshmamma, who was the childless widow of Butchi Savarayudu, then deceased without a son. He was the last male owner of villages in which the plaintiff-appellant claimed an interest as reversioner and collateral relation of the deceased.

The adopted son was the second respondent, Pattabhiramayya. He was the only son of a kinsman of the deceased husband of the adopting widow, the first respondent, who made this adoption with the assent of her late husband's sapindas, several of whom assented in writing. The natural father had died when the son was a few months old. It was found below that he had expressed his approval of this adoption.

The first and principal question raised in both the appeals was whether the adoption of an only son was valid by Hindu Law. In the appeal from Madras further questions related to the power of a widowed mother to give in adoption, and to the power of the other widow to take, under the circumstances, with legal effect.

An appeal from the judgment of the first Court that the adoption was valid, was heard by a Division Bench of the High Court (MUTTUSAMI AYYAR and SHEPHARD, JJ.). Their judgments are reported at length in *Gurulingaswami* v. *Ramalakshmamma*(1). They followed a course of decisions in Madras in favour of the validity of an only son's adoption, but did not examine those judgments of the High Courts in Bengal and Bombay which were to the contrary.

On this appeal, Mr. *J. D. Mayne*, for the appellant, argued that the adoption of an only son of his natural father was prohibited by the Hindu Law, and was void. The different schools of that law were in accord upon the texts, but the Courts were not agreed as to whether the injunction was a positive law on the subject, or was only addressed to the moral sense. All the early authorities on this cited a text of each of the three ancient sages, Baudhayana, Vasishta, and Saunaka. He referred, with reference to the first two texts, to Volume XIV of the 'Sacred Books of the East,' edited by Sir F. Max-Müller, pages 334 and 75. These smritis were all

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(1) (1894) I.L.R., 18 Mad., 53.

to the same purport, that no man should give or accept an only son in adoption, "since he must remain for the obsequies of his ancestor"; Colebrooke's 'Digest of Hindu Law,' Volume II, page 387, Book V, Chapter IV, Section VIII, pl. cclxxiii and the Dattaka Mimamsa, Section IV, Clause 1, in Stokes' 'Hindu Law Books,' page 571, were referred to. The third text, Saunaka's, was quoted in the Vyavahara Mayukha, Chapter IV, Section V, pl. 9, to be found in Stokes' 'Hindu Law Books,' page 61, where also were the Dattaka Mimamsa and Dattaka Chandrika. The above texts were all three cited in *Lakshmappa* v. *Ramava*(1). Reference was made to page 307 of Colebrooke's 'Translation of the Mitakshara on Inheritance,' Chapter 1, Section XI, Verses 9 to 12; 'Sarasvati Vilasa,' Verses 368, 369; 'the Viramitrodaya,' translated by Golap Chandra Sarkar, Chapter II, Part II, Section 8, at page 115.

The opinions of modern English writers were referred to, including Colebrooke and Ellis, quoted in the Appendix, in Strange's 'Hindu Law,' Volume II, page 105, and Chapter IV of Volume I, where the validity of such adoptions was discussed; Strange's 'Manual of Hindu Law,' Chapter III, Verses 93, 94, page 23; Sutherland's 'Synopsis on the Hindu Law of Adoption'; Sir W. H. Macnaghten's 'Principles and Precedents of Hindu Law,' Volume I, Chapter VI, and Volume II, at pages 178 and 179; Sir F. W. Macnaghten's 'Considerations on Hindu Law,' page 147; Steele's 'Law and Custom of Hindus in the Deccan,' page 183; West and Bühler's 'Hindu Law,' 3rd edition, pages 908, 909 and 1040; H. H. Wilson's observations in note at page 809 of the last.

Judicial decisions were in *Lakshmappa* v. *Ramava*(1); *Gopal Narhar Safray* v. *Hanmant Ganesh Safray*(2); *Ganga Sahai* v. *Lekhraj Singh*(3); *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra*(4). On the maxim, "factum valet," some of the decisions relied; but, as was shown in *Lakshmappa* v. *Ramava*(1), above cited, that expression was inapplicable. In the case of an only son being adopted in contravention of the sacred texts there could be no factum, for such an adoption was void and of no effect.

A course of decisions in Madras from the beginning of the century down to 1888 upheld the legality of the adoption in question.

(1) (1875) 12 Bom. H.C.R., 364, at p. 371.
(2) (1879) I.L.R., 3 Bom., 273, at p. 293.
(3) (1886) I.L.R., 9 All. 253, at p. 296.
(4) (1878) L.R., 5 I.A., 40.

They were *Veerapermall Pillay* v. *Narrain Pillay*(1), a case commented on by Sir T. Strange, Chapter IV of Strange's 'Hindu Law,' Volume I, page 102; *Arnachellum Pillay* v. *Iyasamy Pillay*(2); *Permaul Naicken* v. *Pottee Ammal*(3), this last being the case of an eldest son; *Chocummal* v. *Surathy Amay*(4), another case of an eldest son. Then the important case of *Chinna Gaundan* v. *Kumara Gaundan*(5), where Scotland, C.J., regarded the question of the legality of the adoption when made as concluded by authority; *Narayanasami* v. *Kuppusami*(6); *Sri Ammi Devi* v. *Sri Vikrama Deva*(7).

In the North-Western Provinces, judgments in favour of this adoption were given in the Full Bench decision in *Hanuman Tiwari* v. *Chirai*(8). Though Turner, J., had differed, in regard to the prohibition on the father to give and in regard to the religious object of the adoption, the opinion of the majority appeared to be based on *Chinna Gaundan* v. *Kumara Gaundan*(5). In 1889 doubts were expressed in *Tulshi Ram* v. *Behari Lal*(9). However, the unanimous judgment now appealed from followed the judgment of the majority in *Hanuman Tiwari* v. *Chirai*(8), though the reasons given by Edge, C.J., and Knox, J., were more elaborate. Their judgments referred to what was called Jaimini's rule of construction, which seemed never before to have been referred to by the Courts as a governing authority. This was that where the sacred texts of the Rishis assign reasons, their direction was not imperative, but only admonitory; but that where a rule was pronounced without reasons given it was of binding force, and an obligation having the force of law. As to this, reference was made to Mandlik's 'Vyavahara Mayukha,' Appendix IV, Section II, page 499.

It was submitted that the supposed conclusion of the question in Madras by a course of judicial decisions, a result stated in *Chinna Gaundan* v. *Kumara Gaundan*(5), was a mistake. However, the adoption of an only son did not arise again till 1886, the question in that year coming before Collins, C.J., and Muttusami Ayyar, J., when the Court declined to depart from the previous

(1) (1801) 1 Notes of Cases at Madras, p. 78.
(2) (1817) Mad. Sel. Dec., 154, at p. 156.
(3) (1851) Mad. Sel. Dec., 234.
(4) (1854) Mad. Sel. Dec., 31, at pp. 32, 36.
(5) (1862) 1 M.H.C.R., 54.
(6) (1886) I.L.R., 11 Mad., 43, at p. 46.
(7) (1888) L.R., 15 I.A., 176; I.L.R., 11 Mad., 486, at p. 489.
(8) (1879) I.L.R., 2 All., 164.
(9) (1889) I.L.R., 12 All., 328, at p. 331.

course. The High Court in the North-Western Provinces had come to a similar decision that such an adoption was legal when it had been made.

The argument was that the prohibition of the adoption of the only son, though directed against the giving, not against the receiving, was of equal effect against the receiving, for, if there could be no lawful giving, there could be no lawful acceptance. Hence the true view was that the whole transaction was a nullity. The giving was prohibited; see Manu, Chapter IX, Verses 141 142, 159, 168. The review of the cases in the judgment of Edge, C.J., in *Beni Prasad* v. *Hardai Bibi*(1), now appealed from, was referred to, and then Bengal cases were mentioned. *Nundram* v. *Kashee Pande*(2), *Debee Dial* v. *Hur Hor Singh*(3); *Sreemutty Joymony Dossee* v. *Sreemutty Sibosoonderi Dossee*(4), which was mainly based on Strange's 'Hindu Law,' Volume I, page 86; *Mussamut Tikdey* v. *Lalla Hureelall*(5), *Manick Chunder Dutt* v. *Bhuggobutty Dossee*(6).

In the case of *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi*(7), which preceded the last cited, the adoption was held to be invalid, that of an only son having been peremptorily prohibited by the texts. This was the judgment of Dwarkanath Mitter, J., and of Louis Jackson, J.; the former arriving at that opinion without referring to Jaimini's rule, and declining to apply the maxim "factum valet." This was followed by a judgment in which the authorities were well examined by Markby, J., and in this latter judgment Garth, C.J., had concurred, see *Manick Chunder Dutt* v. *Bhuggobutty Dossee*(6).

The Bombay decisions dealing with this question were as follow:—

Huebut Rao Mankur v. *Govind Rao Mankur*(8); *Bhaskar Trimbak Acharya* v. *Mahadev Ranyi*(9); *Lakshmappa* v. *Ramava*(10); *Rangubai* v. *Bhagirthibai*(11); *Somasekhara Raja* v. *Subhadramaji* (12); *Kashibai* v. *Tatia*(13); *Waman Raghupati Bova* v. *Krishnaji*

(1) (1892) I.L.R., 14 All., 67.
(2) (1823) 3 S.D.A., 232; 4 S.D.A., 70.
(3) (1828) 4 S.D.A., 320.
(4) (1837) Fulton's Rep., 75.
(5) (1864) Suth. W.R., 133.
(6) (1878) I.L.R., 3 Calc., 443.
(7) (1868) 1 B.L.R., 221.
(8) (1821) 2 Borr., 75, 79, 85.
(9) (1869) 6 Bom. H.C.R. (O.C.J.), 1, at p. 4.
(10) (1875) 12 Bom. H.C.R., 364, at p. 376.
(11) (1877) I.L.R., 2 Bom., 379.
(12) (1882) I.L.R., 6 Bom., 524
(13) (1883) I.L.R., 7 Bom., 221.

Kashiraj Bova(1). In the last case a Full Bench judgment delivered by Sir C. Sargent, C.J., declared such an adoption to be invalid, following the decision of the Calcutta Court in the case of the *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi*(2), and disagreeing with the Madras and Allahabad decisions.

In *Basava* v. *Lingangauda*(3) the adoption of an only son was upheld on the ground that special custom allowing it was proved, and in *Raiji Jadav* v. *Bai Mathura*(4) it was decided that the adoption of one who at the time was an only son was contrary to law, and his adoption was not rendered valid by other sons being afterwards born to his parents.

Lastly, with regard to this adoption having purported to be effected by a widow, it was without doubt in violation of an injunction contained in the shastras and morally binding upon a Hindu. Could the assent of sapindas be legally sufficient to give authority to the widow in such a case, where direct authority from the deceased husband was wanting? It was submitted that such an assent by sapindas when the objects of the adoption, the spiritual benefit to the deceased husband, are regarded, could hardly be sufficient to complete indirectly the widow's authority to adopt. With reference to the character of the assent by sapindas, were cited, *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(5), *Lakshmappa* v. *Ramava*(6), *Somasekhara Raja* v. *Subhadramaji*(7) and *Nilmadhub Doss* v. *Bishumber Doss*(8)

Mr. *J. H. A. Branson* and Mr. *A. Phillips*, for the respondents, argued that the judgment of the High Court was right. The adoption of an only son was no violation of Hindu Law, and was valid in the Madras Presidency. This had been established by the cases in the Madras Court, referred to in the argument for the appellant to show exactly what the course of decision had been; and whether the point had been concluded by authority or not in 1862, at all events it was concluded by subsequent decisions, affirming what had been, at that day, the better opinion. The course of decision extending back for about a century had recognized that the texts of the Rishis on this subject were an admonition

(1) (1889) I.L.R., 14 Bom., 249.
(2) (1868) 1 B.L.R., 221.
(3) (1894) I.L.R., 19 Bom., 428.
4) (1894) I.L.R., 19 Bom., 658.
(5) (1868) 12 M.I.A., 397, at p. 442.
(6) (1875) 12 Bom. H.C.R., 364, at p. 376.
(7) (1882) I.L.R., 6 Bom., 524.
(8) (1869) 13 M.I.A., 85, at p. 100.

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which was not binding in law. In *Veerapermall Pillay* v. *Narrain Pillay*(1) decided in 1801, reference was made to a still earlier case of the Raja of Tanjore in which it was held that the adoption of an only son, though reprehensible, was yet a legal adoption according to the usage of Hindus. They referred to the decision in *Hanuman Tiwari* v. *Chirai*(2), and to the decisions cited in the judgment now appealed against, and submitted that the decisions in Madras and the North-Western Provinces arriving at the same result outweighed the decision in Bombay in *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova*(3). The grounds for departing from the long course of decision in Madras would be insufficient. Sir J. W. Colvile's words in *Thakoorain Sahiba* v. *Mohun Lall*(4) were appropriate, "to alter the law of succession as established by a uniform course of decision, or even by the dicta of received treatises, by some novel interpretations of the vague and often conflicting texts of the Hindu commentators, would be dangerous, inasmuch as it would unsettle existing titles." *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(5) was also cited, where the same authority explained that the duty of a European Judge in regard to the Hindu Law was not so much to inquire whether a disputed doctrine was fairly deducible from the earlier sources, as to ascertain whether it had been received by the particular school with which that Judge was dealing and had there been sanctioned by usage. The importance of the latter was marked by the observation that "by the Hindu system, clear proof of usage "would outweigh the written text of the law." The judgment of Edge, C.J., was then referred to, and it was submitted that his reasons, to which was added by Knox, J., a knowledge of the Sanskrit, should preponderate over the Full Bench judgment in Subordinate Judge Bombay above mentioned.

The second of these two appeals was from a decree (18th March 1892)(6) of the High Court for the North-Western Provinces at Allahabad, affirming a decree (21st November 1887) of the Subordinate Judge of Benares.

The decree appealed from affirmed a decree which dismissed the suit of the plaintiff-appellant for a declaration that the adoption

(1) (1801) 1 Notes of Cases at Madras, 78, at pp. 91, 126.
(2) (1879) I.L.R., 2 All., 164.
(3) (1889) I.L.R., 14 Bom., 249, at p. 255.
(4) (1867) 11 M.I.A., 386, at p. 403.
(5) (1868) 12 M.I.A., 397.
(6) (1892) I.L.R., 14 All., 67.

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by the first defendant, respondent, of the second defendant, respondent, was invalid and void on the ground that the latter was the only son of his father, and could not be given and received in adoption.

The Subordinate Judge in his judgment followed the Full Bench decision of the Allahabad High Court in *Hanuman Tiwari* v. *Chirai*(1), decided by a majority of the Judges (Sir R. Stuart, C.J., and Pearson, Spankie, and Oldfield, JJ.), Turner, J., dissenting. That decision was that the adoption of a boy who was the only son of his natural father was lawful and valid.

On an appeal by the plaintiff to the High Court the question of the validity of such an adoption was referred by a Divisional Bench (Mahmood and Young, JJ.) to the Full Court. Their order of reference mentioned the dissent of Turner, J., and stated that there had been since 1879 no reported case showing that the judgment of that year had been followed, but that in two unreported cases there had been references of this question to a Full Bench. These cases, however, had been disposed of on grounds other than the point referred.

The following were the questions referred by the order to a Full Bench, which was composed of Sir John Edge, C.J., and Straight, Mahmood and Knox, JJ.:—

First, the adoption of an only son having taken place in fact, is such adoption null and void under the Hindu Law? *Second*, if so generally, does the subsequent birth of sons to the natural parents of the son given in adoption have a retrospective effect of validating it? *Third*, does the circumstance that the adopted son is the sagotra, or descended from one common ancestor with the adoptive father, render his case an exception to the general rule of prohibition against adoption of only sons?

The answer of the Full Bench to these questions was given by the Chief Justice with the concurrence of all the Judges to the effect that the adoption of an only son was valid by Hindu Law, and that it was unnecessary for the disposal of this suit to answer the other questions referred.

The judgments of the Chief Justice and all the Judges of the Full Bench are reported at length in *Beni Prasad* v. *Hardai Bibi*(2).

(1) (1879) I.L.R., 2 All., 164.
(2) (1892) I.L.R., 14 All., 67.

This appeal having come on for hearing on the 29th June and the 6th and 18th July, 1898, Mr. *O. W. Arathoon*, for the appellant, argued that there was an error in the judgment of the Full Bench. The judgment should have been that the adoption of an only son was altogether null and void according to the Hindu Law. The I.L.R., 21 All., for 1899, contains the report of his argument, with references to the authorities, and the decided cases.

Mr. *J. D. Mayne*, and Mr. *G. E. A. Ross*, for the second respondent, Ram Parshad, argued in support of the decision of the Full Bench. Their arguments are reported in that volume of the I.L.R.

Mr. *O. W. Arathoon* replied.

The second of these two cases having been heard, their Lordships' judgment was afterwards given on the 11th March 1899 by Lord Hobhouse:—

JUDGMENT.—The first of these two cases, which comes from Madras, was argued in February 1898, but the judgment was postponed for the hearing of the second, which comes from Allahabad. The reason was that each case raises a question of general importance on which different views have been taken by different High Courts, and it was agreed on all hands to be advantageous that the two litigations should be under consideration at the same time. The Allahabad appeal was argued in the month of July last, and their Lordships are now prepared to state their opinions on both cases.

In the Madras case, the plaintiff sued as one in the line of succession to the last owner of an estate who had died without issue. The principal defendant was a boy who had been adopted by the last owner's widow with the consent of the family gnatis or sapindas. The plaintiff claimed a declaration that the adoption was invalid. His main ground was that the adopted boy was the only son of his father. The defendants showed that the natural father of the boy authorised his widow to give him in adoption in the way which was actually effected between the two widows, and that the plaintiff himself in his character of sapinda was a party to the transaction. In addition to asserting the legal validity of the adoption, they pleaded that the plaintiff was estopped by his concurrence in it.

The District Judge gave no opinion on the point of estoppel. He found that the law in Madras was settled, and he gave judgment in the following terms:—

"The case illustrates how the people of this Presidency have "settled down under the law as enunciated by the Madras High "Court so long ago as 1862(1), and re-affirmed in 1887(2), and "it is impossible to say how many adoptions of only sons may "have been made during the last thirty years on the faith of such "enunciation of the law, and what innumerable rights might be "disturbed by any contrary decision after such a lapse of time."

The case was heard on appeal before the late Judge Sir T. Muttusami Ayyar and Mr. Justice Shephard who affirmed the decree below. The learned Judges did not express any original opinion of their own on the main question. They thought that there was no estoppel because at the date of the adoption nobody thought of its being illegal. As to its legal validity they found that all the Madras decisions had been in its favour and that the Madras Courts were right in following an unbroken current of authority in that Presidency notwithstanding differences of view in other Courts.

At this Bar two points have been taken: *first*, that the gift or reception of an only son in adoption is invalid in law; and *secondly*, that, if not invalid when the boy is received by the adoptive father or given by the natural father, it is so improper that, in the absence of express authority given by a husband, his widow has no power to effect it.

In the Allahabad appeal it is not necessary to make any statement of facts because the decree appealed from depends entirely on the answer given to a question referred by a Division Bench of the High Court to a Full Bench. That question is as follows:—

"The adoption of an only son having taken place in fact, is "such adoption null and void under the Hindu law?" That abstract question is the only one raised in the case lodged by the appellant and the only one argued at this Bar. The High Court answered it in the negative. Mr. Arathoon has contended in a learned argument that it ought to be answered in the affirmative.

As regards the second question raised in the Madras case, which is peculiar to that case, their Lordships feel no difficulty. The only authority for the argument of the appellants is the opinion of the late Sir Michael Westropp delivered in the case of

(1) *Chinna Gaundan* v. *Kumara Gaundan*, 1 M.H.C.R., 54.
(2) *Narayanasami* v. *Kuppusami*, I.L.R., 11 Mad., 43.

Lakshmappa v. *Ramava*(1) which was decided in the High Court of Bombay in the year 1875. That learned Judge held that, assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law. Now the authority of a widow to give or take in adoption differs in different schools of Hindu Law. Their Lordships are not re-trying this Bombay decision. In Madras it is established, as the learned Judge Muttusami Ayyar shows, that, unless there is some express prohibition by the husband, the wife's power, at least with concurrence of sapindas in cases when that is required, is co-extensive with that of the husband. That is certainly the simplest rule and it seems to their Lordships most consistent with principle. The distinction taken by Westropp, C.J., appears to have been quite novel, and also at variance with a decision by his predecessor Sir Matthew Sausse. There may be some peculiarity in the school of law which prevails in Bombay to support it, though it has not been brought to their Lordships' notice; but if there is any such, it does not apply to these parties in Madras. On this point therefore their Lordships agree with the learned Judges below.

What remains to them is the difficult task of deciding the more general question which is common to both the appeals. The difficulty which first meets the eye is the variety of judicial opinions and of opinions in treatises, which, during the last quarter of a century, have been gathering into definite opposite channels in the different areas of jurisdiction. There are also other difficulties beyond. Many of the judicial decisions relied upon are embodied in imperfect reports or in mere notes of points. The question is complicated by the use of different modes of adoption not always clearly specified, and by the intrusion of special, local or tribal customs. And the original authorities on which all the conflicting opinions alike are based are written in Sanskrit, which for many centuries has been a dead language known only to a few learned people, which hardly any of those who have been called to judgment have understood, the translations of which are more or less disputed, and of which it is averred, probably with truth, that its exact phases of meaning cannot be caught except by those who have studied closely and

(1) (1875) 12 Bom. H.C.R., 364.

as a whole the language and the works of the particular writer under consideration. Their Lordships have however one advantage over their predecessors in these inquiries. The greater attention paid of late years to the study of Sanskrit has brought with it more translations of the sacred Hindu books, and closer examinations of texts previously translated. And in the Allahabad case especially, the appellant's side was argued in the High Court by Mr. Banerjee who is stated by the Court to be familiar with Sanskrit, and it is the subject of a very elaborate judgment by Mr. Justice Knox who is a student of Sanskrit and, as he tells us, has paid special attention to the books of Manu and Vasishta. Perhaps the most convenient course will be to set out the more important texts which have been brought into discussion, then to see how they have been treated by recent commentators and by judicial decisions, stating finally the conclusions to which their Lordships have, with these aids, been brought.

The most revered of all the Rishis or sages is Manu, who, though he says nothing specific on the point now in issue, is referred to as favouring one side or the other. The passages cited are as follows. They are in Chapter IX :—

"By the eldest son, as soon as born, a man becomes the father "of male issue, and discharges his debt to his pitris or progenitors. "That son alone, by whose birth he discharges his debt to his fore- "fathers and through whom he attains immortality, was begotten "from a sense of duty." He adds sentences to affirm the powers, privileges and duties of the first-born, and his great importance in the family.—Verses 106–109.

"By a son a man obtains victory over all people; by a son's "son he attains immortality. Then by the son of that son he "reaches the region of Brahma."—Verse 137.

"Since the son delivers the father from the region called 'put' "he was therefore called 'putra' by Brahma himself."—Verse 138.

"Whom the mother or the father give, with 'water,' a son, in "distress, similar, endowed with affection, he is to be deemed "a dattrima, one brought forth."—Verse. 168.

In the three last quotations their Lordships have followed the words of Mr. Justice Knox who says that he has attempted to follow the text word by word without interpolating or taking away any particle, and that on that account his style is rough. (See record and Golap Chandra Sarkar's 'Treatise on Adoption,' page 282.)

Near to Manu in point of antiquity and of authority comes Vasishta, around whose utterance on the point in issue the greater part of subsequent comments has clustered. His writings have been translated by Dr. Bühler and published in the work entitled 'Sacred Books of the East,' Volume XIV, which has been edited by Professor Max Müller. The passage in that translation is as follows, Chapter XV, page 75 :—

"(1) Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause.

"(2) (Therefore) the father and the mother have power to give, to sell, and to abandon their (son).

"(3) But let him not give or receive (in adoption) an only son.

"(4) For he (must remain) to continue the line of ancestors.

"(5) Let a woman neither give nor receive a son except with her husband's permission."

On the record Mr. Justice Knox gives his own translation which does not appear to differ substantially, though it does slightly in form, from that of Dr. Bühler.

Another ancient sage is Saunaka, of whom a text is quoted in Dattaka Mimamsa of Nanda Pandita as follows :—

Section IV, Paragraph 1 :—"In reply to the question as to the "qualification of the person to be affiliated, Saunaka declares :— "'By no man having an only son (eka putra) is the gift of a son, "'to be ever made; by a man having several sons (bahu putra), "'such gift is to be made, on account of difficulty (prayatnatas).'"

Next in time is Yajanavalkya whose writings, with comments by Vijnanesvara, constitute the Mitakshara, a work of very high authority all over India. The material passages are as follows in Mr. Colebrooke's translation, Chapter I, Section XI :—

Paragraph 9 :—"So Manu declares :—'He is called a son "'given (dattrima), whom his father or mother affectionately gives "'as a son, being alike [by class] and in a time of distress; "'confirming the gift with water.'"

Paragraph 10 :—"By specifying distress, it is intimated, that "the son should not be given unless there be distress. This "prohibition regards the giver [not the taker]."

Paragraph 11 :—"So an only son must not be given [nor "accepted]. For Vasishta ordains 'Let no man give or accept "'an only son.'"

Paragraph 12 :—"Nor, though a numerous progeny exist, "should an eldest son be given, for he chiefly fulfils the office of "a son, as is shown by the following text :—'By the eldest son as "'soon as born a man becomes the father of male issue.'"

The above-mentioned writings are all classed among the smritis, which are held by orthodox Hindus to have emanated from the Deity, and to have been recorded, not like the sruti in the very words uttered by that Being, but still in the language of inspired men. They contain precepts whose authority is beyond dispute, but whose meaning is open to various interpretations and has been and is the subject of much dispute, which must be determined by ordinary process of reason. The Dattaka Mimamsa stands on a different footing. It is not older than the 17th century A.D. and does not claim any but human origin. Indeed its translator, Mr. Sutherland, says that it is "as its name denotes, an "argumentative treatise, or disquisition, on the subject of adoption; "and though, from the author's extravagant affectation of logic, the "work is always tedious, and his arguments often weak and super-"fluous, and though the style is frequently obscure, and not unrarely "inaccurate, it is on the whole compiled with ability and minute "attention to the subject, and seems not unworthy of the celebrity "which it has attained(1)." Moreover it was written during Muhammadan rule and cannot be the work of a lawgiver or Judge. The date of the Dattaka Chandrika is not certain but it is at all events very much later than the smritis and it stands only on the footing of a work by a learned man. Messrs. West and Bühler in their valuable work on 'Hindu Law,' 3rd Edition, page 11, speak thus :—"The Dattaka Mimamsa and the Dattaka Chandrika, "the latter less than the former, are supplementary authorities on "the law of adoption. Their opinions however are not considered "of so great importance but that they may be set aside on general "grounds, in case they are opposed to the doctrines of the Vyava-"hara Mayukha or of the Dharmasindhu and Nirnayasindhu." This is spoken with special reference to Bombay or Western India But both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their

(1) Preface to the Dattaka Mimamsa, Madras Reprint, 1879.

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Lordships cannot concur with Mr. Justice Knox in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect, which long acceptance of written opinions has upon social customs and it would probably disturb recognised law and settled arrangements. But so far as saying that caution is required in accepting their glosses where they deviate from or add to the smritis their Lordships are prepared to concur with the learned Judge.

The passages in the Dattaka Mimamsa are as follows: They are contained in Section IV. Paragragh 1 is that which gives the saying of Saunaka already quoted. Paragraph 2:—"He, who "has one son only, is 'eka-putra,' or one, having an only son: by "such a one, the gift of that son must not be made; for, a text of "Vasishta declares 'an only son let no man give, &c.'" Paragraph 6:—The writer comments on the word "ever" as used by Saunaka thus, "In a time of calamity, accordingly, Narada says:— "'a deposit, a son, and a wife, the whole estate of a man who has "'issue living, the sages have declared unalienable, even by a man "'oppressed by grievous calamities: although the property be "'solely that of the man himself.' This text also regards an only "son; for it is declaratory of the same import, as the texts of Sau- "naka and Vasishta." Paragraph 8:—The writer comments on Saunaka's words "by no man having an only son" thus:—"From "this prohibition, the gift, by one having two sons, being inferrible, "this part of the text ('By one having several sons, &c.') is sub- "joined, to prohibit the same, by one having two sons also."

The Dattaka Chandrika, Section 1, Paragraph 27, only repeats Vasishta's saying, and couples it with the obligation to adopt a brother's son if there is one.

Their Lordships do not propose to spend much time in a close examination of the recent commentators. They have been very carefully sifted in the Indian Courts, and naturally so, seeing what was the paucity and obscurity of judicial authority until within the last thirty years or so. The principal effect which they have on the mind is to show the great variety and uncertainty of opinion on the question now in issue. The earliest of those referred to is Jagannatha, a learned Hindu lawyer employed by Sir W. Jones to compile a digest. He thought that the prohibition in the smritis is only moral and not legal. That also is the opinion of

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the two latest writers, both deeply versed in the Sanskrit language, Mr. Mandlik who appears to have translated the texts of Saunaka, and Mr. Golap Chandra Sarkar who has written a treatise on adoption. Sir Thomas Strange, writing in the year 1830, expresses an opinion in the body of his treatise that the prohibition is monitory only, Volume 1, page 87. On the other hand the weighty opinions of Mr. Colebrooke, Sir Francis Macnaghten and Mr. Sutherland are thrown into the scale; and that of Mr. Justice Strange is also cited to the same effect, and is supposed by some to express the latest opinions of his father Sir Thomas Strange. But it may be observed that Sir Francis Macnaghten and Mr. Justice Strange found their opinions on the wickedness of the act in question, and that the adoption of an eldest son is placed by Mr. Justice Strange on precisely the same footing as that of an only son, and is ranked by Sir F. Macnaghten as a heinous crime though not so heinous as the adoption of an only son. Their Lordships think that the authority of recent text writers must not be stated more favourably to the present appellants than is stated in the book of Messrs. West and Bühler. Expressing no opinion of their own, those learned writers say at page 908, "If he have "but one son, the gift of that one is everywhere reprobated as a "grave spiritual crime. By most the gift is thought invalid." Their Lordships turn now to the more solid ground of judicial decision.

In Madras the course of decision has been very simple. In 1862 the High Court decided that the adoption of an only son, however sinful, was valid in law. It has been shown by Mr. Mayne that a previous decision then relied on was misapprehended by the learned Judges. But that was not the sole ground of their decision; they also relied on learned opinions and they agreed with those opinions. And the same High Court has since that time had the same question brought before it more than once; three times, it is stated in one of the judgments below. There has been no fluctuation in their decisions. It must be taken that the law in Madras has ever since been settled in favour of the present respondents.

In Allahabad also the condition of judicial decisions is simple. In 1879 the question was brought before a Full Bench of the High Court consisting of Sir Robert Stuart and Sir Charles Turner, who were English barristers, and three eminent civilians, Justices Pearson, Spankie and Oldfield. The Court decided in favour of

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the adoption, Sir C. Turner dissenting. In the year 1889 some doubts were expressed on the point by Justices Straight and Mahmood, and that circumstance, coupled with the delivery of adverse opinions by the High Courts of Calcutta and Bombay, led to the rather unusual course of referring the same question to a full bench, of which Mr. Justice Mahmood was one. The result has been an unanimous decision supported by judgments of the Chief Justice and Mr. Justice Knox which are remarkable for research and fulness of treatment.

In Bengal there has been more fluctuation of opinion. The law was quite unsettled in the year 1868. It would be of little use now to examine the earlier decisions in the Sudder Dewani Adalut and the Supreme Court. That has been done with great care by Sir William Markby in a case about to be mentioned. The first case which raised the exact question in the High Court was heard in the year 1868 before Justices Dwarkanath Mitter and Louis Jackson. The judgment was delivered by Mr. Justice Mitter. After quoting passages from the two above-mentioned Dattaka treatises the learned Judge lays the law down thus:—"The "institution of adoption, as it exists among the Hindus, is essen- "tially a religious institution. It originated chiefly, if not wholly, "from motives of religion; and an act of adoption is to all intents "and purposes a religious act, but one of such a nature that its "religious and temporal aspects are wholly inseparable. 'By a "'man destitute of male issue only,' says Manu, 'must the substitute "'for a son of some one description always be anxiously adopted, "'for the sake of the funeral cake, water, and solemn rites(1).' It "is clear, therefore, that the subject of adoption is inseparable from "the Hindu religion itself, and all distinction between religious "and legal injunctions must be necessarily inapplicable to it,"—*Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi*(2).

There is no doubt that this judgment has exercised very great influence on the controversy; and indeed if the learned Judge's fundamental position were sound, there could be no controversy at all. Let us assume for this purpose, though it is matter of grave dispute, that the learned Judge is right in saying that adoptions originated in motives of religion and not in the ordinary human desire for perpetuation of family properties and names. Still the

(1) Dattaka Chandrika, Section I, Clause 3. (2) (1868) 1 B.L.R., 221.

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question is whether certain precepts have a legal or only a religious bearing. What is there in the subject matter of adoption which makes it clear that all precepts relating to it must bear a legal character? The learned Judge does not discuss that question. He begs it, merely stating that his own inference clearly follows from Manu's text. Their Lordships think that the doctrine propounded by him is equally opposed to a reasonable construction of the books, apart from decision, and to decided cases. Indeed to show how far the doctrine is from being universally applicable it would not be necessary to go further than the passage which the learned Judge himself cites from Manu, though, of course, differences may be suggested between prohibitory and mandatory injunctions. Manu prescribes adoption on the score of religion. According to Mr. Justice Mitter this is necessarily a legal injunction, yet nothing is clearer than that there is no legal compulsion upon a Hindu to adopt a son, however irreligious it may be in him not to do it. There is not even any legal compulsion on his widow to do it, when he is dead and cannot have a natural son. But the principle laid down is so important, goes so deep down to the root of these questions, and has exercised such influence, that their Lordships think it necessary to discuss it at length, for which this will be a convenient place.

Their Lordships had occasion in a late case to dwell upon the mixture of morality, religion and law in the smritis, *Rao Balwant Singh* v. *Rani Kishori*(1). They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing. They then said:—"All these old text-books and "commentaries are apt to mingle religious and moral considera- "tions, not being positive laws, with rules intended for positive "laws. In the preface to his valuable work on Hindu law Sir "William Macnaghten(2) says: 'it by no means follows that "'because an act has been prohibited, it should therefore be "'considered as illegal. The distinction between the *vinculum* "'*juris* and the *vinculum pudoris* is not always discernible.'" They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with

(1) (1898) L.R., 25 I.A., 54, at p. 69.

(2) 'Principles and Precedents of Hindu Law,' Volume I, Preliminary Remarks, page vi.

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the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity, never contemplated by the original law-givers.

The late extension of the study of Sanskrit has apparently resulted not in weakening but in strengthening the cited opinion of Sir William Macnaghten. Of course, their Lordships do not presume to form any opinion on questions of Sanskrit grammar, but they observe that Mr. Golap Chandra, who is frequently referred to in the judgments below, contends as a matter of grammar that words (*e.g.*, those of Saunaka) which have been translated in the imperative form of command should take that of recommendation. Mr. Mandlik insists on the same view, and Mr. Justice Knox says that he originally took a contrary view, but has been brought round by the authority of Mandlik and another Sanskrit scholar, Mr. Whitney.

Let us see now how Mr. Justice Mitter's principle accords with actual decisions. The controversy respecting eldest sons, whether or no they can be given in adoption, has a strong bearing on the present question. Manu attaches the highest importance to the character of an eldest son. The relevant passages from his Institutes have been quoted above.

No specific prohibition is contained in these passages, but the reasonable inference from them is given in the Mitakshara in Chapter I, Section XI, Paragraph 12, which has been already quoted. This express prohibition has been taken by some to be a legal rule, and has been enforced by modern writers of weight, as before stated, and in legal decisions. It would certainly fall within Mr. Justice Mitter's principle. But it is quite abandoned all over India as their Lordships understand; and the prohibition is held to be a matter for religious consideration only. It was the subject of careful examination and express decision by Justices Markby and Romesh Chander Mitter in the case of *Janokee Debea* v. *Gopaul Acharjea*(1).

(1) (1877) I.L.R., 2 Calc., 365.

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Again, it is laid down that the giver of a son ought to have more than two sons. The text of Saunaka quoted above says that the gift is to be made by one having several sons (bahu putra). The Dattaka Mimamsa, Section IV, Clause 8, lays it down that the Sanskrit word signifies more than two, and that Saunaka's precept was introduced for the express purpose of excluding the inference that a man with two sons might give one in adoption. The Dattaka Chandrika, Section 1, Clauses 29 and 30, declares the same law. The precepts are precise, and yet their Lordships cannot find that anybody asserts them to be law in any but the religious sense.

Another precept is that a Hindu wishing to adopt a son should adopt the son of his whole brother in preference to any other person. That question came before this Board in the year 1878 in a case in which the Subordinate Judge had held the adoption to be invalid for violation of this precept, and the High Court were of a contrary opinion. This Board held that the terms of the precept were contained in both the Dattaka Mimamsa and the Dattaka Chandrika, and they are founded on the Mitakshara. Nevertheless they held that it is not a precept of law. They referred to the opinions of English text writers to support them. No decision in point was cited and probably there is none in the books.

One of the conditions for adoption laid down by Manu in the passage first quoted from him is that there must be distress. This is emphasised in the Mitakshara, Chapter 1, Section 11, Paragraph 10:—"The son shall not be given unless there be distress," which appears to mean that the giver must be in distress. "This prohibition," it continues, "regards the giver," and then occur the words "not the taker," apparently interpolated by the learned Benares lady who wrote under the name of Balam Bhatta. The Dattaka Mimamsa, Section IV, Clause 20, says, "no distress existing, the giver commits a sin, on account of the prohibition." If then the giver commits a sin the taker who enables him to do it cannot be free from sin; and if the commission of a sin makes the transaction void in law there can be no gift and consequently no adoption. And yet nobody contends for the legal force of this prohibition. It does not appear that in cases of adoption any inquiry is ever made about the distress of the natural father.

It is clear that the principle laid down so confidently by Mr. Justice Mitter as paramount in cases of adoption is repeatedly repudiated in practice; and in the Bengal case next to be cited

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the learned Judges, while following the conclusion of their predecessors, dissociated themselves from the fundamental reason assigned for it.

Moreover this sweeping doctrine of Mr. Justice Mitter is not consistent with the prevalence of exceptional customs or other interferences with law. The extent to which the smritis admit of special customs has not been argued in these cases and their Lordships cannot easily form any judicial opinion about it. But in a discussion about the sources of Hindu law by Doctor Jolly published in 1883 (see page 33) that learned Sanskrit scholar states grounds for holding that customs are only recognised by the smritis when they do not contravene Divine laws.

Mr. Arathoon has impressed upon their Lordships more than once during this argument that the texts he relies on are held to emanate from the Divine Power. If then that Power has said that certain modes of adoption shall be null and void, how can any human practices lawfully limit its operation? And yet the validity of local or tribal customs to adopt only sons is asserted by every jurist. In the Punjab such a custom is received as the general law of that large area, and it governs the relations of the eight millions or so of the Hindus (Jats, Brahmans, Rajputs and others) who live there: and that, though the sources of their law are the same smritis which are followed in other parts of India. The inference is that among numerous Hindu communities the prohibition of the smritis on this point has not been received as invalidating the transaction.

Again if the religious and legal injunctions were co-extensive, it would place both courts of justice and legislatures in a very delicate position when dealing with such matters. Suppose that in this Madras case the Court had upheld the plea of estoppel; it would have set up a judicial rule to bar the working of a Divine law. Suppose that the statutory six years had elapsed and that the suit had been barred by time; then the Legislature would be interfering to bar the working of a Divine law. In each case a separation would have been made between those religious and temporal aspects which Mitter, J., declares to be wholly inseparable. Yet the British rulers of India have in few things been more careful than in avoiding interference with the religious tenets of the Indian peoples. They provide for the peace and stability of families by imposing limits on attempts to disturb the possession

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of property and the personal legal status of individuals. With the religious side of such matters they do not pretend to interfere. But the position is altered if the validity of temporal arrangements on which temporal courts are asked to decide is to be made subordinate to inquiries into religious beliefs.

No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. A man may, in his conduct or in the disposition of his property, disregard the plainest dictates of duty. He may prefer an unworthy stranger to those who have the strongest natural claims upon him. He may be ungrateful, selfish, cruel, treacherous to those who have confided in him and whose affections for him have ruined them. And yet he may be within his legal rights. The Hindu sages doubtless saw this distinction as clearly as we do, and the precepts they have given for the guidance of life must be construed with reference to it. If a transaction is declared to be null and void in law, whether on a religious ground or another, it is so; and if its nullity is a necessary implication from a condemnation of it the law must be so declared. But the mere fact that a transaction is condemned in books like the smritis does not necessarily prove it to be void. It raises the question what kind of condemnation is meant.

It is true that the learned Judges Mitter and Jackson refer to the texts of the Dattaka Mimamsa and Chandrika. But according to the paramount principle laid down by them those texts could only be read in one way. That principle is in fact the sole ground of the decision, and as it cannot be admitted the decision is deprived of weight.

The next case in Bengal was decided in the year 1878 by Chief Justice Garth and Mr. Justice Markby, *Manick Chunder Dutt* v. *Bhuggobutty Dossee*(1). In delivering judgment Sir W. Markby reviews with great care and discrimination the then existing authorities, judicial and non-judicial, and he shows that only in four cases had the point been brought before the Highest Courts of Appeal in India. There had been no decision at that time in Allahabad. The Madras High Court supported the adoption: so apparently did the Bombay High Court, for the judgment of Chief Justice Westropp which threw doubt upon the point, though delivered in 1875, was not reported as early as 1878. The learned

(1) (1878) I.L.R., 3 Calc., 443, at pp. 460, 461.

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Judge states the ground of his decision thus:—"It appears to me, "therefore, that the vast preponderance of authority, if not the "entire authority in Bengal, is against the validity of the adoption "of an only son; and if we were to hold the adoption of the plaintiff "in this case to be valid, it would be necessary to over-rule both "the carefully considered decision of Jackson and Dwarkanath "Mitter, JJ., and the equally careful decision of four Judges of "the Sudder Court. This of course could only be done by a full "bench. But we could only refer the case to a full bench if there "is a conflict of authority, or if we ourselves differ from these "decisions. Having gone through all the cases with great care, I do "not think it can be said that there is any such conflict of authority "in Bengal as to justify us in referring the case to a full bench on "that ground; and I am not prepared to refer the case to a full "bench upon the ground that I myself think the adoption of an "only son valid. On the contrary, on the best consideration I "have been able to give to the authorities, I think such an adoption "ought, in Bengal, to be held to be invalid, wherever the effect of "holding such adoption to be valid would be to extinguish the "lineage of the natural father, and so to deprive the ancestors of "the adopted son of the means of salvation."

This is a very instructive judgment and entitled on all grounds to great respect; and it is with great respect that their Lordships, being obliged to differ either from it or from other High Courts, proceed to note some points which detract from its weight. As to the vast preponderance of authority in Bengal there were only two decided cases. One was before the Sudder Dewani Adalat and is *Nundram* v. *Kashee Pande*(1). The report does not show any examination of the question by the learned Judges themselves. Their decision appears to rest wholly upon the opinion of pundits, who in their turn content themselves with a simple citation of texts. The other decision rests entirely on a principle which is untenable, as Sir W. Markby himself showed the year before in *Janokee Debea* v. *Gopaul Acharjea*(2). Moreover the Court in 1878 hardly addressed itself to the question why the injunctions relating to the only son are imperative and legal while those which relate to the eldest son are only monitory or religious. In 1877 Sir W. Markby says that while the latter prohibition is only monitory the former

(1) (1823) 3 S.D.A., 232.

(2) (1877) I.L.R., 2 Calc., 365.

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is clear; referring, as their Lordships suppose, to the differences of expression in Colebrooke's translation of the Mitakshara. In 1878 he intimates that the stronger objection to the adoption of an only son is based on religious grounds, on which their Lordships remark that Manu ascribes a character to the eldest son which affords strong religious grounds against his adoption, and that they do not find themselves competent to put such grounds in the balance against one another, so as to decide which is the stronger.

On this point they add that there seems to have been a great deal of exaggeration used in urging the religious topic throughout this controversy; especially in later times. Manu says that by the eldest son as soon as born a man discharges his debt to his progenitors; and it is through that son that he attains immortality. According to him the son serves his father's spiritual welfare at the moment of his birth. There is no intimation that if the boy dies the next day, or fails to have a son, this service is obliterated. Why then should it be so if the boy is adopted? It is true that Manu attributes additional value to the firstborn's son and grandson. It may be that such further benefit is lost by adoption, as it would be by death, but that is a very different thing from depriving the ancestors of the adopted son of the means of salvation, which have been already attained. Vasishta whose text is the fundamental one does not rest his injunction on spiritual benefit at all, but he says that the only son is to continue the line of his ancestors; one of the very commonest of human motives for desiring legitimate issue. Nor does he make any allusion to "put" here, or, if Mr. Justice Knox is right, elsewhere. If he was really thinking of the spiritual benefits of the son's ancestors as the ruling consideration, it is inexplicable that he should not have said so. Moreover, their Lordships asked during the argument why a man who had given a natural son in adoption could not afterwards if he was so minded adopt another; and neither authority nor reason was adduced to show that he could not.

That is the state of authorities in Bengal. The question has never come before a full bench, and it seems to their Lordships that there is only one decision, viz., that of 1878, to which great weight is to be attached.

In Bombay, after a Division Bench had decided in favour of validity, the question was discussed before another Division Bench

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in the year 1875; *Lakshmappa* v. *Ramava*(1). The case was decided on another ground as has been mentioned above. But the Chief Justice, Sir M. Westropp, delivered an elaborate judgment containing his reasons for holding the adoption of an only son to be invalid. Those reasons appear to have been adopted by the Court including Sir M. Westropp himself in a subsequent case which was decided in 1879 but has never been reported. In 1889 the question was referred to a full bench who simply followed the unreported case. See *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova*(2). Sir C. Sarjent, the then Chief Justice, delivered judgment. He pointed out that prior to *Lakshmappa* v. *Ramava*(1), the decisions in Bombay were in favour of validity; that the judgment of Sir M. Westropp in that case was the first that treated the point with due consideration; and that as the opinion there expressed had been adopted by a full bench, it was not proper to review it. The decision was necessarily in favour of invalidity. The law in Bombay therefore rests on the authority of the unreported case of 1879 which itself rests on the reasoning contained in the judgment of 1875.

In that judgment the learned Chief Justice makes more elaborate reference to the smritis than is contained in any judgment earlier than the present Allahabad case. He dwells emphatically on Colebrooke's translation of the Mitakshara, showing that with regard to the only son the expression "must not," and with regard to the eldest the expression "should not," is employed. He adds that the distinction is even more strongly marked in the Mayukha which is received as a high authority in Bombay. On this point their Lordships interpolate again the remark that they are not re-trying the Bombay decision and that the effect of the Mayukha has not been argued before them. He then examines decisions by Bombay Courts prior to the establishment of the High Court, which certainly exhibit a confusion of legal opinion. The authority of the High Court up to 1875, though not perhaps very decisive, was in favour of validity. From this, and from the decision of the Madras Court, the learned Chief Justice differs. He cites the passages of smritis and law books and English text-writers with which we have now been made familiar. And his decision apparently is founded on the language of Colebrooke's

(1) (1875) 12 Bom. H.C.R., 364. (2) (1889) I.L.R., 14 Bom., 249.

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Mitakshara and on the judgment of Mr. Justice Mitter. Their Lordships have already stated their reasons for thinking that the latter of these foundations is unsound. The value of the former will be examined presently. They have also stated above that the point actually decided in this case is a novel suggestion of the learned Chief Justice, and is unsustainable in principle, and unsupported by authority unless there be something peculiar to Bombay to support it.

Before leaving this judgment their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of factum valet. That unhappily expressed maxim clearly causes trouble in Indian Courts. Sir M. Westropp is quite right in pointing out that if the factum, the external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law. Sir M. Westropp has, not without cause, reduced the ambiguous maxim to its proper meaning.

Such was the state of judicial authority in India prior to the present cases. For as regards the Punjab, it is true that, in the early days of the Chief Court, Judges have pronounced opinions in favour of the adoption under general Hindu law; and in 1874 Melvill and Thornton, JJ., pointed out that the turning point of the controversy was Mr. Justice Mitter's judgment of 1868. But after the first reported case in 1867 the decisions there have turned on the popular customs into which the Government had the prudence to inquire immediately after the annexation, and which they made the foundation of law. The Punjab therefore may be omitted in our estimate of judicial authority. The reasons against the validity of the adoption of an only son are contained in the three judgments of the learned Judges Mitter, Markby, and Westropp. The point has never come before this Board for decision. It has been alluded to in two cases but in so indirect a way that though the authority of the Board is relied on by both sides it is not available for either. The foregoing remarks

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represent all the light which has been thrown on the smritis to which, after all, we must recur to decide the question.

In addition to the remarks already made on the bearing of Manu's texts, those of Mr. Justice Knox upon his silence are worthy of attention. Manu mentions three conditions for a good gift of a boy in adoption. The natural father must be in distress; the boy must be "similar," apparently meaning of the same caste with the adoptive father; and he must be affectionate. Nothing is said about his having brothers, which is now represented as a vital condition the breach of which is a sin, heinous crime as some writers have called it, and as annulling the transaction. It seems very unlikely that Manu should either have viewed it in that light, or with his very high notions of the value of the first-born should have overlooked the point altogether.

The crucial text is that of Vasishta. He first states the parents' power in the most sweeping terms, and derives it from causes affecting every child that is born into the world. The power is to later ideas, whether Hindu or English, an extravagant one; but it accords with what we know of the early stages of other nations and probably did not shock the contemporaries of Vasishta, though the sage Apastamba, who is perhaps of equal antiquity, denies the right to give away or sell a child (Prasna II, Patala 6, Khanda 13, paragraphs 6–11(1)). A man may sell his son—no restriction of purpose is expressed—or he may even abandon him. But then comes an injunction expressed in terms which may amount to a command or may be only a recommendation; viz., that an only son should not be given or accepted. The first remark to be made upon this is akin to the one just made upon Manu. If Vasishta intended to except an only son from the father's power to give in adoption, why did he not say so? It would have been much more simple. But he first states the power, and far greater powers, in the broadest terms, and then adds a qualification which is, to put it at the highest, in ambiguous terms. That looks much more like an appeal to the moral sense not to exercise the power than a denial of its existence. In this respect the case resembles that of the father's power to alienate family property: which indeed is the light in which Vasishta seems to regard a son. The power is given, while the action is condemned in terms consistent with actual

(1) 'Sacred Books of the East,' Volume II, pages 130, 131.

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prohibition. After long controversy it has been settled by a great preponderance of Indian authority, culminating in a decision by this Board, that the power exists, and that the prohibition, though a solemn warning as to the spiritual responsibility of exercising it, is not efficacious in law.

In examining this question their Lordships are again at great disadvantage in not knowing Sanskrit. In the absence of agreement among Sanskrit students they cannot adopt the representations made, though by learned men, to the effect that as a matter of grammar Vasishta's injunction imports admonition rather than command. So with respect to what has been called Jaimini's rule which is so much relied on by Chief Justice Edge. That author, who wrote in the 13th century, appears to have been received as a high authority in the interpretation of smriti texts. He lays down the rule that all precepts supported by the assignment of a reason are to be taken as recommendations only. That, if sound, would be conclusive as to Vasishta's text. But it is rather startling, and a very intimate acquaintance with the smritis would be needed before admitting its truth. It has not been brought forward in any case prior to this case from Allahabad. It may, however, fairly be argued that one who, having the power to give an absolute command, gives an injunction not expressed in unambiguous terms of absolute command but resting on a reason, is addressing himself rather to the moral sense of his hearers than to their duty of implicit obedience. So far Vasishta's reason, founded as it is on temporal and not on religious considerations, gives some, though not very strong, support to the respondent's theory.

The text of Saunaka is open to two obvious remarks. One is that the injunction not to give an only son is couched in the same terms as the injunction to give a son if there are more than two. The latter of these cannot possibly be obligatory. The other remark is that, as Nanda Pandita in the Dattaka Mimamsa points out, Saunaka in effect prohibits a gift in adoption when there are only two sons; and that is a prohibition which has never been regarded as obligatory. Saunaka does not help the appellants but rather lends weight against them.

Then comes the Mitakshara. We have seen that Sir M. Westropp emphatically, and Sir W. Markby possibly, relies on the difference of expressions in Colebrooke's translation. The passages from their judgments have been quoted above, and so have the

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passages from the Mitakshara, Chapter I, Section XI, paragraphs 10, 11, 12. Now it has been brought out in the arguments that precisely the same expressions of injunction are used by the author in these three paragraphs. To fortify their knowledge their Lordships have inquired of one of the most eminent of Sanskrit scholars, Professor Max Müller, and he has courteously informed them that as a matter of fact the three expressions are identical, and as a matter of grammar are, in his judgment, equally capable of expressing obligation or recommendation. Now paragraphs 10 and 12 have been observed on before. It has been placed beyond dispute in point of law that neither is obligatory. It requires some good reason to show why, when the same expression is used in three consecutive sentences, it should be construed one way in the first and third and another way in the middle one. No such reason has been given. It is an unfortunate thing that in translating a law book Colebrooke should have used different English words to represent the same Sanskrit word. He has certainly misled at least one Judge in a leading case. As the matter is now shown to stand, the Mitakshara must be taken to bear strongly against the appellants.

In intimating that Sir M. Westropp was misled by Colebrooke their Lordships have not overlooked the fact that in 1889 Sir C. Sarjent thought that Sir M. Westropp was aware of the state of the Sanskrit text. It seems, however, next to impossible that Sir M. Westropp should have known that Colebrooke's variations of expression were not authorized by the original and should have said nothing about it; seeing that it deprives his emphatic reference to those variations of all meaning. If indeed he knew the state of the Sanskrit text and thought it so immaterial as not to deserve notice, he practically treated Colebrooke as the original authority and his reasoning does not thereby gain but loses in force.

The material passages in the two Dattaka books have been indicated before, and remarks have been made on those which quote and comment on Saunaka. It seems to their Lordships that the authors, who bring in the older texts at every turn, did not mean to do more than repeat and enforce them. If they were clearly laying down any additional precepts or authoritative interpretations of ambiguities, then, though as Mr. Justice Knox points out, such comments should be received with some caution, they should

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also be received with due regard to the authority which the books have acquired. But on this topic the writers seem anxious to found themselves entirely on the smritis and to refer their readers back to them. Certainly on the crucial point now in issue they throw no light at all. They do not touch the question whether the injunction not to adopt only sons is a matter of positive law or only addressed to the moral sense. And yet Jaimini's treatise, written some centuries earlier than the Dattaka Mimamsa, must have made the later of the writers, if not both, familiar with the importance of that distinction.

It is, however, worth while to observe how Nanda Pandita deals with the consequences of a forbidden adoption. He quotes Manu's requirement that the adopted son should be "similar" and he says, (Dattaka Mimamsa, Section II, paragraphs 22, 23), "Hence, it is established, that one of a different class cannot be adopted as a son." In Section III, he recurs to that prohibition and asks, "should this rule be transgressed, what would be the case?" Then he deduces from texts of Saunaka and Katyayana that the adopted son shall not share in the inheritance, but shall be entitled to food and raiment. So that the adoption is not void, but the son of the wrong class is reduced to a claim for maintenance only. With this exception, which favours the appellant's theory, it seems to their Lordships that these two treatises leave the question exactly where it stands on the earlier authorities.

From both the Courts below we learn that there is no resentment excited by this kind of adoption. The District Judge of Godavari says "the people have settled down under the law "enunciated in 1862." He can hardly recollect the state of things prior to 1862, but his statement of the present state of things is founded on personal knowledge. Whether the people have settled down under the High Court decision, a result which is usually of very slow growth if it takes place at all, or whether, as is more probable, that decision was in accordance with the ordinary existing ideas and practice, we are told that in point of fact there is no conflict between the declared law and the feelings of the people. Nor is there any indication that there ever was such a conflict. In Allahabad the parties are Agarwala Banias of Benares, who are, as two of the learned Judges below state, specially careful of caste and religious observance. The adoption was 20 years old and no caste penalties had followed it. These things do not prove a custom, but

they do tend to prove that among orthodox Hindus the adoption of only sons has never been so inculcated as a sin by their teachers as to excite abhorrence or social hostility, such as we know to follow some other breaches of their religious laws. That the practice is a frequent one is shown by the frequency of litigated cases, which must be quite insignificant in number as compared with those that actually occur, and from the establishment of customs authorising it in various places. This is not one of the cases in which people are tempted by appetite to break an acknowledged law. It is inconceivable that the choice of an only son for adoption can in any large number of cases proceed from any other cause than a conviction of its suitability to the circumstances. That is a family matter which a wise lawgiver, while warning parties of their spiritual responsibility, would yet leave it possible for them to do. The Hindu sages appear to have taken that course in this and kindred matters.

Their Lordships then have a case before them of which the broad outlines are as follows. Old books, looked on as divine, give to the father plenary powers over his sons. The same books discountenance the giving of an only son in terms which may be construed as a positive command making the gift void or as a warning pointing out the mischief of the act but leaving individual men to do it at their peril. The books contain no express statement which kind of injunction is meant. The practice of such adoptions is frequent. Over some substantial portions of Hindu society it is established as a legal custom, whatever may be the general law. In other very large portions it is held to be part of the general Hindu law. Nowhere is it known to be followed by hatred or social penalties. Pausing there, the case is one in which if the authoritative precepts are evenly balanced between the two constructions, the decision should be in favour of that which does not annul transactions acceptable to multitudes of families, and which allows individual freedom of choice.

But what says authority? Private commentators are at variance with one another; judicial tribunals are at variance with one another; and it has come to this, that in one of the five great divisions of India the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as mere official authority goes there is as much in favour of the law of free choice as of the law of restriction. The final judicial authority

rests with the Queen in Council. In advising Her Majesty their Lordships have to weigh the several judicial utterances. They find three leading ones in favour of the restrictive construction. The earliest of them (in Bengal, 1868) is grounded on a palpably unsound principle and loses its weight. The second in time (Bombay, 1875) is grounded in part on the first and to that extent shares its infirmity; and in part on texts of the Mitakshara which are found to be misleading. So that it too loses its weight. The third (Bengal, 1878) is grounded partly on the first, and to that extent shares its infirmity; but it rests in great measure on more solid ground, viz., an examination of commentators and of decided cases. It fails, however, to meet the difficulty of distinguishing between the injunction not to adopt an only son and other prohibitive injunctions concerning adoptions which are received as only recommendatory; the only discoverable grounds of distinction being the texts of the Mitakshara, which are misleading, and the greater amount of religious peril incurred by parting with an only son, which is a very uncertain and unsafe subject of comparison. The judicial reasoning then in favour of the restrictive construction is far from convincing. That the earliest Madras decision rested in part on a misapprehension of previous authority has been pointed out; and the Madras reports do not supply any close examination of the old texts or any additional strength to the reasoning on them. The Allahabad Courts have bestowed the greatest care on the examination of those texts, and the main lines of their arguments, not necessarily all the by-ways of them, command their Lordships' assent. Upon their own examination of the smritis their Lordships find them by no means equally balanced between the two constructions but with a decided preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving individual freedom of choice. They find themselves able to say with as much confidence as is consistent with the consciousness that able and learned men think otherwise, that the High Courts of Allahabad and Madras have rightly interpreted the law and rightly decided the cases under appeal.

Their Lordships have been reminded of the length of time for which the law must have been considered as settled in Bombay and Calcutta. A similar consideration affected the Courts of Madras and Allahabad and is remarked on by both. The time is not very long in any of the four provinces, but it is long enough to increase

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the gravity of the questions in these appeals. In estimating the weight of reasoning in the various litigated cases their Lordships have not forgotten the weight of the actual decisions; that they represent the opinions of eminent and responsible men, arrived at after public and anxious discussion, carrying with them an authority not legally disputable in the provinces under their jurisdiction, and it may be affecting many minds and many titles to property or to personal status. Such decisions are not lightly to be set aside. A Court of Justice, which only declares the law and does not make it, cannot, as the Legislature can, declare it with a reservation of titles acquired under a different view of it. But their Lordships are placed in the position of being forced to differ with one set of Courts or the other. And so far as the fear of disturbance can affect the question, if it can rightly affect it at all, it inclines in favour of the law which gives freedom of choice. People may be disturbed at finding themselves deprived of a power which they believed themselves to possess and may want to use. But they can hardly be disturbed at being told that they possess a power which they did not suspect and need not exercise unless they choose. And so with titles. If these appeals were allowed, every adoption made in the North-West Provinces and in Madras under the views of the law as there laid down may be invalidated, and those cases must be numerous. Whereas in Bengal and Bombay the law now pronounced will only tend to invalidate those titles which have been acquired by the setting aside of completed adoptions of only sons, and such cases are probably very few. Whether they demand statutory protection is a matter for the Legislature and not for their Lordships to consider. It is a matter of some satisfaction to their Lordships that their interpretation of the law results in that course which causes the least amount of disturbance.

Their Lordships will humbly advise Her Majesty to dismiss both appeals, and the appellants must pay the costs.

Appeals dismissed.

Solicitor for appellant in the first appeal—Mr. *R. T. Tasker.*

Solicitors for respondents in the first appeal—Messrs. *Keen, Rogers & Co.*

Solicitors for appellant in the second appeal—Messrs. *T. L. Wilson & Co.*

Solicitors for respondents in the second appeal—Messrs. *Pyke & Parrott, C.B.*

PRIVY COUNCIL.

SRI BRAJA KISORA DEVU GARU, APPELLANT,

v.

SRI KUNDANA DEVI PATTA MAHADEVI GARU, RESPONDENT.

P.C.* 1899. February 17. March 4.

[On appeal from the High Court at Madras.]

Hindu Law—Duration of a grant held by a Hindu widow made to her by her husband in his lifetime.

On the distribution of compensation under the Land Acquisition Act, 1870, the title of a widow to a village, she alleging it to be her property by absolute right, as a jaghir granted to her by her husband, came into contest. Her late husband's adopted son, being now possessed of the zamindari within which the village was, disputed her right, alleging that the grant had been only for her maintenance, and claiming the whole compensation.

The terms of the grant, if any had been expressed, were unknown. No written grant was produced.

The Judicial Committee pointed out that an inquiry, directed by the Appellate Court below, as to whether a local custom existed for zamindars to grant to their wives for life only, and if such custom was valid, was inappropriate; inasmuch as no custom at all, in its legal sense of something exceptional to the general law, was in question. The power of the husband as zamindar to have made such a grant for life, or for more, was not in dispute.

All that was known was that the widow had received rents for about twenty-six years.

There was no sufficient evidence for holding that the village had been alienated in perpetuity.

The judgment of the District Judge, dividing the compensation equally between the parties, was maintained, the widow being treated as holding for life.

APPEAL from an order (2nd May 1895) of the High Court, reversing an order (15th November 1893) of the District Judge of Ganjám, upon a reference made to him under the Land Acquisition Act, 1870.

On the 6th July 1893, the Special Deputy Collector referred to the District Judge the rival claims to the absolute property in a village preferred by the parties, respectively, to this appeal.

They were the zamindar now appealing and his adoptive mother, the respondent: she being the widow of his adoptive father. She had had possession of the village for about twenty-six years, and she alleged it to have been given to her as "mokhasa."

* Present: Lord WATSON, Lord HOBHOUSE and Sir RICHARD COUCH.

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She therefore claimed to be absolutely entitled to the village, and consequently to the whole of the compensation. The zamindar claimed payment to himself of the whole, on the ground that the widow's possession was only for her maintenance and for her life. He asserted that she possessed no right to sell the village, and that therefore she could not claim compensation in respect of it. He added that he had the right to resume the land, but that he did not wish to do so.

The question raised on this appeal was that expressed in the first issue, whether the grant was to the widow as an absolute jaghir, or only an assignment for her maintenance for life.

The District Judge decided that there was a presumption, where an Uriya zamindar in the district gave a village to his wife after, or in, marriage that it was a life interest only that was given; and that all the evidence produced to rebut this presumption only confirmed it. He divided the compensation equally between the claimants.

The High Court regarded the gift as coming under the *primâ facie* presumption that a gift by a husband to wife was by way of stridhan, and that such a gift passed to her heirs. They remanded the suit, directing the Sessions Judge to find whether there was a valid local custom for zamindars to give villages to their wives for life only. The Judge found in the affirmative. The High Court considering the evidence in support of the custom insufficient reversed the award, and gave the whole compensation to the widow.

Mr. *J. D. Mayne*, for the appellant, the zamindar, argued that there had been no evidence to show that an absolute estate had been given by the husband to the widow.

There was no general principle that favoured her claim, as he was quite as likely to have given the village for her maintenance as to have given it absolutely. There was no presumption that the gift was for her stridhan. The question was neither of the law, which was clear, nor of custom, which was not alleged, nor could be decided, to govern the case; but the question was of a donor's intention in a particular gift, and of the effect of that gift. There was, therefore, no ground for making any other valuation of the interests of the parties than that estimate which the District Judge had made.

The respondent widow did not appear.

Their Lordships' judgment was delivered by LORD HOBHOUSE.

SRI BRAJA KISORA DEVU GARU v. SRI KUNDANA DEVI PATTA MAHADEVI GARU.

JUDGMENT.—This question relates to the distribution of a sum of money paid into Court as the price of land taken under the Land Acquisition Act, 1870. The land taken is situate in a village called Maulabhonaja, which formed part of the zamindari of Chinna Kimedi. The disputant parties are the zamindar who appeals, and his adoptive mother, the widow of a former zamindar, who is respondent. The sum is small but the title to it is the same as the title to the whole village, and on that ground the High Court has granted leave to appeal.

It is not disputed that the widow has been enjoying the revenues of the village for many years. She alleges that it was granted to her by her husband as an absolute jaghir. The zamindar alleges that it was assigned only by way of maintenance to her. That was the first issue which the District Judge stated for trial.

On the trial no document containing any grant was produced by the widow. She produced two letters from the Collector written on an occasion when the zamindar then in authority denied that she had any title at all. The first (exhibit I) is dated 13th May 1871, and is addressed to the zamindar. It contains this passage:—

"Sri Kundana Devi Patta Mahadevi Garu has sent me an "Arzi stating, among other matters, that her husband, the late Sri "Audiconda Devu Zamindar Garu, placed her in possession of the "three villages of Pattuguda, Maulabhonaja and Bholladi attached "to Pratapagiri taluk, as jaghir, that after her husband's death "the late Collector Mr. Carmichael put her in enjoyment of the "said villages, that upon your accession to the zamindari you also "wrote and gave her a document for her enjoying those three "villages as jaghir for her life."

The other letter, dated 15th June 1872, is addressed to a Magistrate. It commences thus:—

"It appears from the decrees hitherto passed by this Court "that the right to the two villages of Maulabhonaja and Pattu-"guda in Pratapagiri taluk belongs to Mahadevi Garu, and that "they were given by the zamindar as mokhasa for her enjoyment "for life. There is nothing to show that that grant was can-"celled as alleged by the present zamindar."

The term mokhasa is explained to be the equivalent of the more generally known term jaghir. Each shows that the land is to

be held for the benefit of the holder. Neither defines the duration of the holding. These terms, therefore, are consistent with either theory; and the Court must judge between them by such indications as it can get. The District Judge gave his opinion thus:—

"The presumption in such cases where an Uriya zamindar in "this district gives a village to his wife after, or in, marriage is "that it was a life interest only that was given. In this case all "the evidence produced by claimants to rebut this presumption "only confirms it.

"The contention for claimant 1 under issue I is baseless and "rejected."

He proceeded to award to each claimant one-half of the fund.

The widow appealed to the High Court. The learned Judges said that *primâ facie* a gift by a husband to his wife is by way of stridhan and that such a gift passes to her heirs. They add that the District Judge had referred to a local custom of which there was no evidence; and they remanded the case for him to find "whether there is a local custom for zamindars to give villages to "their wives for life only, and if such custom is valid."

In point of fact the District Judge had not referred to any custom at all, in its legal sense of a rule exceptional to the general law. He had only stated what in his opinion was the presumption relating to gifts by Uriya zamindars to their wives; and very likely his opinion was guided by what he had himself known to be done. It is not suggested that there is any rule of Hindu law forbidding zamindars to make gifts to their wives by way of maintenance if they are so minded. A custom, such as contemplated by the issue directed on remand, is some established practice at variance with the general law. How can there be a custom to do that which the general law permits any one to do or abstain from at his own will? There might be a rigid local or tribal rule forbidding grants to wives except for maintenance. But that is not the scope of the issue; nor could it be, seeing that the power of this zamindar to make a complete alienation is not questioned. The inquiry seems to be unmeaning and therefore misleading. However, the District Judge addressed himself to the duty thrown upon him, and examined three witnesses who said it is the custom in Chinna Kimedi and in other specified zamindaris to give villages to zamindarnis for life, to be resumed at their deaths. Upon these statements he found in favour of the custom.

On appeal the High Court held that this evidence was inadequate to prove a custom, and in this their Lordships agree. The learned Judges then refer to their previously expressed opinion as to presumption, and saying that the general law must prevail decide in favour of the widow. This however is a case in which the terms of the grant to the widow, if there ever was any expressed in any terms, are unknown. She has enjoyed the revenue for many years, and that is all we know. There is no general law to determine under such circumstances the amount of benefit which a husband, having absolute discretion in the matter, has conferred on his wife. The two documents produced by the widow herself bear against her view; though it must be confessed that their weight is slight. The evidence of the witnesses is very slight, but such as it is, it goes to show that the idea of giving land for life only to a wife by way of maintenance is not unfamiliar among the class to which this zamindar belongs, as indeed it is highly improbable that it should be.

Their Lordships think that the High Court has been misled by the idea that the nature of the gift is governed by some rule of law which can only be contravened by the establishment of a custom. They agree with the District Judge that there is no sufficient ground for holding that the village has been alienated from the zamindari in perpetuity. And they think that his division of the fund into halves is a very reasonable way of dealing with it. They will humbly advise Her Majesty to reverse the decree appealed from and to restore the award of the District Judge. The respondent must pay the costs of the proceedings in the High Court and of this appeal.

Appeal allowed.

Solicitor for the appellant—Mr. *R. T. Tasker.*

APPELLATE CIVIL.

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

1899. March 27.

NARASIMHASWAMI (DEFENDANT), APPELLANT,

v.

LAKSHMAMMA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 10, 69, 73—Decision of Collector ejecting tenant—Appeal.

An appeal lies from the decision of a Collector ejecting a tenant under section 10 of the Rent Recovery Act (Madras), 1865. Such a decision, notwithstanding the use of the word 'order' in the section referred to, is a judgment within the meaning of section 69.

Mahomed Yakub Sahib v. *Mahomed Jaffer Ali Sahib* (I.L.R., 4 Mad., 167) not followed.

SECOND APPEAL against the decree of J. H. Munro, Acting District Judge of Kistna, in Appeal Suit No. 323 of 1896, affirming the order of ejectment of C. Kristnasami Naidu, Head-quarter Deputy Collector of Kistna, in Summary Suit No. 290 of 1893.

Suit to enforce acceptance of patta. The Deputy Collector, after hearing the evidence, directed the defendants to accept the patta tendered. The defendant neglected to execute a muchalka in favour of the plaintiffs, and upon the application of the latter an order for ejectment was made by the Deputy Collector under section 10 of the Rent Recovery Act (Madras), 1865. Against this order the defendant appealed to the District Judge who said:—"This is an appeal against an order of ejectment passed under section 10 of Act VIII of 1865. There is distinct authority (*Mahomed Yakub Sahib* v. *Mahomed Jaffer Ali Sahib*(1)), that no appeal lies against such an order. The appeal is therefore dismissed with costs."

The defendant preferred this second appeal.

Hon. *Bhashyam Ayyangar*, Hon. *Subba Rao* and *Sundara Ayyar* for appellant.

Hon. *Bhashyam Ayyangar*.—An appeal lies from an order of ejectment made under section 10 of the Rent Recovery Act (Madras), 1865. Section 69 provides for an appeal from all judgments passed by a Collector under the Act. Though the phrase 'order for ejecting' is used in section 10, such an order is referred

* Second Appeal No. 1266 of 1898.

(1) I.L.R., 4 Mad., 167.

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to as a 'judgment for ejectment' in section 73. Further, an appeal seems to be clearly intended, whether from a judgment or an order, by section 76. In *Mahomed Yakub Sahib* v. *Mahomed Jaffer Ali Sahib*(1) relied on by the District Judge, the Court evidently overlooked section 73. *Ragava* v. *Rajagopal*(2) was a suit to set aside an order for ejectment, and the Court seems to have assumed that no appeal would lie. In *Manicka Gramani* v. *Ramachandra Ayyar*(3), SHEPHARD, J., expresses the view that the word 'judgment', as used in section 69, includes an order made in ejectment made under section 10, and MOORE, J., that an appeal was clearly intended.

Sivasami Ayyar and *Ramachandra Ayyar* for respondents.—In the last paragraph of section 10 the word 'order' is used, whereas the preceding paragraphs refer to judgments. Section 76 relates to orders passed after decree and relating to the execution thereof. *Mahomed Yakub Sahib* v. *Mahomed Jaffer Ali Sahib*(1) is a direct authority that no appeal lies, and was apparently not referred to in *Manicka Gramani* v. *Ramachandra Ayyar*(3).

JUDGMENT.—The question is whether an appeal lies from the decision of the Collector ejecting a tenant under section 10 of Act VIII of 1865. The decision of the Court in *Mahomed Yakub Sahib* v. *Mahomed Jaffer Ali Sahib*(1) that there is no appeal appears to have been decided without the attention of the Court having been called to section 73 of Act VIII of 1865 and without in any way referring to that section. That section describes the decision of a Collector, whereby he orders that a tenant should be ejected, as a judgment, and this must include cases of ejectment under section 10. Reading, therefore, sections 10 and 73 together, it seems necessarily to follow that the decision of the Collector ejecting the tenant is, notwithstanding the use of the word 'order' in the former section, a judgment within the meaning of section 69 of the Act and appealable as such. The observations of the learned Judges (Shephard and Moore, JJ.) in *Manicka Gramani* v. *Ramachandra Ayyar*(3) seem to support this view. We therefore reverse the decree of the District Judge and direct him to receive the appeal memorandum and proceed with it according to law. Costs will abide and follow the event.

(1) I.L.R., 4 Mad, 167. (2) I.L.R., 9 Mad., 39. (3) I.L.R., 21 Mad., 482.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

1899. March 21.

BOMMARAZU (DEFENDANT No. 1), APPELLANT,

v.

SESHAMMA AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

Regulation XXV of 1802, (*Madras*), *s.* 9—*Regulation XXVI of* 1802, (*Madras*), *s.* 2—*Assessment of Land-revenue Act*, (*Madras*)—*Act I of* 1876.

An application to a Collector to grant separate registration of a portion of a permanently-settled estate, which has been alienated by a court-sale, is one under the provisions of Regulations XXV and XXVI of 1802 and not under Act I of 1876.

APPEAL against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in Original Suit No. 35 of 1897.

Suit for a declaration that plaintiff was entitled to have the village of Dalanayipattadai divided from the zamindari of the first defendant, and registered in the name of the plaintiff, and for an order directing the second defendant, the Collector of the District, to so register it. Plaintiff, being the auction-purchaser of the said village, had applied for its separate registration, to the Collector, who refused on the ground that the first defendant did not concur in the application. The first defendant contended that the purchaser could not acquire more than what the vendor could give, and relied upon the fact that clause 10 of the sannad, of which plaintiff should have been cognizant, expressly prohibited alienation of any portion of the zamindari unless the peishcush on such separate portion should amount to 500 pagodas and upwards; also that Act I of 1876, under which the application was said to be made, related only to private alienations. The District Judge held that the prohibitory clause 10 of the sannad referred only to private alienations made by the zamindar, and not to separation, the result of an auction sale in execution of the decree of a Civil Court. He dealt with section 2 of Act I of 1876 and held that the Collector was not justified in refusing separate registration on the ground that the first defendant did not concur: and he gave plaintiff a decree as prayed for.

* Appeals Nos. 152 to 154 of 1898.

Defendant No. 1 preferred this appeal.

Seshagiri Ayyar for appellant.—Clause 10 of the sannad, which prohibits alienation except in certain circumstances, relates to a court-sale as well as to private alienations: and a purchaser must be taken to know the conditions which it contains. Further, the suit was brought under Act I of 1876, section 5, which only relates to acts of parties, and not to the case of a court-sale. (He referred to *Fischer* v. *Secretary of State for India in Council*(1) and *Kamalammal* v. *Raju Naicker*(2).)

Hon. *Bhashyam Ayyangar* and *Desikachariar* for respondent No. 1.—This suit is not brought under Act I of 1876. That Act was passed to enable matters relating to private alienations to be dealt with. Neither can clause 10 of the sannad affect a sale under a decree of the Court. This case is governed by Regulations XXV and XXVI of 1802. Section 8 of the former relates to private, and section 9 to involuntary alienations. Section 2 of the latter Regulation directs registers to be kept for the registration of transfers of land, and by section 16 of Regulation II of 1803 Collectors are to apportion the assessment on land sold in pursuance of decrees, and Act II of 1864, section 45, deals with sales for arrears of revenue. A Collector is bound to register and sub-assess a portion of a zamindari transferred in accordance with the provisions of Regulation XXV of 1802, and the Court may compel him should he refuse. See *Ponnusamy Tevar* v. *Collector of Madura*(3).

Seshagiri Ayyar in reply.

The Government Pleader (Mr. *E. B. Powell*) for respondent No. 2.

JUDGMENT.—Paragraph 10 of the sannad has in our opinion no bearing on the matter now in dispute. We consider that both the Collector and the District Judge were in error in considering that this suit is under section 6, Act I of 1876. The application to a Collector to grant separate registration of a portion of a permanently-settled estate which has been alienated by a court-sale is in our opinion one under the provisions of section 9 of Regulation XXV of 1802 and Regulation XXVI of 1802 and not under Act I of 1876 and the decision in *Ponnusamy Tevar* v. *Collector of Madura*(3) shows that where such separate registration

(1) I.L.R., 19 Mad., 292. (2) I.L.R., 19 Mad., 308. (3) 3 M.H.C.R., 35.

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is refused by a Collector, the party aggrieved can, by a suit in a Civil Court, compel him to comply with his request. On this ground we consider that the decree of the District Judge is correct and dismiss these appeals with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

1899. April 6, 7, 14.

BOMMAYYA NAIDU (PLAINTIFF), APPELLANT,

v.

CHIDAMBARAM CHETTIAR (DEFENDANT), RESPONDENT.*

Revenue Recovery Act (Madras)—Act II of 1864, ss. 38, 59—Sale for arrears of peishcush—Material irregularity or mistake in conduct of sale—Grounds for setting sale aside—Posting notice of sale in Collector's office—Jurisdiction of Civil Courts.

A person whose application that a sale of land may be set aside under section 38 of the Revenue Recovery Act II of 1864 (Madras) is refused by a Collector, is a person aggrieved within the meaning of section 59 of that Act, and is entitled to seek redress in a Civil Court; and a Civil Court has jurisdiction to entertain such a suit and may set aside such a sale.

When a party seeks to set aside a sale in a Civil Court on the ground of material irregularity or mistake in the conduct of the sale, he must establish, as in proceedings under section 38, that substantial injury has been caused by such irregularity or mistake. A Civil Court cannot cancel the sale unless such substantial injury has been established.

The words "except as otherwise is hereinafter provided," which occur in clause (1) of section 38, refer to the action which the Collector is empowered to take *suo motu*, under clause (3) of the same section, and have no relation to the remedy provided by section 59.

Direct evidence is not necessary to connect inadequacy of price realised with a material irregularity, where the latter has been proved: and the relation of cause and effect between the two may be inferred where such inference is reasonable.

But where the only irregularity shown was an omission to display the notice of sale in the Collector's office, and there was no evidence to show that this affected the attendance of buyers at a place many miles distant, where the sale actually took place, the inadequacy of price being susceptible of other explanations:

***Held*, that it was not shown that the irregularity referred to had caused substantial loss and that there was therefore no ground for setting the sale aside.**

Appeal No. 226 of 1898.

BOMMAYYA NAIDU v. CHIDAMBARAM CHETTIAR.

APPEAL against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Original Suit No. 7 of 1898.

Suit to set aside a sale, by the Sub-Collector of Coimbatore to the defendant, of a village, being portion of the plaintiff's zamindari, for arrears of peishcush. The grounds on which the suit was based were:—That the said village had not been properly attached under section 27 of the Madras Revenue Recovery Act II of 1864; that the attachment notice had not been affixed in any portion of the village; and that the sale proclamation had not been issued in pursuance of the attachment and affixed either to the land or to any other place. It was alleged that by reason of these irregularities the village had been sold at a price below its value. Application had been made by plaintiff, under section 38 of the Revenue Recovery Act (Madras), 1864, to the Collector, who had refused to set the sale aside, but made the following order:—"The notice required by law was not posted up in this office owing to a mistake in the Sub-Collector's office, but I agree with the Sub-Collector in thinking that this omission does not constitute a serious irregularity." He was not satisfied that the village had been sold for so much below its value as to justify him in setting aside the sale and he therefore confirmed the sale and dismissed the petition. The District Judge found that no notice of sale had been put up in the Collector's office; that there had, in consequence, been an irregularity in the sale; but that such irregularity was not sufficient to justify the Court in setting the sale aside. He was further of opinion that the District Court had no jurisdiction to entertain the suit, section 38 of the Act referred to providing a special form of procedure. He dismissed the suit.

The plaintiff preferred this appeal.

Sankaran Nayar for appellant.—A party deeming himself aggrieved by any proceedings under the Madras Revenue Recovery Act II of 1864, may, by section 59 of that Act, apply to a Civil Court for redress. It is submitted that this may be done even without preliminary proceedings in the Collector's Court. Three formalities are essential under sections 27 and 36: the notice of demand, the attachment and the proclamation. The notice of demand is admitted, but it is complained that the other two requirements were not fulfilled. Exhibit C shows that the price realised is inadequate. All the prescribed formalities must be strictly carried out (*Maharajah Mahashur Singh Bahadoor* v.

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Baboo Hurruck Narain Singh(1)). Nor is it necessary, in a civil suit, to prove damage. None was alleged or proved either in the case cited, or in *Mekaperuma* v. *The Collector of Salem*(2) where the omission to serve notice of demand was held to vitiate the whole sale. So, many cases relating to the question of limitation have been decided on the assumption that suits will lie to set aside such irregularities if brought within six months as provided in section 59. The Collector is not a necessary party, *Balkishen Das* v. *Simpson*(3). Section 38 only relates to applications to the Collector; and the words "except as hereinafter provided" must refer to suits brought under section 59. The result is that while a sale can only be set aside by the Collector on proof of "substantial injury" having been sustained, no proof of injury need be proved before the Civil Court. Nor does the Act curtail the general right to obtain a declaration that no title has passed to the purchaser owing to the omission to perform essential preliminaries, and without which the sale is ineffective. As to notification of sale, see *Narayanan Numbudri* v. *Damodaran Nambudri*(4), also *Monindra Nath Mookerji* v. *Saraswati Dasi*(5). Where an irregularity is such as to be likely to cause a scarcity of bidders, the damage sustained may be assumed to arise from the irregularity (*Gur Buksh Lall* v. *Jawahir Singh*(6) and *Surno Moyee Debi* v. *Dakhina Ranjan Sanyal*(7)).

Hon. *Bhashyam Ayyangar* and *Ranga Ramanujachariar* for respondent.—The sale complained of took place after the passing of Madras Act III of 1884. *Mekaperuma* v. *The Collector of Salem*(2) was decided prior to that date. Under the later Act the procedure is positively laid down and no sale can be set aside unless substantial injury is proved to have been sustained. Section 38 of the Revenue Recovery Act (Madras Act II of 1864), as it originally stood, gave the Collector no power to set a sale aside; but section 59 still retains its original form, including the words "except as hereinbefore provided." As no substantial injury has been shown, it is submitted that the suit is not maintainable. Moreover, plaintiff cannot be treated as a party aggrieved, within

(1) 9 M.I.A., 272.
(2) I.L.R., 12 Mad., 445.
(3) L.R., 25 I.A., 151; I.L.R., 25 Calc., 833.
(4) I.L.R., 17 Mad., 189.
(5) I.L.R., 18 Calc., 125.
(6) I.L.R., 20 Calc., 599.
(7) I.L.R., 24 Calc., 291.

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the meaning of section 59, unless the Court also holds that he has suffered substantial injury, there being no grievance recognised by the Act unless accompanied by such injury. Nor will the Court infer that the low price realised at the sale was the necessary consequence of an omission to do one or more out of several specified acts; the connection between the two must be proved, and the onus of proving it is on the person alleging it, *Olpherts* v. *Mahabir Pershad Singh*(1). In *Karuppa* v. *Vasudeva*(2), it was held that non-compliance with the directions of sections 38 and 39 does not invalidate the title of the purchaser. So in *The Secretary of State for India in Council* v. *Rasbehary Mookerjee*(3), an omission to name all the proprietors of a share in the estate sold was held not to amount to an irregularity within the meaning of section 38 of the Bengal Revenue Sale Act XI of 1859. See also *Rajah Gobind Lal Roy* v. *Ramjanam Misser*(4). In the Acts upon which *Balkishen Das* v. *Simpson*(5) was decided, there is no proviso corresponding to that in section 38 of the Madras Act II of 1864, making proof of substantial injury a condition precedent to setting a sale aside. Section 38 of the Revenue Recovery Act (Madras Act II of 1864) necessitates a finding both as to a material irregularity and to substantial injury, and these must be the matters subsequently referred to in section 59, as being "hereinbefore provided." Moreover, the Collector is a necessary party, being, in fact, the real defendant by reason of his refusal to set aside the sale, though the purchaser may be joined, *Arunachellam Chetti* v. *Arunachellam Chetti*(6).

Sankaran Nayar in reply referred to *Earl of Shaftesbury* v. *Russell*(7).

MOORE, J.—The village of Erumarapatti was sold on the 30th August 1897 on account of arrears due by the zamindar of Andipatti. Application was made to the Collector to set aside the sale, under the first clause of section 38 of Act II of 1864, on the ground that there were material irregularities in connection with the sale and that in consequence of such irregularities the zamindar had sustained substantial injury. The Collector found that one irregularity, the omission to post a certain notice in his office, had been proved, but held that this was not a serious irregularity and

(1) L.R., 10 I.A., 25
(2) I.L.R., 6 Mad., 148.
(3) I.L.R., 9 Calc., 591.
(4) L.R., 20 I.A., 165.
(5) L.R., 25 I.A., 151; I.L.R., 25 Calc., 833.
(6) L.R., 15 I.A., 171.
(7) 25 R.R., 534.

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also that although the village had been sold for less than its full value, yet that the price realised was not so much below the value as to justify him in setting aside the sale. He accordingly rejected the petition of the zamindar (plaintiff-appellant) who, thereon, filed a suit to set aside the sale, the auction-purchaser alone being made the defendant (respondent). The District Judge held that the notice of sale was not posted up in the Collector's office, that this was an irregularity, but that it did not furnish sufficient ground for setting aside the sale; and also decided that he had no jurisdiction to entertain the suit.

It appears to me that the District Judge had jurisdiction to entertain this suit. Section 38, clause 1, Act II of 1864 (Madras), provides that application may be made to the Collector to set aside a sale of immoveable property on the ground of some material irregularity in publishing or conducting it, but lays down that "except as otherwise is hereinafter provided" no sale shall be set aside on the ground of irregularity unless the applicant proves that he has sustained substantial injury by reason thereof. Much has been said at the hearing of this appeal as to the meaning of the words "except as otherwise is hereinafter provided," but I think that there can be no reasonable doubt that they refer to the action which the Collector can take *suo motu* under the latter part of clause 3 of this section; and that they must consequently be excluded from consideration in determining the question which arises in the present suit, namely, whether an applicant whose petition under the first clause of the section has been rejected has any remedy. It appears to me that he has such remedy under section 59, which provides that nothing in the Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under the Act from applying to the Civil Courts for redress. Here the plaintiff (appellant) considers himself aggrieved, because the Collector refused to set aside the sale, and he is, in my opinion, entitled to ask a Civil Court to decide if he is entitled to redress.

The District Judge has held that there was an unimportant irregularity in connection with the sale, but that it did not cause the appellant substantial loss. It is contended on behalf of the respondent that if these findings are upheld the appeal must be dismissed. The pleader for the appellant, however, urges that although clause 1 of section 38 provides that the Collector cannot set aside a sale, on an application being made to him to do so,

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unless it is shown that there was an irregularity connected with it which caused the applicant substantial loss, yet that a Civil Court can cancel the sale on proof of any irregularity, whether it has caused loss or not. It does not appear to me that it is possible to accept this argument. It is section 59 that gives the appellant his right to sue, and that section provides that it is only when he has been aggrieved by proceedings taken under the Act that he is entitled to redress. He cannot be held to be aggrieved because the Collector did not, on proof of an irregularity, set aside the sale, notwithstanding that substantial loss had not been caused, inasmuch as clause 1 of section 38, under which the Collector has acted, does not empower him to cancel a sale without proof of substantial injury. The only question that remains for consideration is as to whether it has been shown that any irregularity proved to have been committed in connection with the sale caused the appellant substantial loss. The only irregularity that I can hold has been proved is the one admitted by the Collector, namely, that the notice of sale was not posted up in his office. The evidence given by the plaintiff and his witnesses to prove want of due proclamation, &c., is worthless. The zamindar himself (fourth witness for plaintiff), although he tries to make out that he did not know till the 28th of August that the village was about to be sold, cannot show that there was any irregularity, acknowledges that he cannot remember if he received an attachment notice or not, and admits that he has never taken the trouble to ascertain if the notice was published in the gazette or not. In the absence of evidence, it cannot be assumed that the failure to post up a notice in the Collector's office in Coimbatore affected the attendance of intending purchasers in a village in Karur taluk. The only bidders at the sale appear to have been the appellant and the respondent, and the village appears to have been knocked down to the respondent, because the appellant had not taken the precaution to have sufficient money with him to enable him to deposit the amount required by the Tahsildar before he could be allowed to increase his bids. I must hold that it has not been shown that the irregularity proved in connection with the publication of the notice of sale has caused any substantial loss to the appellant, and on that ground I would dismiss this appeal with cost.

SUBRAMANIA AYYAR, J.—It was for the plaintiff to establish the circumstances which affect the validity of the sale impeached

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by him. The evidence adduced on his behalf is altogether meagre and unsatisfactory and, as held by the District Judge, it fails to show any defect in regard to the sale except that the sale notice was not affixed in the office of the Collector as it should have been. Now, what is the effect of that omission on the validity of the sale? Does the omission amount, as contended for the plaintiff, to a neglect of an indispensable part of the prescribed procedure, so as to render the sale *ipso facto* null and void? Clearly not. Mr. Sankaran Nayar for the plaintiff relied strongly on *Mekaperuma* v. *The Collector of Salem*(1). But there is a clear and sound distinction between that case and the present. The ground on which the sale was set aside there was the absence of any demand legally served upon the defaulters, and, as the learned Chief Justice and Parker, J., observed, the service of such demand upon the defaulter is an essential preliminary to a sale. Otherwise, the property of a defaulter may be taken away from him, even though he is ignorant that coercive proceedings under the Act are being taken against him. Nothing of the kind, however, can happen in consequence of the defect of procedure which is established here, and which cannot ordinarily result in more than the property sold fetching less than what might have been got for it had that publicity which the affixing of a sale notice in the Collector's office is intended to secure, been given to the sale. The omission in question cannot, therefore, be said to be more than an irregularity, though undoubtedly it is a material irregularity. In this view, is a Civil Court altogether debarred, as held by the District Judge and urged before us by Mr. Bhashyam Ayyangar on behalf of the defendant, from entering into the question of the validity of the sale? Mr. Bhashyam Ayyangar relied on section 38 of Act II of 1864 in support of his contention. But what does that section really provide? Under paragraphs I and II thereof, a party may apply to the Collector within thirty days from the date of the sale to set aside the sale, on the ground of material irregularity or mistake or fraud in publishing or conducting it, and the Collector can set it aside, if the alleged ground is made out, provided, however, that, when such ground is material irregularity or mistake in the publication or the conduct of the sale, it can be set aside only if the applicant proves to the satisfaction of the Collector that substantial injury was caused by such irregularity or mistake. Under the third paragraph of the section, it is competent to a Collector to act on his own motion, and, if he thinks that the sale ought not to stand, he can set it aside, irrespective of the question whether substantial injury has been caused by the sale or not. The words, which occur in the concluding part of the first paragraph of the section and on which much stress was laid by Mr. Bhashyam Ayyangar, viz., 'except as hereinafter provided,' are inserted there obviously for the purpose of excluding from the operation of that part of the section the case in which the sale is set aside by the Collector *suo motu*. There is, therefore, absolutely nothing in the section relied on to warrant the view that civil tribunals are entirely debarred from going into the question of the validity of a revenue sale in publishing or conducting which a material irregularity has been allowed to occur. And having regard to section 59 of the Act, whereby power is reserved to a party aggrieved by any proceeding under the Act, to seek redress in a Civil Court, save as specifically excepted in the enactment, and sales like the present not coming within the saving clause, there can be no doubt that Courts are at liberty to set aside such sales, subject, however, to the condition that the party seeking the relief must establish that he has sustained substantial injury by the irregularity complained of. It is true that no such condition is to be found in the section just cited. But the provision that a party impeaching a sale on the ground of material irregularity cannot have it set aside by the Revenue authority specially empowered to deal with the matter unless proof of injury, as aforesaid, is given, certainly implies that the party is subject to a similar condition, when he takes proceedings in the matter in a Civil Court. For, what reason is there for considering that proof of injury is essential to the cancelment of the sale by one authority, but not for the cancelment of it by the other? None whatever. Such being the case, it remains to consider whether the plaintiff has made out that the omission to put up the notice in the Collector's office has caused him such injury as is required by the law before a sale can be set aside. It must be admitted that the sum of Rs. 5,300, for which the village was knocked down to the defendant, is less than its probable value, which might well be taken at about Rs. 8,000 (exhibit C). No doubt, as pointed out by Mr. Sankaran Nayar, in cases like this, direct evidence is not necessary to connect the inadequacy of the price

(1) I.L.R., 12 Mad., 445.

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realised with the material irregularity proved and the relation of cause and effect between the two may be inferred, where such inference is reasonable from the nature of the irregularity and the extent of the inadequacy of the price (*Gur Buksh Lall* v. *Jawahir Singh*(1); see also *Venkatasubbaraya Chetti* v. *Zamindar of Karvetinagar*(2)). Turning, however, to the irregularity here, to say that the non-publication of the notice at Coimbatore,—the Collector's station—which is many miles from where the property was sold, led to a paucity of bidders at the auction and occasioned a fall in the price, would hardly be a reasonable inference, if it can be called an inference. And as to the inadequacy in the price, it is not such as to be insusceptible of other explanations, such as that it was due to an apprehension on the part of the bidders that the purchaser would probably be involved in litigation about the validity of the sale—an apprehension which suits like this unfortunately tend to foster.

I concur, therefore, in dismissing the appeal with costs.

APPELLATE CIVIL.

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

1899. April 5, 6, 14.

APPASAMI NAICKAN AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

JOTHA NAICKAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, art. 179—Execution of decree—Payment out of Court to Plaintiffs of money collected by receiver, but not under decree—Step in aid of execution.

The question whether an application to enforce execution of a decree was barred by limitation depended upon whether a payment out of Court to plaintiffs of money collected by a receiver constituted (with the application alleged to have preceded it) a step in aid of execution within the meaning of article 179 of schedule II to the Limitation Act. The receiver had been appointed during the pendency of the suit, which was by mortgagees for possession of the mortgaged land and for mesne profits accrued prior to the date of plaint. The receiver remained in possession of the land for a period of six months after decree, when he handed it over to the plaintiffs; and the payment out of Court above referred to was of money which had apparently been collected by the receiver during the said six months, and formed no part of the mesne profits dealt with by the decree:

Held, that such money was not collected or paid in execution of the decree though the plaintiffs had become entitled to it as a consequence of the decree. It consisted of current profits of the estate, in demanding which plaintiffs had done nothing towards the execution of the decree, which did not deal with such profits, and which could be fully executed without reference to them.

And *held*, therefore, that the payment referred to did not constitute a step in aid of execution, and that the present application was barred by article 179 of schedule II to the Limitation Act.

(1) I.L.R., 20 Calc., 599, at p. 604. (2) I.L.R., 20 Mad., 159, at p. 161.

* Letters Patent Appeals Nos. 57 and 58 of 1898.

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APPEAL under Letters Patent, section 15, against the order of Mr. Justice Shephard (Officiating Chief Justice), in Appeal against Order No. 176 of 1897, presented against the order of G. T. Mackenzie, District Judge of Coimbatore, in Execution Petition No. 19 of 1897, in the matter of Original Suit No. 7 of 1889.

Suit was filed on 3rd July 1889 by plaintiffs, as mortgagees, to obtain possession of mortgaged land and for mesne profits in respect of faslis 1295 to 1298 inclusive, and for interest. On 19th October 1889, a receiver was appointed; and on 30th December 1889, a decree was passed as prayed. Plaintiffs took over possession from the receiver in July 1890; but the decree was not otherwise satisfied. On 4th January 1892, plaintiffs obtained out of Court certain money which had been collected by the receiver. On 1st March 1894, plaintiffs applied for execution by sale of the defendants' right of redemption, which was granted by the District Court, but on appeal to the High Court the application was held to be time-barred unless it could be shown to be saved by the said payment on 4th January 1892, and on this point the case was remitted to the District Court. An appeal under section 15 of the Letters Patent was unsuccessful, and on 6th February 1897 (that being within three years of the previous application) a petition was presented to the District Judge, who said:—"It appears to me that the action of plaintiffs in drawing out of Court the money which the receiver had collected was not a step in aid of execution and does not save limitation. *Koormayya* v. *Krishnamma Naidu*(1) is cited and no doubt much can be said in either direction, but

(1) I.L.R., 17 Mad., 165.

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I think that we must remember that the money which plaintiffs thus took was not part of the mesne profits which the decrees gave them but part of the subsequent rents of the land." He rejected the application. On appeal to the High Court, that decision was upheld by SHEPHARD, OFFG. C.J., in the following judgment:—

"The first question is whether the application of 1st March 1894 "is barred by the law of limitation. In the petition, no allega- "tion is made of any proceeding which could act as an interrup- "tion. The only pretence for saying that there was any inter- "mediate application is founded on the receipt, dated 4th January "1892, for a sum drawn by the appellants out of moneys deposited "by the receiver. It is quite clear that this money was not received "on account of the mesne profits in respect of which the decrees "now sought to be executed were given. It was money to which "the appellants, as mortgagees having decrees for possession, were "entitled on account of current profits of the property. Even as- "suming that from the payment of money by a receiver it may be "inferred that there was an application to the Court to take a step "in aid of execution, this payment would not help the appellants. "There was in reality no application at all and therefore the appli- "cation of March 1894 was barred by limitation. It follows that "the present application, which is only a renewal of the former one, "must fail. I should doubt anyhow whether it could be enter- "tained seeing that the appellants did not choose to prosecute the "former application. On the question turning on section 99 of the "Transfer of Property Act, it is enough to say that anyhow the "appellants are not entitled to have the property brought to sale. "The appeals are dismissed with costs."

Against the above judgment the plaintiffs preferred this appeal under Letters Patent, section 15.

Hon. *Bhashyam Ayyangar* for appellants.—The action of the plaintiff in applying to the Court and drawing therefrom on 4th January 1892 the money which the receiver had collected and deposited in Court, was a step in aid of execution within the meaning of article 179 of the second schedule to the Limitation Act. The words "in aid of execution" are used in the Civil Procedure Code as meaning all the rights that a person may enforce under a decree. [COLLINS, C.J.—The Judge says the money paid was not part of the mesne profits but arose from the subsequent rents and profits of the land. Assume a case of a defaulting

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tenant: would an application to him by the plaintiff for rent constitute a "step in aid of execution?" The receiver merely held the money for payment to the person entitled.] An application to the Court for money paid in by a purchaser of lands sold in execution of a decree has been treated as a step in aid of execution in *Venkatarayalu* v. *Narasimha*(1), *Bapuchand* v. *Mugutrao*(2) and *Koormayya* v. *Krishnamma Naidu*(3). The money for which the receipt was given on 4th January 1892 would not have been paid unless application had been made, and the Court will presume that it was duly applied for (*Trimbak* v. *Kashinath*(4)). In *Dharanamma* v. *Subba*(5), it was held, where the decree-holder consented to the postponement of a sale of certain land but insisted on certain other land being sold, that this was a step in aid of execution. So also with regard to an oral application to fix a date of sale, *Amar Singh* v. *Tika*(6).

Sundara Ayyar for respondents.—The receipt upon which reliance is placed does not show the period in relation to which the money paid was collected, nor the date of the application, and is insufficient to establish that the payment evidenced by it was a step in aid of execution. Moreover, possession by a receiver is that of the person ultimately found to be rightly entitled, and the receipt of this money by plaintiff was merely a receipt from his own agent, and cannot constitute a step in aid of execution of the decree. The receiver is a trustee (*Seagram* v. *Tuck*(7)), and "when the party is ascertained the receiver will be considered as his receiver—" Kerr on Receivers, page 137. The decree not dealing with profits, plaintiff is not entitled to recover them after the date of plaint: so the receipt of profits of subsequent years is not a step in aid of execution of the decree which relates only to profits prior to the date of plaint. In all the cases cited, money had been paid into Court under a decree. Here the receiver was in possession before the date of decree, and there could be no decree against the defendant for mesne profits when he was not in possession. So the money paid to plaintiff was not money which had been paid into Court under a decree.

JUDGMENT.—We think that the order of the learned Judge is right.

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(1) I.L.R., 2 Mad., 174. (2) I.L.R., 22 Bom., 340. (3) I.L.R., 17 Mad., 165.
(4) I.L.R., 22 Bom., 722. (5) I.L.R., 7 Mad., 306. (6) I.L.R., 3 All., 139.
(7) L.R., 18 Ch. D., 296.

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There is nothing to show that any application to take a step in aid of execution was made within three years prior to the application of the 1st March 1894. The receipt dated 4th January 1892 may, no doubt, be taken as evidence that an application was made to pay out the money referred to in that receipt, but the application is not forthcoming; no sufficient reason for the omission to produce it is given, though a special opportunity was allowed to the appellants to produce it or explain the omission; and there is nothing to show definitely what was the money for which the receipt was given. A receiver was appointed during the pendency of the suit. A decree was given for possession and for mesne profits ascertained in the decree for faslis 1295 to 1298. The receipt was not, it is clear, for any part of these mesne profits. The decree was given on the 30th December 1889, but the receiver remained in possession until the 4th July 1890. The receipt was apparently for money collected in the interval. We do not think that it can be properly said that such money was collected or paid in execution of the decree, though no doubt it was as a consequence of the decree that the appellants (plaintiffs) became entitled to it. The appellants in demanding payment of these current profits of the estate did nothing towards the execution of the decree, for the decree did not deal with these profits. It could be fully executed without any reference to them. On the ground, then, that no application for a step in aid of execution was made during the three years prior to the application of the 1st March 1894, we must hold that execution is barred by article 179 of the second schedule of the Indian Limitation Act.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

BALKURAYA (DEFENDANT), APPELLANT,

v.

SANKAMMA (PLAINTIFF), RESPONDENT.*

1899. March 16. April 11.

Liquidated damages—Breach of a contract to pay various sums—Agreement to pay enhanced rent in event of breach—Penalty.

By the terms of a deed a tenant was liable to pay rent to the plaintiff at an enhanced rate if he failed to pay, at a time specified, Government revenue, interest on a mortgage, and the rent agreed upon. The interest and the rent having fallen into arrears, and a suit having been brought to recover rent at the enhanced rate:

Held, that plaintiff was entitled to recover the additional amount as liquidated damages.

SECOND APPEAL against the decree of H. G. Joseph, District Judge of South Canara, in Appeal Suit No. 270 of 1897, modifying the decree of M. G. Krishna Rao, Acting District Munsif of Puttur, in Original Suit No. 209 of 1896.

Suit for four years' rent, at an enhanced rate mentioned in the lease upon which the defendant held certain land as tenant. The lease (exhibit A) contained the following clause:—"If, by your non-payment of the Government revenue, interest (on mortgage amount) and rice at the aforesaid time, you let (them) fall into arrears, you must, by increasing at the rate of five mudis of rice a year commencing from the year in which there have been arrears in that manner, be delivering to me at the rate of forty-five mudis a year." Defendant contended that the enhanced rate was not payable in case of default in respect of interest and rent alone, but only on default in respect of all three obligations, namely, of Government revenue, interest and rent. The Government revenue had been paid. The District Munsif held that defendant had not discharged the obligations as to payment of rent and interest at the proper time, and that the five mudis excess must have been fixed by way of liquidated damages. He decreed at the enhanced rate as prayed. On appeal, the District Judge (with an unimportant variation) upheld the decree.

The defendant preferred this second appeal.

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* Second Appeal No. 1457 of 1898.

BALKURAYA v. SANKAMMA.

Srinivasa Ayyangar for appellant.—This is a provision for payment at an enhanced rate in the event of certain defaults being made. On the true construction of the lease, liability only arises upon failure to discharge all the obligations thereby imposed. The provision is, moreover, a penal one, and under section 74 of the Contract Act, plaintiff is only entitled to reasonable compensation. The proportion of the penalty to the contractual obligation should be considered; here there had been no default in payment of the Government kist which was the most important duty; the default was only in respect of rent and interest.

Madhava Rao for respondent.

SUBRAMANIA AYYAR, J.—The sole question for determination in this case is whether, as contended for the appellant, the provision contained in the instrument of lease (exhibit A) whereby the lessee is made liable to deliver to the lessor five mudis of rice as additional rent if the lessee should fail to pay in proper time the sum of Rs. 24-8-3 payable to Government as revenue, &c., in respect of the land demised, or to pay on the due date the sum of Rs. 62-8-0, which the lessee was under an earlier provision bound to pay every year to one of the lessors' creditors as interest on the amount due to him under a mortgage held by him on the land, or to deliver at the time fixed forty mudis of rice deliverable to the lessor as net rent, is a penalty. Now, several promises, the breach of any one of which entitles the lessor to the additional quantity of rice, differ considerably in their importance with reference to the possible consequences of their non-performance. The lessee's failure to deliver at the proper time the forty mudis of rice deliverable to the lessor would not ordinarily cause much harm to the latter. But, if default is made in regard to the payment of the Government revenue or the interest due to the mortgagee the lessor might suffer serious injury by the land being caused to be sold on account of such dues. The present case falls therefore under the third head of classification adopted by Jessel, M.R., in *Wallis* v. *Smith*(1) with reference to the question of the distinction between penalties and liquidated damages. And, as pointed out by the Master of the Rolls at page 258 of the report, the decided cases are uniformly in favour of holding in that class of cases that the parties intend the payment to be by way of liquidated damages. Among the decisions which

(1) L.R., 21 Ch. D., 243.

BALKURAYA v. SANKAMMA.

specially deal with the question whether a promise to pay additional rent, as in the present instance, is to be regarded as a penalty or as a promise to pay liquidated damages, it is enough to cite the decision of the House of Lords in *Lord Elphinstone* v. *Monkland Iron and Coal Co*(1)., where the earlier cases are noticed as an authority clearly supporting the latter view.

The lower Courts were, therefore, right in rejecting the appellant's contention and holding that as the appellant had committed defaults not only in regard to the delivery of the forty mudis due to the plaintiff, but also in regard to the payment of interest due to the mortgagee, the plaintiff is entitled to recover the additional rent as liquidated damages.

The second appeal fails and must be dismissed with costs.

MOORE, J.—I concur.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS

v.

AYYAKANNU MUDALI.*

1899. March 1.

District Municipalities Act (Madras)—Act IV of 1884, ss. 188, 189—Keeping a private cart-stand without a license.

In a prosecution for using a place as a cart-stand without a license, under the Madras District Municipalities Act, 1884, it was proved that carts resorted daily to the premises of the accused, laden with produce for sale to the general public and not only to the accused, who acted as a broker, and permitted the carts to stand on his premises until the sale and removal of the goods was completed:

Held, that the place was used as a cart-stand within the meaning of section 188, and that the accused had committed an offence punishable under section 189 of the Act.

APPEAL on behalf of Government under Criminal Procedure Code, section 417, against the judgment of acquittal passed on the accused by P. Rajagopala Chari in Calendar Case No. 220 of 1897.

(1) L.R., 11 App. Cas., 332.

* Criminal Appeal No. 731 of 1898.

QUEEN-EMPRESS v. AYYAKANNU MUDALI.

Charge under section 189 of the Madras District Municipalities Act, 1884, of keeping a private cart-stand without a license within the limits of a Municipality. The accused had been acquitted by the Second-class Magistrate, whereupon an appeal was preferred on behalf of Government and the acquittal set aside by the High Court and the Magistrate directed to re-try the case and to take further evidence as to the character of the alleged cart-stand. (See *Queen-Empress* v. *Ayyakannu Mudali*(1).) The Magistrate accordingly re-tried the case, and, after taking further evidence, arrived at the conclusion that the alleged cart-stand was not really used as such in the sense contemplated by section 188 of the Madras District Municipalities Act IV of 1884, and again acquitted the accused.

This appeal was preferred on behalf of Government, under section 417 of the Code of Criminal Procedure, against the above order of acquittal.

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

Mr. *K. Brown* for the accused.

JUDGMENT.—We must say that the re-trial has not been satisfactorily conducted by the Magistrate. He appears to have regarded the evidence of the Sanitary Inspector given at the former trial as evidence in the present trial, for there is no examination-in-chief of this witness in the present trial, but only his cross-examination. In this, the Magistrate was plainly in error. It was his duty as a Magistrate to see that the evidence against the accused was duly placed on the record, but this the Magistrate has failed to do.

Taking the evidence, however (incomplete though it be), as it stands on the record, we are of opinion that the Magistrate has failed to give due effect to it.

From the evidence of the defence witnesses themselves, it is clear that some ten or fifteen carts from outside villages daily resort to the premises of the accused, laden with produce and goods of various kinds. These premises consist of one or two sheds (the evidence is conflicting as to the number) and of a vacant piece of ground where the carts stand. The accused pays Rs. 300 per annum as rent for these premises. The carts do not bring produce for sale specially to the accused, but for sale to the general public, and the accused acts as a broker between the owners of the produce

(1) I.L.R., 21 Mad., 393.

QUEEN-EMPRESS v. AYYAKANNU MUDALI.

and the public. He allows the carts to stand on his premises until the sale and removal of the goods is completed and apparently until they are paid for. It seems to us that these facts show clearly that the place is used as a cart-stand within the meaning of section 188 of Madras Act IV of 1884. The accused allows the carts of the public to come to his premises and to stand there while their goods are being sold. This is done habitually, and the number of the carts is considerable, so much so that two sweepers are employed to remove the dung and rubbish. The accused himself used to take a license for the premises as a cart-stand, and we have no doubt that the premises were used as such.

We must, therefore, set aside the acquittal and convict the accused, Ayyakannu Mudali, of having committed an offence punishable under section 189, Madras Act IV of 1884.

Looking, however, to the fact that the offence was committed two years ago and that it does not appear on the present record that the premises were insanitary, and looking also to all the facts of the case, we think that a nominal penalty will suffice to meet the ends of justice. We sentence the accused to pay a fine of one rupee. It is said that the accused is willing and anxious to take out a license. We have no doubt the Municipal authorities will grant it, if satisfied that the premises will be kept in a sanitary condition and if the grant is not open to any other objection on public grounds.

APPELLATE CIVIL.

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

CHAKRADHARUDU AND OTHERS (PLAINTIFFS), PETITIONERS,

v.

VENKATARAMAYYA (DEFENDANT), RESPONDENT.*

1899. January 27.

Small Cause Courts Act—Act IX of 1887, s. 15, sched. II, art. 35 (j) vil Procedure Code—Act XIV of 1882, s. 646B—Suit for the value of property lly retained—Jurisdiction of Small Cause Courts.

n moveable property having been distrained under section 15 of the overy Act (Madras), 1865, such distraint was set aside and the property

* Referred Cases Nos. 81 to 90 of 1898.

CHAKRA-DHARUDU v. VENKATA-RAMAYYA.

ordered to be restored to the owners. That order not having been carried out, the owners filed suits on the Small Cause side of the Courts of the Subordinate Judge and the District Munsif, for the value of the property so illegally retained:

Held, that the suits were not excepted from the jurisdiction of the Small Cause Courts by article 35 (*j*) of schedule II of the Provincial Small Cause Courts Act, 1887.

CASE stated under Civil Procedure Code, section 646B, by W. C. Holmes, Acting District Judge of Kistna, in Civil Miscellaneous Petitions Nos. 993 to 1052 of 1898 on his file (Original Suits Nos. 221 to 253 of 1898 and Nos. 510 to 536 of 1898 on the file of the District Munsif of Masulipatam).

Certain moveable properties having been distrained under section 15 of Act VIII of 1865, Madras, the owners thereof sued to set aside such distraints, and obtained orders from the Head-quarters Deputy Collector setting them aside and directing the properties to be restored. These orders not having been carried out, plaints were filed on the Small Cause side of the Subordinate Judge's Court at Kistna, and of the District Munsif's Court at Masulipatam, for the value of the properties so ordered to be restored; and of which the owners had been kept out of possession though demands for restoration had been made. The plaints were returned as being non-cognizable by a Court of Small Causes, and were accordingly presented in the District Munsif's Court on its regular side. The District Munsif, however, decided, with reference to a ruling of the High Court in *Narasimhalu* v. *Venkata-ramayya*(1), that the suits were cognizable by a Court of Small Causes and again returned the plaints. The report of the District Judge, after stating the above facts, continued:—"The suits are cognizable as Small Cause suits under section 15, Act IX of 1887, provided they are not excepted by schedule II of the Act. The only clause that would except these suits would be clause 35(*j*). The question is, are these suits suits for compensation for illegal, improper or excessive distress? It seems clear they are not; they are suits to recover the value of the property illegally retained. The properties were, according to the averments in the plaints, attached, but the attachments had been set aside by a Revenue Court, and the properties were retained, though ordered by the Revenue Court to be restored to the petitioners. There was no question in the suits as to the original distress being illegal,

(1) Referred Cases Nos. 5 to 13 of 1898 (unreported).

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improper or excessive. The suits seem to be clearly cognizable as small cause suits."

Mr. *N. Subramanyam* for petitioners.

Pattabhirama Ayyar for respondents.

JUDGMENT.—We agree with the District Judge that the suits are not excepted from the jurisdiction of the Small Cause Court by article 35(*j*) of the second schedule to the Provincial Small Cause Courts Act IX of 1887. They should be tried by the Small Cause Court. The defendants must pay the plaintiff's costs incurred in this Court and in the Courts below in consequence of defendant's objection to the trial of the suits on the Small Cause side.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam.

QUEEN-EMPRESS

v.

RANGAMANI AND ANOTHER.*

1899. January 10.

Criminal Procedure Code—Act V of 1898, *s.* 260—*Charges under Penal Code* (*Act XLV of* 1860), *ss.* 147 *and* 324—*Summary procedure under Penal Code, s.* 323.

A first-class Magistrate took a case on his file and commenced a regular enquiry therein under sections 147 and 324 of the Indian Penal Code; but after hearing evidence and being of opinion that only an offence under section 323 of the Indian Penal Code had been made out, he proceeded to deal with the case summarily:

Held, that inasmuch as the evidence adduced was not sufficient to justify a committal, but clearly disclosed an offence over which he had summary jurisdiction, the Magistrate was right in acting as he did. Such a course is different to disregarding part of a charge for the purpose of dealing with a case summarily. The High Court will not interfere where a Magistrate has *bonâ fide* acted in the interests of justice.

Empress v. *Abdool Karim* (I.L.R., 4 Calc., 18) distinguished.

CASE referred for the orders of the High Court under Criminal Procedure Code, section 438, by E. A. Elwin, District Magistrate of Bellary, in Criminal Revision Case No. 24 of 1898 (in Summary Case No. 4 of 1898 on the file of the Deputy Magistrate of Adóni).

* Criminal Revision Case No. 2 of 1899.

QUEEN-EMPRESS v. RANGAMANI.

Five persons were charged with abusing and beating the complainant, one of them being armed with a pointed sword; and the medical evidence showed that of the injuries inflicted, two might have been caused by such a weapon. The Taluk Magistrate had issued process under section 147 of the Indian Penal Code, but the Sheristadar-Magistrate, who commenced the enquiry, was of opinion that the offence charged amounted to one punishable under section 148 of the Indian Penal Code and triable as such by a first-class Magistrate. The case was therefore sent to the Deputy Magistrate, who took it on his file under sections 147 and 324 of the Indian Penal Code, offences under which are not triable summarily, and commenced a regular enquiry, examining three witnesses for the prosecution, and taking the statements of the accused. Being of opinion that only an offence under section 323 of the Indian Penal Code had been made out, the Deputy Magistrate proceeded to deal with the case summarily under that section. The question was, whether, having regard to *Empress* v. *Abdool Karim*(1), this course was proper.

The parties were not represented.

JUDGMENT.—The District Magistrate was undoubtedly right to submit this case to the High Court under section 438, Criminal Procedure Code, having regard to *Empress* v. *Abdool Karim*(1). This case, however, is distinguishable. Here, if the Deputy Magistrate had confined himself to the charge before him, he would have been obliged to discharge the accused, as he was of opinion that the evidence was not sufficient to justify a committal, and being of that opinion, he was right in not discharging the accused when the evidence clearly disclosed an offence over which he had summary jurisdiction. This is totally different to disregarding that part of the charge which took the case out of his summary jurisdiction for the purpose of dealing with the case summarily. The High Court will not interfere where the Deputy Magistrate has *bonâ fide* acted in the interests of justice as in this case.

(1) I.L.R., 4 Calc., 18.

APPELLATE CIVIL.

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

KUNJAN CHETTI AND OTHERS (DEFENDANTS NOS. 1, 3 AND 4), APPELLANTS,

v.

SIDDA PILLAI AND OTHERS (PLAINTIFFS AND DEFENDANT NO. 2), RESPONDENTS.*

1898. November 10. 1899. April 25.

Hindu Law—Decree against father how far binding against sons—Question of fact—Acquiescence by sons in father's defence.

In a suit against a Hindu father a decree had been obtained, the execution of which interfered with land belonging to the undivided family of which the father was the manager and his two sons members. The sons had not been joined as defendants in that suit, though they were of age at the time; but they had known of it and had not objected to family funds being spent in its defence. On their suing for an injunction to restrain the decree-holder from executing the decree, on the ground that it was not binding on them:

Held, that the question how far the sons are bound by a decree against the father must be decided with reference to the particular facts of each case. If the father is manager and the question in issue is one which equally affects him and the other members of the family, and if the suit is properly defended, the adjudication will bind all the persons interested with the father, since in that case it will be presumed that the father represents their interests.

The sons will still more clearly be bound if, being of full age, and knowing of the litigation, they acquiesce in the conduct of it by the father.

SECOND APPEAL against the decree of W. J. Tate, District Judge of Salem, in Appeal Suit No. 178 of 1896, affirming the decree of V. Malhari Rao, District Munsif of Salem, in Original Suit No. 773 of 1894.

Suit for an injunction to restrain defendants Nos. 1, 3 and 4 from removing a hedge from and felling trees on plaintiff's land. The land in question was the joint family property of the plaintiffs and their father (who was impleaded as second defendant). In a previous suit against plaintiff's father alone, first defendant had obtained a decree, and in execution thereof was doing the acts complained of, namely, attempting to remove the hedge and fell the trees on the family land. It was claimed that the said decree was not binding on the plaintiffs, who, though of age at the time, had

* Second Appeal No. 1620 of 1897.

KUNJAN CHETTI v. SIDDA PILLAI.

not been made parties to that suit. The third issue framed by the District Munsif was whether the decree referred to rendered the question *res judicata*. The judgment and decree were not produced by the defendant, against whom this issue was accordingly decided. The fourth issue was whether this suit was maintainable: and it was held that it was, inasmuch as the plaintiffs had not been added as parties in the previous suit by the first defendant against their father. A perpetual injunction was accordingly granted restraining defendants Nos. 1, 3 and 4, from interfering with the plaintiffs in their enjoyment of the family land. The District Judge, in confirming this decree, held that as plaintiffs were of age when the previous suit had been brought against their father by first defendant, they should have been made parties to that suit, the evidence showing that they and their father were members of an undivided family, and that the plaint land (on which the hedge and trees stood) was joint family property. He further held that in obtaining the former decree the first defendant had not sued the plaintiff's father in his representative capacity, and (referring to *Narayan Gop Habbu* v. *Pandurang Ganu*(1)), that the plaintiffs had not been effectively represented in the suit.

Defendants Nos. 1, 3 and 4, preferred this second appeal.

Seshagiri Ayyar for appellants.

Masilamani Pillai for respondents.

The appeal was first heard by SUBRAMANIA AYYAR and BENSON, JJ.

JUDGMENT.—The District Judge appears to have assumed that, unless it appears on the face of the record that the father was sued in a representative capacity, the decree obtained against the father must necessarily be held to be not binding on the sons. It is not clear what the District Judge means by stating that the sons were not "effectively represented." The question how far the sons are bound by a decree against the father, in cases like the present, must be decided with reference to the particular facts of the case.

If the father is manager and the question in issue is one which equally affects him and the other members of the family, and if the suit is properly defended, the adjudication will bind all the persons interested along with the father, for the reason that, in

(1) I.L.R., 5 Bom., 635.

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that case, it must be presumed that the father represents the interest of all (*Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut*(1)). If the sons are of full age and are aware of the litigation and take no steps to be brought on the record, but acquiesce in the conduct of the litigation by the father, the case will be still stronger and they will clearly be bound by the decision.

We must, therefore, ask the District Judge to submit a finding on the third issue in the light of the above observations; fresh evidence being admitted on both sides, if desired.

[In compliance with the above order, the District Judge submitted a finding to the effect that the first plaintiff admitted that he had not objected to family funds being spent on the former suit: that his father was manager of the family; and that though he pleaded absence during the litigation, this was improbable. The second plaintiff had lived with his father at the time when and had attended the Court while the former suit against the father was pending. On the whole he found that there was a strong probability that the plaintiffs, who were over thirty years of age, had had every opportunity of knowing and must have known of the former suit: and there was no reason for thinking that the latter was not properly defended.]

The appeal coming on for final hearing after the return of the above finding the Court, as constituted above, delivered the following judgment:—

JUDGMENT.—Accepting the finding we allow the second appeal, reverse the decrees of the lower Courts and dismiss the suit with costs throughout.

(1) 14 M.I.A., 367 at p. 376.

PRIVY COUNCIL.

P.C.* 1899. February 21. March 24.

SRI BALUSU RAMALAKSHMAMMA (PLAINTIFF), APPELLANT.

v.

THE COLLECTOR OF THE GÓDÁVARI DISTRICT (DEFENDANT), RESPONDENT,

[On appeal from the High Court at Madras.]

Alluvion—Gradual accretion to a formation of dry land already existing, and appropriated to an owner of land, on a river's bank—The ownership of the bed of the river was not the subject of contest below—Variation of claim disallowed.

Although there is not in Madras, as there is in Bengal, an express law embodying the principle that gradual alluvion enures to the land to which the accretion is made, following the ownership of that land, the rule is equally well established in both those provinces.

Both parties were riparian proprietors of adjoining estates on both banks of the river Gódávari. The plaintiff claimed the right to newly-formed land, in mid-stream, which she alleged to have been formed by accretion upon an already existing lanka or alluvial island which belonged to her. On that point there were concurrent findings against her. The accretion had taken place upon a lanka owned, not by her but by the Government, and higher up stream than hers:

Held, that the plaintiff must abide by the ground of claim which she had presented below, that being that the new land was formed by gradual accretions to definite and visible portions of a lanka previously belonging to her. This she could not now vary to a claim founded on an ownership of the river-bed on the strength of her being zamindar and owner of the land on both banks of the river, without either issue or evidence directed to such subaqueous ownership.

APPEAL from a decree (17th September 1895) of the High Court, affirming a decree (31st December 1891) of the District Judge of Gódávari, dismissing the appellant's suit.

The plaintiff (appellant) sued the defendant (respondent), who represented the Government on the 22nd June 1889, for the proprietary possession of an area of dry land in mid-stream of the river Gódávari.

The river divided her zamindari estates which adjoined Government villages higher up-stream on both banks. Her claim was for 102 acres of cultivated land, and 160 acres of sands, newly formed against a lanka, or island. This formation she alleged to have accreted to a lanka or island previously existing within the

* *Present:* Lord WATSON, Lord HOBHOUSE and Sir RICHARD COUCH.

limits of her zamindari (Kapileswarapuram), that lanka having been named Kedarlankar, and being her property. She alleged that, during her minority, the Government being, as the Court of Wards, in charge of her zamindari, took possession of the land in suit as it was gradually formed, and having made over the rest of her estate to her on her attaining her majority on the 23rd March 1886, retained possession of the formation as if entitled thereto.

The written statement of the defendant was (1) that the formation was in the bed of a tidal and navigable river, and (2) that it was a gradual accretion to a lanka named Tatapuda, higher up the river, and belonging to the Government.

The position of each lanka is stated in their Lordships' judgment, which contains all the facts of the case.

In his judgment of the 31st December 1891, the District Judge decided that the judgment must turn on the fact whether the new formation was a gradual accretion to the one lanka or to the other. He then found that the accretion had been entirely to the lanka Tatapuda, belonging to the Government.

The formation of lankas in the Gódávari was described by the District Judge, on a remand from the High Court, in his return, dated the 11th March 1895, as follows:—

"The Gódávari is a broad river. In places it is about four miles wide. In the hot weather the river-bed is a waste of sand with some streams of clear water here and there finding their way down to the sea. When the floods come down in June and later months, the river is a turbid torrent, more than twenty or thirty feet deep, very heavily laden with rich silt from the black soil of Central India. When the river reaches the deltaic tract, where the fall is only one foot per mile, the current slackens and the silt is deposited in large islands or accretions in the riverbed, which are called lankas. These are composed of rich black soil, carried down and re-arranged by the river, and they are extremely fertile. As the river falls, these lankas have their edges cut off abruptly by the current. When the river is at its lowest in the hot weather, one sees, as I said above, a few streams of clear water, an extensive waste of barren valueless sand, and, standing up in the midst of this waste of sand, the black fertile lankas."

The High Court on the 17th November following dismissed the appeal with costs.

In their judgment the High Court said:—"We are satisfied "upon the evidence adduced that at the lanka in dispute the "river Gódávari is not a tidal and navigable river."

As regards the question of accretion, the Court doubted whether there was any presumption in the case of such rivers as the Gódávari, that the owner of both banks was also the owner of the bed of the river. Without deciding this point, they said:—"In the "present case the existence of a lanka belonging to Government in "mid-stream would be sufficient to rebut the presumption. The "origin of the Government title to that Tatapudi lanka does not "appear to be material. It exists, and the suit lanka is an accre- "tion to that Tatapudi lanka, and it is not a sudden vertical "accretion in the bed of the river. The well-established rule is "that, where the acquisition of land is by gradual, slow and "imperceptible process, the accretion by alluvion belongs to the "owner of the adjacent land. We see no reason why this rule "should be held to apply only to alluvion caused by the action of "the sea or by the ebb and flow of waters in tidal rivers. The "gradual and imperceptible character of the accretion is the reason "and foundation for the rule; and if the accretion had been a "gradual one to the bank on either side, no one would doubt that "it belonged to the riparian proprietor to whose land it was "annexed. We are of opinion, therefore, that the principle on "which the late District Judge (Mr. Ross) decided the case was "correct, and that the suit lanka is the property of Government."

On this appeal, Mr. *J. D. Mayne*, for the appellant, argued that, notwithstanding the finding on the question of the accretion, her case could rest on her right of property in a formation in the bed of the river within the limits within which, on either bank of the river, she possessed zamindari rights. The issues had sufficiently raised the question. The bed of the river, on which the lanka was formed, was her property. The lanka in dispute had not ceased to be her property, though it might have, in the course of its increase, come into contact with the lanka belonging to the respondent.

Mr. *A. Cohen*, *Q.C.*, and Mr. *J. H. A. Branson*, for the respondent, were not heard.

Afterwards, on 24th March, their Lordships' judgment was delivered by Lord Hobhouse:—

JUDGMENT.—The plaintiff in this case, who is now the appellant, brought the present suit for the purpose of establishing, as against the Collector who represents the Government, her title to a formation of land in the river Gódávari. The formation is called a lanka, which term, as their Lordships understand, not only includes islands more generally known as churs, but also accretions to the banks of rivers. The lanka in dispute is one formed in contact with an island called the Tatapudi lanka.

The plaintiff and the Government are neighbouring owners of land. Each possesses a village and lands on both banks of the Gódávari, the Government village Tatapudi being higher up stream than the plaintiff's village which is called Kapileswarapuram. The river is very broad; said to be in some places hard by four miles broad. At this spot, their Lordships gather from some measurements made in 1866 that it was then not less than two miles broad. It is above the flow of the tide, but is used for navigation, whether at all times or only when the waters are high does not appear.

At some time not precisely specified an island was formed commencing at a point in the river between the banks which are owned by the Government, and extending gradually till its lower extremity protruded between the banks which are owned by the plaintiff. The Government took possession of this island. The plaintiff's predecessor in title claimed it in the year 1847, and the Collector rejected his claim. He sued for possession in the year 1859, but his suit was barred by time. This island is Tatapudi lanka, and it has ever since been the property of the Government without dispute. The plaintiff now sues to recover the later formation which is in contact with Tatapudi lanka, alleging that it is within the village of Kapileswarapuram. The Collector alleges that it is an accretion to Tatapudi lanka. He also alleged that it is formed in the bed of a tidal navigable river, but it has been found against him that the river is not tidal at this point.

Issues were framed, of which the important ones are as follows:—

"(1) Whether the land in dispute is within the boundaries "of the Kapileswarapuram village?

"(2) Whether, by reason of being within the boundaries of "the Kapileswarapuram village, the land in dispute is the property "of the plaintiff?

Framed on allegations made by Pleader at first hearing.

"(3) Whether the plaint land is "the property of the plaintiff by right "of accretion to Kedarlankagedda and "Nadimtippa?

"(4) Whether the plaint land is the property of the "defendant by right of accretion to Tatapudi lanka?

"(5) Or, whether it is the property of the defendant as a "formation in the bed of a tidal navigable river?"

On the first issue the District Judge found that, if two imaginary straight lines were drawn connecting the two eastern boundaries of Kapileswarapuram and its two western ones on each bank, the disputed lanka would lie between those lines, and in that sense it is within the limits of Kapileswarapuram. But then he went on to point out that Tatapudi lanka falls within the same limits; and he accordingly finds on the second issue that the disputed lanka is not the property of the plaintiff simply by reason of its lying within the aforesaid imaginary lines.

He states that each party asserts the disputed land to be not an island which has sprung up in the bed of the river, but a gradual accretion to previously formed land; the defendant says to Tatapudi lanka, and the plaintiff says to a lanka of hers called Kedarlankagedda. It is therefore the third and fourth issues which comprise the substance of the dispute; and after examining the evidence closely the District Judge finds, "that the land is not "the property of the plaintiff by right of accretion to Kedarlanka-"gedda and Nadimtippa, but that it is the property of defendant "by right of accretion to Tatapudi lanka." On that finding he dismissed the suit.

On the fifth issue the District Judge found that the land is an accretion to a lanka in the bed of a tidal navigable river; but on this point the High Court directed further enquiry, after which they decided that the disputed land is not in tidal waters.

The High Court agreed with the District Judge in holding that the plaintiff's test of drawing mathematical lines from bank to bank was a fallacious one because it included in the plaintiff's land Tatapudi lanka which is defendant's land. They then addressed themselves to the claim which the plaintiff urged to be owner of the whole bed of the river between the banks owned by her, and therefore of every formation of soil on that bed. Upon

that claim their Lordships observe that it is not made by the pleadings or by the issues settled by the District Judge. The third and fourth issues relate simply to accretion to some previously existing dry land, and the question raised was whether that was the plaintiff's land or the defendant's. The subaqueous ownership now claimed by the plaintiff raises a totally different question on which much evidence might and probably would have been given; and that question was not tried by the District Judge. The High Court would have been quite justified in refusing to entertain the question until raised by proper issues and evidence. The practical result was no more favourable to the plaintiff. The learned Judges point out that they are called on to decide a very important and difficult question on very meagre evidence. It is indeed hard to say that there is any evidence at all. None has been mentioned by Mr. Mayne, and the learned Judges say that the whole case of the plaintiff rests on the presumption of English law founded on the character of English rivers. The difference between them and such rivers as the Gódávari is obvious. Their Lordships do not travel into that interesting discussion because it is irrelevant to the case made by the plaintiff.

The view of the High Court is that at the highest the principle relied on by the plaintiff is only a presumption, and that the ownership of Tatapudi lanka by the Government rebuts the presumption. They then find concurrently with the District Judge that the lanka is an accretion to Tatapudi and not a vertical accretion in the bed of the river. That carries the case in favour of the defendant. There does not appear to be in Madras, as in Bengal, an express law embodying the principle that gradual accretion enures to the land which attracts it; but the rule, though unwritten, is equally well established. It is hard to see why it should not apply to land which the river washes on both sides, as well as to land which is washed only on one side. If the *terra firma* of Tatapudi pushed out a promontory by gradual imperceptible deposits, that would, in the absence of special circumstances to show title in another, enure to Tatapudi. It is the same with an island which is part of the Tatapudi estate.

The result is that their Lordships, having grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Gódávari, would require to know much more about the river in question and the mode in which it has been dealt with,

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before deciding as to the presumption or its rebuttal. The plaintiff must abide in this suit by the case she has presented. The case is that the disputed lanka was formed by gradual accretions to definite visible portions of her land. That is found against her by the concurrent decisions of the Courts below; and without examining the matter further their Lordships must hold that her claim has failed. Their Lordships will humbly advise Her Majesty to dismiss the appeal, and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Lawford, Waterhouse, & Lawford.*

Solicitor for the respondent—*The Solicitor, India Office.*

PRIVY COUNCIL.

P.C.* 1899. February 14. March 4.

RAJA SETRUCHERLA RAMABHADRA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

RAJA SETRUCHERLA VIRABHADRA SURYANARAYANA AND ANOTHER (PLAINTIFFS), RESPONDENTS.

[On appeal from the High Court at Madras.]

Hindu Law—Agreement between members of a Hindu family—Construction—Their estate managed by one in the relation of ordinary agent to principal—Liability to account.

Three brothers of a joint Hindu family agreed that their estate should remain joint, excepting the share of a separated fourth brother, which was excluded. It was in the agreement that the eldest of the three should manage the family estate, and that after twelve years, and after an account rendered by him of the profit and loss, a division among them should be made; any one of them to obtain his share on giving up his portion of the profits. In a suit for partition commenced by one of the brothers and carried on by his representatives, the term having expired:

Held, that the true construction was that the above was not a mere agreement to postpone partition, leaving the family status of the brothers uninterrupted, but was an agreement which put them on a new footing. Upon reference to several terms of the agreement it appeared that the elder had become liable on the

* *Present:* Lord WATSON, Lord HOBHOUSE, Lord MACNAGHTEN, and Sir RICHARD COUCH.

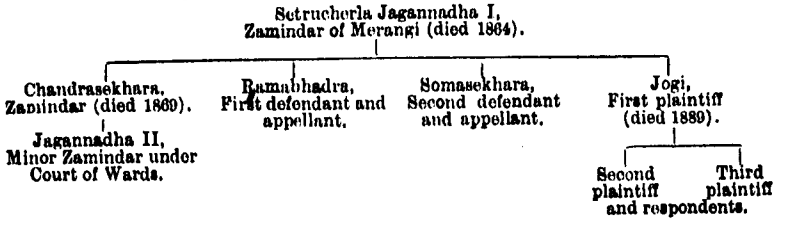
footing of an ordinary agent, accountable for receipts and expenditure, and that he was not in the position of the managing member of a joint family liable only to account as to the then existing state of the property.

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APPEAL from a decree (20th October 1895) affirming a decree (24th November 1892) of the District Judge of Vizagapatam.

The suit out of which this appeal arose was brought on the 20th November 1888 by the father, since deceased, of the two respondents, against his two brothers. The respondents were minors, representing their father, and appearing by the Collector of Vizagapatam, agent to the Court of Wards. The suit claimed delivery of the plaintiff's one-third share, which had been, with the rest of the family estate, in the possession of the eldest of the three brothers, under an agreement executed by them on the 6th October 1874; also an account of the past profits, during his management, and interest.

The following table shows the relative position of the parties:—



The Merangi zamindari was finally declared, as the result of litigation between Jagannadha II and his uncles Ramabhadra, Jogi, and Somasekhara (see *Zamindar of Merangi* v. *Sri Rajah Satrucharla Ramabhadra Razu*(1)), to be partible among the four brothers, the sons of Jagannadha I, as members of a joint Hindu family. The actual partition of the rest of the property was the subject of an award of a panchayat on the 7th October 1874, and on the previous day the agreement, on which this suit was based, was executed by the three, Ramabhadra, Somasekhara and Jogi. The twelve years therein mentioned expired on the 6th October 1886.

The decision of the District Judge was that the appellant Ramabhadra was liable under the arrangement, evidenced by the contract of 6th October 1874, as a trustee, his position not being that of a mere manager of a joint Hindu family, and that as such trustee he was liable to make over, to the plaintiff, land of the

(1) L.R., 18 I.A., 45; I.L.R., 14 Mad., 237.

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value of Rs. 16,622, and money to the amount of Rs. 1,36,407, as the plaintiff's share of the property made over to him, Ramabhadra, and to make over the accumulations and investments thereof, together with mesne profits and interest thereon, and with further interest and costs, and he declared the second appellant, Somasekhara, to be liable jointly with Ramabhadra for the costs of the suit.

The defendants appealed. It was pending this appeal that the estate of the respondents passed into the hands of the Court of Wards.

The Judges of the High Court (Shephard and Best, JJ.) supported the conclusion of the Court below that the defendant Ramabhadra had been placed in possession of the property found to have been made over to him by that Court, in which the plaintiff's representatives were entitled to a one-third share. They also maintained the decision that, on the construction of the 'Samakhya' (as the agreement of 6th October 1874 was termed), it was intended that that defendant should be put, for the time being, in a position to make him accountable at the end of the period for the rents and profits accruing during it. The first Court's decree was affirmed. Ramabhadra and Somasekhara appealed from that decision.

Mr. *Cozens Hardy*, *Q.C.*, and Mr. *J. D. Mayne*, for the appellants, argued that there was error in the judgments of the Courts below. The agreement of 1874, on its true construction, had effect to cause either the result that the original status of union was continued between the brothers, or a re-union was effected between them. In either case, the three were placed in the same position as if the separation of the fourth had not taken place. The appellant Ramabhadra, the manager, on behalf of himself and his brothers, received possession of the family estate upon no other footing than as manager for the family of a joint and undivided Hindu estate. The present suit should be dealt with as one for the partition of joint family property, which had remained undivided by consent of three brothers, while a fourth separated himself and his share from them; and the property should be deemed to be the undivided estate of the three nevertheless. The error indeed amounted to this that the suit had been treated as one for specific performance against a trustee. In an ordinary suit, and in the absence of fraud, the only account that the managing member

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was liable for was as to the existing state of the property divisible. The parties had no right to look back and claim relief against past inequality of enjoyment on the part of the members. Redress in this respect could not be awarded. The plaintiffs by the law of joint families could not claim a decree for their shares, respectively, with profits that might have accrued since 1874, with interest, and mesne profits, down to the date of the decree. All that they were entitled to was an account of their properties as they existed at the date of their suit, without calculation of what might have accrued in the past.

Mr. *J. H. A. Branson* (with whom was Mr. *A. Cohen*, *Q.C.*), for the respondents, argued that the Courts below were right in holding that by the effect of the agreement of 1874 there was neither re-union nor continuance of the former united status of the three brothers; nor were they constituted a joint family. That, they had ceased to be on the partition. The relation of Ramabhadra, as managing member of a Hindu family, had ceased. He was no longer on the less responsible footing of the ordinary manager in a joint family, but was accountable, under the terms of the agreement, as an agent acting in the possession of his principal's property. The terms of the agreement were inconsistent with any other view of his position. As to this part of the case counsel was not heard in reply.

The statements on both sides as to a contested item, whether one portion of the property sued for was comprised in the agreement, appear in their Lordships' judgment. This was delivered on a subsequent day, 4th March, by Lord Hobhouse:—

JUDGMENT.—The principal question in this suit relates to the construction of a very peculiar agreement between three brothers. Their position at that time may be stated in brief outline. They belonged to the Merangi family, being a joint family of Hindus, and the property with which they were dealing belonged to the Merangi estate. When their elder brother died in the year 1869 he was succeeded by an infant son, between whom and his uncles there arose dispute whether or no the zamindari was partible. This dispute was not settled till the year 1891. But other portions of the family property were clearly partible, and a panchayat was appointed to make partition. That body made an award in December 1873, and a revised award on the 7th October 1874. These awards appear to have effected a final settlement as between

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the three younger brothers on one side and their nephew on the other. But the day before the revised award was completed the three younger brothers entered into the agreement in question.

The document bears date the 6th October 1874, and runs as follows:—

"As one of us, Sri Somasekhara Raju Bahadur Garu, has not "agreed to the award passed by the panchayat in the dispute in "respect of dayam (partition) which took place between us three "and the minor zamindar of Merangi, we have resolved that it "would be better for us three to live jointly than to become "divided by instituting civil suits and putting ourselves to much "expense and trouble, and have arranged, among ourselves, the "following conditions for living jointly:—

"1. That the three shares belonging to us according to the "panchayat award after excluding the share of the minor should "be kept joint;

"2. That Sri Ramabhadra Raju Garu, who is the eldest of "us, should take charge of the said three shares and manage the "same; and

"3. That we should live jointly for twelve years from this "date, and effect division thereafter after settling the profit or loss "accruing up to that date. Should in the meantime any of us "desire to become divided, without remaining joint for twelve "years as aforesaid, the member so desiring should give up his "share in the profits which may accrue up to that date and should "himself bear the loss which may have been occasioned thereby. "We have entered into this 'samakhya' (agreement) after agree-"ing that it should be acted upon accordingly and therefore we "three shall bind ourselves to the said conditions."

This arrangement was followed during the twelve years' term. About two years afterwards the youngest brother Jogi, for whom his two minor sons have been substituted and are now respondents, filed his plaint in this suit against his two brothers who are now appellants. He prayed for a division and delivery of his third share of the property including the income during the twelve years' term.

Ramabhadra resisted the suit, alleging that the agreement had never been acted on, and pleading limitation. Those issues were decided against him, and there is no longer any question about them. The questions raised in this appeal are:—first, whether the

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defendant Ramabhadra is liable to account for the income of the property during the twelve years' term, and secondly, whether one portion of the property sued for was comprised in the agreement.

On the first point the defendant contends that under the agreement the three brothers remained a joint Hindu family and that he was the manager of that family and is not accountable for the income of past years. The District Judge has stated his view of the defendant's position in these terms:—

"I think the first defendant is liable to answer to the plaintiff "not only as the manager of a Hindu family, but further as a "trustee. He is, I find, accountable not only on the footing of "what is spent and what remains, but upon the footing of what "expenditure might have been confined to if frugality and skill "had been employed."

On this footing he took accounts and framed his decree. The defendant appealed, but the High Court dismissed his appeal with costs.

Their Lordships cannot accept the defendant's view of the agreement. It is not a simple agreement to postpone the partition and so to leave the family status of the brothers untouched. They are put upon a new footing. The defendant has the management secured to him for an absolute term of twelve years, and though during that term the others would not be precluded from demanding division, they could only do so on condition of giving up profits and bearing any loss occasioned by their premature withdrawal. Moreover the division when it comes is to be effected after settling the profit and loss accruing to that date. That is hardly the language which would have been used if the parties had meant nothing except that they should divide the corpus of the estate as it stood at the end of the term, whether it had increased or decreased. The language is more appropriate to express an intention that accounts should be taken of receipts and expenses, treating surpluses as profits and deficits as loss.

In their Lordships' view the defendant was an agent for the three, unpaid it is true, but accountable for his receipts and expenditure. The District Judge's description of him as a trustee, and as liable for failure in frugality or skill is open to criticism in point of expression, but it does not appear that in applying his principle he has saddled the defendant with any larger liability than results from his agency. It is true that the

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defendant by not keeping accounts has driven the Court to proceed on grounds more or less conjectural; but his Counsel admit that if he fails in maintaining his position as an ordinary joint-family manager, he has nothing to complain of in the District Judge's treatment of the case except as regards one item in the account.

That item is a substantial one. It is stated in schedule D as profits from 1874, the date of the panchayat, from the lease of the Merangi estate by the defendant. That means a lease of the zamindari, which belonged to the minor nephew's share, to the defendant. After deducting the rent paid to the zamindari treasury and other expenses the District Judge brings out the sum of Rs. 16,483-5-4 as the net sum due to the plaintiff's share.

The lease by the Court of Wards is dated the 20th August 1874. It is made on the application of the defendant in the previous May, and the grant is in these terms:—"You should "continue to enjoy the said Merangi zamindari at an annual cost "of Rs. 37,000." The holding is to be from the 1st July 1874 till the zamindar ceases to be a minor. There are several other conditions, none of which throw any light on the question between the defendant and his brothers.

From the terms of the lease itself and from the award of the panchayat it would seem that the defendant had been previously in enjoyment of the property at a favourable rent on account of rendering services to the family. The terms of that holding do not appear in the record; and it cannot be gathered from the award what precisely was the view which the arbitrators took of the defendant's interest. They awarded some amount of profits equally between the four branches of the family. But as between the three brothers the award became abortive, and the lease of August 1874 put the matter on a new footing.

The view taken by the District Judge is thus expressed. He is referring to a tabular statement explaining his decision:—

"Item No. 15 represents the plaintiff's one-third share of the "profits of a lease of the zamindari of Merangi which the Collector "on behalf of the minor zamindar gave in the name of the first "defendant. The first defendant contends that this should be "treated as his self-acquired and separate property. In Benga[1] "the first defendant, as the person who acquired this lease, might, "though he pledged the joint property of his brothers (exhibit "K) as security for the fulfilment of the terms of his lease, claim

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"a double share of the proceeds of the lease; for he alone worked "that lease. But in this part of India property obtained with "the assistance of joint funds is joint, and I think that this lease "and consequently its proceeds may be said to have been acquired "by the aid of the joint property pledged to secure it."

There is, however, no proof that the joint estate ever became security for the rent; and there is good ground for inferring that it did not.

From a letter written by the defendant on the 8th June 1876 it appears that some demand must have been made by the Court of Wards upon him to give security for the rent. He then says it is true that he alone is the lessee. But he goes on to state the arrangement of October 1876, and he continues thus:—

"As the lands which fell to my share and to those of my "brothers are sufficient for the security of the rent, we three are "ready to give, in writing, those properties as security. While "we three brothers are possessed of property sufficient for the "security, there appears to be no reason why others should be asked "to give security. It is all the same whether one security bond is "obtained from us three or whether separate ones are obtained. "Therefore, you are hereby informed that, if you would write your "opinion in regard to this matter, a draft copy of the security bond "will be prepared and sent to you as soon as the Tahsildar puts us "in possession of the lands."

The security bond bears date the 1st November 1876. It purports at the beginning to be executed by the defendant alone. In the subsequent part language is used as if a plurality of persons were giving security, and it refers to a schedule which comprises the family lands. At the foot it is executed by the defendant alone. And when the lands actually charged come to be specified in the schedules, the shares of his brothers are expressly excluded, though his own share which is charged is incorrectly spoken of as "our" one share. The following item is a specimen:—

"Out of the land within the said boundaries the three shares of "Sri Raja Setrucherla Jagannadham Raju Bahadur Garu, the "minor zamindar of Merangi, of Sri Raja Setrucherla Soma-"sekhara Raju Bahadur Garu and of Sri Raja Setrucherla Jogi "Raju Bahadur Garu being excluded, one acre of land belonging "to our one share."

When this had been pointed out by Mr. Mayne, their Lordships asked Mr. Branson if he could show how the joint property or the

RAJA SETRUCHERLA RAMABHADRA v. RAJA SETRUCHERLA VIRABHADRA SURYANARAYANA.

property of the defendant's two brothers was ever made a security for the rent, and he stated that he could not show how.

The result is that though the defendant spoke of giving security by joinder of his brothers, and though the language of the security bond is in part drawn on that footing, it did not bind any property except that of the defendant himself. Whether his brothers refused to join, or whether on reading his letter the Court of Wards thought his security ample without them, it is idle to speculate. The District Judge was perhaps misled by the language of the letter and the corresponding language of the body of the security bond, excluding its commencement, its ending and its schedule. As a matter of fact, his reason for treating the lease as joint property fails; and then no other reason is shown why it should not take effect according to its tenor.

Their Lordships will humbly advise Her Majesty to vary the decree appealed from by striking out of the sums to be paid to the plaintiffs the sum of Rs. 16,483-5-4 being item No. 15 in the tabular statement framed by the District Judge and with that exception to affirm the decree. As each party has partially succeeded and partially failed each should bear their own costs.

Appeal, on the principal point, dismissed; varied as to an item in the account.

Solicitors for the appellant—Messrs. *Keen, Rogers & Co.*

Solicitor for the respondent—The *Solicitor, India Office.*

APPELLATE CIVIL.

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

1899. January 27. February 10. April 13.

MURUGESA MUDALI (PLAINTIFF)

v.

JOTHARAM DAVAY AND ANOTHER (DEFENDANTS).*

Specific Relief Act—Act I of 1877, ss. 10, 11—Civil Procedure Code—Act XIV of 1882, s. 208—Limitation Act—Act XV of 1877, sched. II, art. 49—Claim to recover goods in hands of third parties—Alternative claim for value as compensation.

In execution of a decree obtained by the defendants against one M in the Court of Small Causes, certain goods were attached, to which plaintiff preferred a claim. That claim being disallowed, plaintiff filed in the City Civil Court, Madras, a suit for and obtained a declaration of his title to the goods, but prior to the date of the decree, namely, in October 1895, the goods attached had been sold by the Court of Small Causes, and certain third parties had become purchasers thereof. On plaintiff, in December 1897, suing "for the recovery of "the goods or their value as compensation:"

Held, (1) that the goods not being in the possession or under the control of the defendants, plaintiff was not entitled to a decree for their recovery in specie: and that plaintiff's only remedy was by way of damages for the wrongful taking of his goods at the instance of the defendants; and

(2) that the suit being framed for the recovery of specific moveable property was governed by article 49 of schedule II of the Limitation Act, 1877, and was therefore not barred by limitation. The alternative prayer for the value of the goods as compensation must be read as ancillary to the main relief asked for with reference to section 208 of the Code of Civil Procedure and did not alter the character of the suit or bring it within any other category of the schedule.

* Referred Case No. 29 of 1898.

MURUGESA MUDALI v. JOTHARAM DAVAY.

CASE stated under Civil Procedure Code, section 617, and Presidency Small Cause Courts' Act, section 69, by the Judges of the Presidency Small Cause Court, Madras, in Small Cause Suit No. 23026 of 1897.

The defendants obtained a decree in Small Cause Suit No. 4062 of 1895 against one Manikka Mudali. In execution of that decree certain goods were attached. The plaintiff in the present suit preferred a claim to the goods, but the Court disallowed the claim. Within one year from the date of the order dismissing the claim, the plaintiff filed a suit in the Madras City Civil Court for a declaration of his title to the goods. On the 4th December 1896, the plaintiff obtained a decree declaring his title to the goods. Before the date of this decree, namely, in October 1895, the goods attached were sold by the Court of Small Causes, and certain third parties became purchasers thereof. On the 4th December 1897, the present suit was filed for the recovery of the goods or their value as compensation.

The defendants pleaded that the suit was barred, under sections 13 and 43 of the Civil Procedure Code, by suit No. 171 of 1895 in the City Civil Court; and that the suit was also barred by limitation.

The Chief Judge, by whom the case was tried, held that the suit was not barred by the suit in the City Civil Court and the decision therein; and that it was not barred by limitation so far as it was a suit for recovery of the goods *in specie*, but that in so far as it claimed compensation, if claimed as a distinct alternative

relief and not as included, under section 208 of the Code, in a decree for recovery of the goods *in specie*, it was barred by limitation; but that the plaintiff could not, under the circumstances of the case, have a decree for recovery of possession of the goods *in specie;* and he therefore dismissed the suit. The plaintiff then preferred an application to the Full Bench under section 38 of the Presidency Small Cause Courts' Act. The Full Bench agreed with the decision of the Chief Judge on the limitation question, but upon the question whether the plaintiff was entitled to a decree for recovery of possession of the goods *in specie*, there was a difference of opinion among the members of the Bench.

The following two questions were, therefore, referred for the opinion of the High Court:—"(1) Whether the plaintiff, in the "circumstances of this case, is entitled to a decree for recovery of "possession of the goods in question *in specie?* and (2) in the view "that the suit is one for compensation or damages, whether the "suit is barred by limitation?"

Narayana Rao for plaintiff.

Venkataramayya Chetti for defendants.

JUDGMENT.—The right to sue for the recovery of specific moveable property is governed by sections 10 and 11 of the Specific Relief Act I of 1877. In the present case the goods are in the possession of third parties who purchased them, when sold in execution, under a decree of the Court. The goods are not, and never have been, in the possession or under the control of the defendants. It seems to us that there is no foundation for the contention that the plaintiff is, in the circumstances of this case, entitled to a decree for the recovery of the goods *in specie*. The injustice that might result from giving such a decree is apparent if it is remembered that such a decree may be enforced under section 259, Civil Procedure Code, by attachment of the judgment-debtor's property and the imprisonment of his person, yet it would be impossible for the judgment-debtor to obey the decree without the assistance of the third parties who are in possession of the goods, which assistance might be refused, or be granted only on ruinous terms. If the goods had been purchased by the defendants and were in their possession, then, no doubt, an action would lie for their recovery *in specie*, but, in the facts of this case, the plaintiff's remedy is by way of damages for the wrongful taking of his goods at the instance of the defendants. A similar

distinction, in an analogous case, is made in section 298, Civil Procedure Code. The remedy by way of damages is, in the circumstances of this case, a complete remedy, and, in our opinion, it is the only remedy open to the plaintiff against the defendants.

We answer the first question in the negative.

As to the second question we agree with the Full Bench of the Small Cause Court that the suit is not barred. The suit as framed is one for the recovery of specific moveable property, and therefore falls under article 49 of the second schedule of the Limitation Act, which allows a period of three years from the time when the property was wrongfully taken. The taking in the present case was admittedly less than three years prior to the suit. The alternative prayer in the plaint for the value of the goods must be read as ancillary to the main relief asked for with reference to section 208 of the Code of Civil Procedure. It does not alter the character of the suit, or bring it within any other category of the schedule.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Moore.

1899. March 24, 28. May 3.

ANANTANARAYANA AYYAR (DEFENDANT) APPELLANT,

v.

KUTTALAM PILLAI AND OTHERS (PLAINTIFFS NOS. 1 AND 2 AND SUPPLEMENTAL RESPONDENTS) RESPONDENTS.*

Religious Endowments Act—Act XX of 1863—*Trustees—Dismissal for breach of duty —Failure to submit accounts—Meetings of Committee—Number of members present—Resolution appointing* quorum—*Resolution by three out of seven.*

Though committees constituted under the Religious Endowments Act, 1863, are not strictly corporations, their procedure in matters relating to the management of properties and trustees under their control should be governed by the rules applicable to regular corporations.

In 1879, when a committee consisted of seven members, a meeting was held at which five were present, and a resolution was unanimously passed that at future meetings three should form a *quorum*. This resolution had never been rescinded, and had always been acted upon. In 1895, when the committee also consisted of seven, a meeting was held after due notice to all its members, at which three were present, and a trustee of the temple was, on valid grounds, dismissed from office, and called upon to hand over charge of the temple and its

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Appeal No. 272 of 1897.

ANANTA-NARAYANA AYYAR v. KUTTALAM PILLAI.

properties. The resolution of dismissal was unanimous and was confirmed at a subsequent meeting:

Held, that the meeting as constituted was competent to pass the resolution removing the trustee.

Whether unanimity of the whole committee might not have been necessary in the event of business having been transacted otherwise than at a meeting: *Quære*.

Failure on the part of a trustee to submit accounts to the committee is a breach of one of the most important duties cast upon him by law and is sufficient to justify his dismissal.

APPEAL against the decree of S. Gopala Chariar, Subordinate Judge of Tinnevelly, in Original Suit No. 48 of 1895.

Suit by three out of four trustees of the temple of Sri Narambunadhaswami at Tiruppudaimaruthur to eject the fourth trustee from the properties of the said temple, and for an injunction restraining him from interfering with the temple and its properties, for cash in hand, mesne profits and an account. The temple is an institution governed by the Religious Endowments Act, XX of 1863, and is managed by trustees appointed by the Siva committee of the district. The defendant, having refused to recognise the plaintiffs as his joint-trustees, and having otherwise defaulted, was first suspended, and subsequently, in 1895, dismissed from office by the committee, who, at a later meeting confirmed the order of dismissal and called upon the defendant to hand over the temple and its properties. The defendant declined to accept the notice and continued in charge of the temple and in possession of its properties. Dealing with the merits of the dismissal, the Subordinate Judge held that defendant had been guilty of gross default, negligence and disobedience in the matter of keeping and submitting accounts, and also of insubordination, and that he was fully liable to be dismissed. The defendant, however, disputed the power of the committee, as constituted at their meetings, to suspend or remove him, on the ground, *inter alia*, that only three members, and not the whole or a majority of the committee had passed the orders. The committee, at the time of the last-mentioned meetings, consisted of seven members, of whom only three were present when the order of dismissal was passed. It appeared, however, that on 19th March 1879, when the committee also consisted of seven members, a meeting was held at which five members were present, when a resolution was unanimously passed that at future meetings of the committee three members should form a *quorum*. This resolution had never been rescinded or

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altered; and had ever since been acted upon. The Subordinate Judge held that the order of dismissal had been validly passed, and decreed for the plaintiffs as prayed.

The defendant preferred this appeal.

Sundara Ayyar and *Ramachandra Ayyar* for appellant.

Hon. *Bhashyam Ayyangar* and *Ramakrishna Ayyar* for respondents.

SUBRAMANIA AYYAR, J.—The appellant in this case was a trustee of the temple of Narambunadhaswami at Tiruppudaimaruthur, subject to the superintendence and control of a committee constituted under the Religious Endowments Act (XX of 1863). He was removed from the office under a resolution, dated the 24th October 1895, and passed at a meeting of the committee which was convened after due notice to all the members, and at which three of them attended and concurred in his removal, the total number of members constituting the committee being seven. The Subordinate Judge upheld the dismissal. There is no doubt that the dismissal is right so far as the merits go. Admittedly, the appellant sent no accounts to the committee from October 1892. The plea set up by him that a great portion of the accounts was stolen from the temple is obviously unreliable.

This breach alone of one of the most important duties cast upon him by the law would have justified his dismissal. Several other grounds also in support of the dismissal have been established by the evidence.

It was, however, contended on the appellant's behalf that the resolution sanctioning the dismissal was invalid in law. First, because unanimity on the part of all the members of the committee was necessary for a valid resolution; and, secondly, if unanimity was unnecessary, then because the members who passed the resolution did not constitute a majority of the committee.

It is, however, difficult to believe that the learned Vakil for the appellant was serious in contending that in the case of a body such as the committee in question unanimity was necessary, since it is elementary law that in the case of persons called upon to exercise powers and functions of a more or less public character, unanimity is dispensed with for the obvious reason that if it were insisted upon, the power of willing and acting on the part of such persons would become impossible.

As to the second part of the contention *Virasami* v. *Subba*(1) is a direct authority against the appellant. As, however, the question was not discussed there, as the learned Vakil strongly urged that the view taken in that case with reference to the present point is opposed to the established legal principle applicable to the matter, and as the point is one of some importance in connection with the working of committees under the Act, it is perhaps desirable to discuss it, though briefly. In the Act just referred to, there are no provisions bearing on the present question. Though committees constituted under the Act are not strictly corporations, there can be no doubt that, with reference to the matter in hand, such committees ought to be looked upon in the light of, and be governed by the rules applicable to, regular corporations, as appears from, among other cases, *Grindley* v. *Barker*(2), where Eyre, C.J., and Buller, J., expressly refer to the existence of such an analogy between corporations and persons exercising powers of a public character.

Now, as to the rules relating to corporations with reference to the present point, the law is stated thus in Kents' Commentaries: —"The same principle prevails in these incorporated societies as in the community at large, that the acts of the majority, in cases within the charter powers, bind the whole. The majority here means the major part of those who are present at a regular corporate meeting. There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the *quorum* may decide. This is the general rule on the subject; and if any corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provisions of the Act or charter of incorporation." (Volume II, 13th edition, pages 292 and 293.)

It is superfluous to say that this statement of the law is amply supported by the authorities cited by the learned author, many of which are decisions of English Courts. As to the distinction, however, between the case of a select body as a board of directors and the case of constituent members, noticed by the learned

(1) I.L.R., 6 Mad., 54 at p. 57. (2) 1 Bos. & Pul., 229 at pp. 237, 239.

author, it is to be observed that such a distinction does not appear to have been recognized by the Civil Law, as will be seen from the following passage from Mackeldey's work on that law:—"If not otherwise prescribed this (*i.e.*, the corporate) will is expressed by a resolution of the corporation. But if the constitution has no provisions on the matter, then all the members who have a vote must be convened, and whatever is then determined by a majority of the voters is to be regarded as the united will of the corporation, to which dissenters and absentees must submit." (Translation by Dropsie at page 139.) Nor does Savigny recognize any such distinction in that part of his system of Modern Roman Law where he deals exhaustively with the topic of juristical persons and cognate matters, inclusive of the subject of majority, and where he points out the error of the notion (which notion is alluded to in the Subordinate Judge's judgment) that under the Civil Law it was necessary in the case of corporations generally, that a majority of two-thirds of all the members should be present whenever a resolution of a corporation had to be determined by a majority (see particularly page 244 and note, 250, and 251 and note—Rattigan's Translation of Book II). The distinction in question would seem, therefore, to be more a peculiarity of the English Law than a principle of general jurisprudence. Assuming, however, that it is otherwise, let us consider the validity of the resolution in question on the footing that the law applicable is as stated in the passage quoted from Kent. Now, if a committee under Act XX of 1863 is in the position of the constituent members within the meaning of the passage, the conclusion to be arrived at is simple and clear. The meeting at which the resolution was passed, having, as already stated, been convened after due notice to all the members, and the members that attended the meeting having been of one mind, their resolution must in law be undoubtedly regarded as the resolution of the whole body. But suppose such a committee is to be viewed in the light of a select body, as a board of directors. As only three members were present at the meeting and as that number was less than a majority of the total number of members constituting the committee, the meeting and the proceedings thereof must be held to be invalid, unless the contrary conclusion is sustainable with reference to the resolution of the 19th of March 1879 (exhibit B) and to the practice introduced thereby as to a *quorum*. This resolution was passed at a meeting at which five

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out of the seven members were present; and it was then settled unanimously that three members should from that time form the *quorum*. The evidence abundantly shows that this resolution has ever since been acted upon. That the committee, as a body resembling a corporation, possesses, as urged for the respondent, in the absence of any provision on the subject in the Act XX of 1863, implied power to make rules or bye-laws with reference to the matters dealt with in the resolution of the 19th March 1879 was not disputed and cannot be disputed (Lumley on Bye-laws, pages 7–11). This resolution, until it is revoked or altered, must be taken to be a valid bye-law and binding upon all the parties concerned, provided that it does not contravene the law of the land in any respect and provided that it is not unreasonable. No doubt if the rule requiring the presence of a majority of all the members of a select body at a meeting of such a body were an inflexible rule, the resolution of the 19th March 1879 cannot be treated as a good bye-law. But that that rule is not inflexible is shown by *In re Tavistock Ironworks Company*(1). Lord Romilly, M.R., there held that as the articles of association of the company concerned in that case were silent on the point, and as the business of the company had been usually conducted by any two out of a board of six directors, two directors did form a *quorum*. The circumstance that there the practice of two directors conducting business was tacitly adopted, while here the practice of three members doing business was introduced by an express resolution, is, of course, immaterial. The difference, if any, between the two cases, is only such as to make the present a stronger case than the other. As to unreasonableness, there is no ground whatever for saying that the resolution is open to such an objection.

It follows that the resolution of the 19th March 1879 and the practice inaugurated by it are valid, and that the three members who attended the meeting on the 24th October 1895 were perfectly competent to pass the resolution removing the appellant. It is scarcely necessary to say that the present decision applies only to the transaction of business by the members of a committee at a meeting which is the ordinary and natural mode of ascertaining the corporate will, securing as it does, the advantages and safeguards resulting from personal consultation. Should a committee transact

(1) L.R., 4 Eq., 233.

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business otherwise than at a meeting, whether unanimity is not necessary to render such transaction of business valid, (*In re Great Northern Salt and Chemical Works*(1)), does not arise in this case and need not be considered.

It remains to notice the cases cited for the appellant. First as to *Cook* v. *Loveland*(2). The master and one warden whose action was there in question had clearly no authority to act as deputies of the whole body, as they were not appointed as deputies. With reference to their position as among the principals no question of a *quorum* at a meeting such as is raised here was or had to be decided there. *Brown* v. *Andrew*(3), cited next, was a case in which the relation of principal and agent, in the strict sense of the terms, undoubtedly existed. The authority given was treated as a special joint authority given to a fixed number of persons who were bound to join. It is, however, noteworthy that Lord Denman, C.J., pointed out that there was no evidence of the course of proceeding on the part of those persons, thus implying that had such evidence been given, the question would probably have borne a different aspect. *Cook* v. *Ward*(4), which was the other case cited, is one in which a delegated authority was again delegated. This latter delegation was, of course, held to be invalid. None of these cases is therefore in point. The legal objection taken to the validity of the resolution removing the appellant also fails and the appeal is dismissed with costs.

MOORE, J.—I concur.

(1) L.R., 44 Ch. D., 472 at pp. 480, 481.
(2) 2 Bos. & Pul., 31.
(3) 18 L.J., Q.B., 153.
(4) L.R., 2 C.P.D., 255.

APPELLATE CRIMINAL.

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

1899. March 24.

RUPPELL (COMPLAINANT), PETITIONER,

v.

PONNUSAMI TEVAN AND ANOTHER (ACCUSED), RESPONDENTS.*

Penal Code—Act XLV of 1860, *ss.* 482, 486—*Merchandise Marks Act—Act IV of* 1889, *s.* 15—*Use of counterfeit trade-mark—Prosecution after one year from first discovery of offence—Limitation.*

A complainant having, in 1893, discovered that goods were being sold marked with what was alleged to be a counterfeit trade-mark, called upon the persons so selling to discontinue the use of the said alleged counterfeit trade-mark and to render an account of sales. The right to proceed further was reserved but no action was then taken. In 1898, upon its being ascertained that the same trade-mark was being used, a prosecution was commenced:

Held, that, inasmuch as the complainant had not shown that he believed the use of the alleged counterfeit trade-mark had been discontinued after his first discovery and complaint in 1893, the prosecution was time-barred under section 15 of the Indian Merchandise Marks Act, 1889; and that the complainant must enforce his remedy by civil process.

PETITION under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the proceedings of R. Sivagnanam, Town Second-class Magistrate of Trichinopoly, in Calendar Case No. 130 of 1898.

Charge of using a false trade-mark and selling goods with a counterfeit trade-mark under sections 482 and 486 of the Indian Penal Code. The complainant, on behalf of Messrs. McDowell & Co., Madras, alleged that his firm had since 1886 sold cigars, and that they had the exclusive right to the use of the word 'Bahadur' as the trade-mark in respect of their said cigars; that the accused had been offering for sale and selling cigars not of his firm's manufacture under the name of 'Rai Bahadur,' packed in a manner and in boxes similar to those which his firm packed theirs, and had fraudulently appropriated a material and substantial part of his firm's trade-mark. The complainant, in cross examination before the Magistrate, had deposed as follows:— "In 1893 or 1894 I think we noticed Messrs. Ponnusami Tevan & Co. infringing our trade-mark. It was about that period that we

* Criminal Revision Case No. 16 of 1899.

noticed the said firm was manufacturing 'Rai Bahadurs.' We then wrote a letter to Ponnusami Tevan & Co. in 1893 or 1894. I do not know that the accused was continuing the 'Rai Bahadurs.' I then believed that he gave up the 'Rai Bahadurs.' Because we wrote a threatening letter to the accused, I believed he gave it up. Exhibit I. now shown me might be the threatening letter alluded to." After hearing the evidence for the prosecution the Magistrate discharged the defendants under section 253 of the Code of Criminal Procedure, holding that the resemblance between the two trade-marks was not such as to deceive people and that no case had been made out.

The complainant presented this petition.

Mr. *E. Norton* for the petitioner.—Under section 486 of the Indian Penal Code, when proof has been given of the factum of user, the onus is thrown upon the accused to establish his innocence. The Magistrate has erred in holding that the difference between the trade-marks was sufficient to justify an acquittal. Proof of user of a false trade-mark is sufficient, and actual deception need not be shown. The word 'Bahadurs' was essentially the trade-mark of Messrs. McDowell & Co.; and the manner in which the word 'Rai' has been prefixed is sufficient to show a dishonest intent. See *Nallaya Pillai* v. *Rangasami Pillai*(1) It is a fact to be taken into consideration that the respective boxes of the petitioners and of the defendants would never be exposed for sale side by side, and a strict comparison by purchasers would, therefore, never be possible. See *Seixo* v. *Provezende*(2), per Lord Cranworth, L.C., at page 198. Also *Ford* v. *Foster*(3), per James, L.J.; and *Wotherspoon* v. *Currie*(4).

Sivagnana Mudaliar for the accused.—Apart from the great difference between the descriptions 'Rai Bahadurs' and 'Bahadurs,' petitioners knew of the use of the words 'Rai Bahadurs,' by the accused so far back as 1893, and the present charge is therefore barred. (He read exhibit I.) By section 15 of the Indian Merchandise Marks Act, no complaint is to be lodged after the expiration of three years of the commission of the offence, or after one year of its first discovery. (On the question of the alleged false

(1) Criminal Revision Case No. 204 of 1895 (unreported).
(2) L.R., 1 Ch. App., 192.
(3) L.R., 7 Ch. App., 611 at p. 622.
(4) L.R., 5 H.L., 508 at p. 510.

RUFFELL v. PONNUSAMI TEVAN.

trade-mark, he referred to *Leather Cloth Company* v. *American Leather Cloth Company*(1) and *Barlow* v. *Gobindram*(2).

Mr. *E. Norton* in reply.—The evidence of the complainant shows that he believed the defendants had ceased to use the mark after the letter of complaint of 1893, to which no reply had been received. Section 15 of the Merchandise Marks Act could not have been intended to apply to a case where it is supposed that the offence has been discontinued, and it is subsequently found that it has been persisted in, in spite of complaint.

JUDGMENT.—It is perfectly clear that the petitioners were aware of the alleged infringement so long ago as 1893, and there is nothing to lead us to conclude that they believed that the manufacture was discontinued and was lately revived. Section 15 of the Merchandise Marks Act IV of 1889, enacts that no prosecution such as the present shall be commenced after the expiration of one year after the first discovery of the offence by the prosecutor. The reason for this limitation is clear.

Ordinarily the infringement of a trade mark is rather a civil than a criminal wrong, but as civil proceedings may require much time and expenditure to bring them to a conclusion, the Legislature, in its anxiety to protect traders, has allowed of resort to the criminal courts to provide a speedy remedy in cases where the aggrieved party is diligent and does not by his conduct show that the case is not one of urgency. If, therefore, the person aggrieved fails to resort to the criminal courts within a year of the offence coming to his knowledge, the law assumes that the case is not one of urgency, and it leaves him to his civil remedy by an action for injunction.

On the ground that the prosecution is barred by time, we decline to interfere with the order of the Magistrate, and we dismiss this petition.

(1) 11 H.L.C., 523.

(2) I.L.R., 24 Calc., 364.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam.

QUEEN-EMPRESS

v.

LAKSHMAYYA PANDARAM. *

1899. March 17.

Evidence Act—Act I of 1872, ss. 30, 114, illus. (b)—Joint trial—Confession of co-accused—Plea of guilty by one—Evidence.

On the trial of more persons than one, jointly, for the same offence, where one of them pleads guilty, the person so pleading is no longer on his trial, and cannot be treated as being jointly tried with the others. A confession by that person affecting himself and others cannot, therefore, be taken into consideration as against such others under section 30 of the Indian Evidence Act.

APPEAL against the sentence of B. H. Chester, Presidency Magistrate, Black Town, Madras, in Calender Case No. 24661 of 1898.

Charge against first and second accused, under sections 411 and 414 of the Indian Penal Code, of dishonestly receiving and assisting in the disposal of a currency note for Rs. 1,000, knowing it to be stolen property; and against third accused, under section 381, Indian Penal Code, of theft in respect of the same. The first accused pleaded not guilty: the second and third accused pleaded guilty. The third accused had stolen the note in Madras and passed it to the second accused, his brother, who brought it to the first accused at Conjeevaram. The note was cashed for the second accused by the partner of the first accused, at the request of the latter, an entry being made in the books of the firm recording the number of the note and the name of the first accused; and the said partner subsequently passed the note on to the local treasury. The second accused made a statement which incriminated the first accused. In his judgment the Presidency Magistrate referred to that statement, taking it into consideration under section 30 of the Indian Evidence Act; and he accepted it as true. He convicted first accused and imposed a fine of Rs. 1,000 with six months' rigorous imprisonment in default; and sentenced the second and third accused to rigorous imprisonment for three months and nine months, respectively, and to pay a fine of Rs. 50 each.

* Criminal Appeal No. 804 of 1898.

QUEEN-EMPRESS v. LAKSHMAYYA PANDARAM.

Compensation amounting to Rs. 1,000 was directed to be paid to the complainant out of the fines.

The first accused preferred this appeal.

Mr. *D. Chamier* and *Venkatasubba Ayyar* for appellant.—The circumstances under which the first accused cashed the note do not warrant the conviction. Further the chief, if not the only evidence against him is the statement of the second accused, which the Magistrate accepted as true. That evidence was wrongly relied upon. Under section 30 of the Indian Evidence Act when more persons than one are being tried jointly for the same offence, the Court may take into consideration a confession made by one of them. Here, the second accused was not being jointly tried with the first accused for he pleaded guilty; and having so pleaded he was no longer on his trial and his confession was not admissible, (*Queen-Empress* v. *Pirbhu*(1); see also *Queen-Empress* v. *Pahuji*(2) and *Reg.* v. *Kalu Patil*(3)). Even though the confession of a fellow prisoner be received, it is insufficient in itself to support a conviction (*Queen-Empress* v. *Khandia bin Pandu*(4)). Further, by section 114 of the Indian Evidence Act, illustration (*b*), the Court may presume, *inter alia*, that an accomplice is unworthy of credit unless he is corroborated in material particulars. Here there was no such corroboration. On these grounds as well as on the evidence it is submitted that the conviction should be reversed.

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

JUDGMENT.—The first accused has been convicted under section 411, Indian Penal Code, of dishonestly receiving a currency note which was stolen property, knowing the same to have been stolen. He was charged jointly with the second accused, who pleaded guilty and made a further statement which implicated the first accused.

The evidence for the prosecution showed that the note was stolen by the third accused who informed the second that he had found it and asked him to get it cashed in April. In May the first accused took the note to his partner, and it was cashed by him and an entry of the first prisoner's name, the number of the note and the amount given in cash was made in the firm's books. Some months afterwards the partner sent the note to the treasury and there it

(1) I.L.R., 17 All., 524.
(2) I.L.R., 19 Bom., 195.
(3) 11 Bom. H.C.R., 146.
(4) I.L.R., 15 Bom., 66.

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was cashed. The witnesses for the accused proved that the second accused came to the first and asked him to cash the note in the presence of another person. He enquired how the second accused became possessed of it, and being satisfied with his answer went publicly to the treasury, where he was known, and there tried to get it cashed. Having been unable to get it cashed there he went again publicly to his partner and there in the presence of two or three people got the note cashed and handed the money to the second accused who went away with it. The Magistrate appears to have convicted the first accused upon the statement of the second accused, and, contrasting that with the evidence called for the accused, to have disbelieved the latter.

It is to be observed in the first place that, though the statement of an accused person may be considered under section 30 of the Evidence Act, it is not in fact of equal weight with the evidence of an accomplice and that by section 114 the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In this case the only part of the accomplice's statement which went to show that the first accused had reason to believe that the note was stolen was not only not corroborated but was distinctly contradicted by the evidence in the case. There was absolutely no evidence given apart from this statement (if it can be considered at all) that the first accused had any reason to believe that the note was stolen. Moreover the statement of the accused was not entitled to be considered even under section 30, for it follows his plea of guilty and it has been held, as I think rightly, that in those circumstances it ceases to be the statement of a person jointly tried, because the trial ends with his plea (see *Queen-Empress* v. *Pirbhu*(1) and *Queen-Empress* v. *Pahuji*(2)).

The conviction of the first accused is, therefore, wrong. The appeal is allowed and the conviction set aside. The fine if paid must be refunded to the first accused.

(1) I.L.R., 17 All., 524.
(2) I.L.R., 19 Bom., 195.

APPELLATE CIVIL.

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

1897. November 17, 18, 21. 1899. January 9.

ASSAN AND OTHERS (DEFENDANTS NOS. 5 TO 8, 10 TO 13, AND 15 TO 17 IN SECOND APPEALS NOS. 1951 TO 1955 AND 1958 AND 1959 OF 1897, AND DEFENDANTS NOS. 10 TO 13, 15 TO 18, AND 20 TO 22 IN SECOND APPEALS NOS. 1956 AND 1957 OF 1897), APPELLANTS,

v.

PATHUMMA AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 4, 9, 14 AND 18 TO 43), RESPONDENTS.*

Limitation Act—Act XV of 1877, *ss.* 4, 14—*Exclusion of time of proceeding* bonâ-fide *in Court without jurisdiction—Joinder of causes of action—Court Fees Act—Act VII of* 1870, *s.* 28—"*Plaint*"—*Suit filed before period of limitation expired, but stamp duty not paid till afterwards—Muhammadan Law—Suit for partition of property of deceased by his heirs—Law governing devolution where deceased's paternal ancestors had been subject to Muhammadan Law, but his mother was a member of a tarwad holding property subject to Marumakkatayam Law.*

Two suits were brought for partition of the property of a deceased by his heirs under the Muhammadan Law:—the first, by his widow and six children in the Court of the Subordinate Judge; the second, by two other children by his first wife, in the Court of the District Munsif, from which Court it was transferred to the Court of the said Subordinate Judge. The Subordinate Judge having ruled that the plaintiffs in each suit were not entitled to sue jointly, the plaints were permitted to be amended. The first plaint was accordingly re-presented in the Subordinate Court as that of the widow; the second, also in the Subordinate Court, as that of the first child of the first wife: and seven further plaints were filed in the Subordinate Court on behalf of the remaining children respectively. These seven further plaints were unstamped. Six of them, presented by the widow's children, stated explicitly that the duty payable thereon was included in that already paid on the widow's plaint, which sum correctly represented the duty payable on the footing that the share of each formed a distinct subject-matter. All the plaints were by order placed on the file of the District Munsif's Court. The plaints were at first treated at the Munsif's Court as being duly stamped: though payment of fresh Court-fees was subsequently ordered after the expiration of the period of limitation. The deceased had died in 1882; the two original suits had been filed in 1893 and 1894, respectively—within twelve years of his death; and the two amended suits and the seven fresh plaints had been filed in December 1894 more than twelve years from his death:

Held (on the question of joinder), that there was no misjoinder of causes of action. If the suits were viewed substantially as suits against trespassers, the plaintiffs, as tenants in common, were competent to sue together in respect of

* Second Appeals Nos. 1951 to 1959 of 1897.

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what was thus a common injury to them. If, on the other hand, the suits were suits for partition, the plaintiffs were *a fortiori* entitled to join;

(On the question of limitation), that the suits by the two children of the first wife were not barred as they should be treated as a continuation of their original joint claim, which had been instituted in the same Court before the period of limitation had expired:

That where there has been a misjoinder which has precluded a Court from entertaining a suit, the period during which such suit has been prosecuted diligently and in good faith may be deducted in computing the period of limitation: the inability of the Court to entertain a suit combining causes of action which could not be combined, being covered by the words "from other cause of a like nature,"—in section 14 of the Limitation Act:

That with reference to the widow's amended suit, inasmuch as her original suit (on behalf of herself and her six children) had been filed before the period of limitation had expired and had been prosecuted diligently and in good faith the time during which that original suit had been pending must be deducted and her amended suit held to be not barred:

That for similar reasons, a like deduction should be made in favour of the six fresh suits of her children (unless a contrary decision were necessitated by the fact that their plaints had remained unstamped until after the expiration of the extended period of limitation).

Per SUBRAMANIA AYYAR, J.—That although an amount equal to the fees properly payable in respect of the widow's amended suit and of the six fresh suits filed by her children had in fact been paid on the joint suit originally filed, credit could not be claimed out of that original payment for the Court-fees due on the six fresh suits subsequently instituted. These plaints must, therefore, be considered to have been not duly stamped, if not entirely unstamped, at the time when the period of limitation expired:

That, the said plaints having been filed in time, the fact that they were not duly stamped or were entirely unstamped when the period of limitation had expired, did not render them time-barred; since the plaints must be regarded as having been presented on the day upon which they were filed. It cannot be inferred from the Limitation Act, 1877, that the word "plaint" as used in section 4, explanation, means "plaint duly stamped." A "plaint" in law means merely "a private memorial tendered to a Court, in which the person sets forth his cause of action: the exhibition of an action in writing." Whether any Court-fee is payable in an action commenced by the plaint, and if so when and how it should be paid, are matters that are foreign to the question whether the document is a plaint or not. The Court Fees Act and the Limitation Act are entirely different in their purpose and scope, and neither can be taken to control or qualify the other.

Per DAVIES, J.—That inasmuch as the order of the Subordinate Judge requiring separate plaints was erroneous it could not operate to enhance the Court-fees truly payable. The true plaints in the case, in so far as stamp duty was concerned, were the two joint plaints originally presented. These were filed in time, and were sufficiently stamped. The fees having been paid at the beginning, no question arose as to the insufficiency of stamp duty, and the objection on the ground of limitation was thereby disposed of.

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A deceased as well as his paternal ancestors had followed the Muhammadan Law; but his mother had been a member of a tarwad which held property subject to Marumakkatayam Law. On its being contended that in such a case the property of the deceased, whether derived from his father or mother, passed according to the rule of Marumakkatayam Law to his mother's tarwad, and not to his heirs according to the Muhammadan Law:

Held, that the law governing the devolution of the property of the deceased, derived from either parent but not held by him as a member of a tarwad subject to Marumakkatayam Law, is the Muhammadan Law.

Venkatramayya v. *Krishnayya* (I.L.R., 20 Mad., 319) referred to.

SECOND APPEALS against the decrees of S. Subba Ayyar, Subordinate Judge of North Malabar, in Appeal Suits Nos. 229, 212 to 216, 221, 225 and 226 of 1896, affirming the decree of V. Kelu Eradi, District Munsif of Tellicherry, in Original Suits Nos. 429, 430, 432, 433 and 434 of 1894; 135 and 136 of 1895; 431 and 435 of 1894.

Suits (nine in number) for partition of property by a widow and her six children, and by two children by a first wife, as heirs of one Pokker, deceased, who had lived subject to Muhammadan Law.

The facts and arguments are fully set out in the judgments.

Sankaran Nayar and *Ryru Nambiar* for appellants.

Mr. *O. Krishnan*, *V. Krishnasami Ayyar*, *Anantakrishna Ayyar*, and *Govindan Nambiar* for respondents.

SUBRAMANIA AYYAR, J.—The facts which have given rise to these second appeals, though complicated, may, so far as the determination of the questions raised in this Court is concerned, be stated as follows: The property in dispute was held by one Pokker, alleged by the contending defendants to have died in 1881. The plaintiffs in the nine suits are the surviving widow of Pokker and her six children by him and his two children by his other wife deceased. They sued for a partition of the property as his heirs under the Muhammadan Law. Originally these had been commenced as two suits. Kunhi Pathumma, the surviving widow of Pokker, and her children sued jointly for their shares of the property, in Original Suit No. 71 of 1893, on the file of the Tellicherry Subordinate Court, instituted on the 22nd December 1893. Assan and Packichiumma, Pokker's other children, sued similarly for their shares in Original Suit No. 293 of 1894 in the Tellicherry District Munsif's Court on the 7th of September 1894. The latter suit was, on the 5th October 1894, transferred to the

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Subordinate Court to be tried with the other suit. Among the objections taken to both the suits in the Subordinate Court by the contesting defendants, one was that the plaintiffs were not entitled to sue jointly as they did. On the 5th December 1894 the Subordinate Judge passed an order holding that that objection was fatal to the entertainment of the suits but permitted the plaints to be amended so as to make each that of any one of the plaintiffs therein. Accordingly, within the time fixed by the Subordinate Judge for the amendment, *i.e.*, on the 11th December 1894, the plaint in No. 71 of 1893 was re-presented amended as the plaint of Kunhi Pathumma: while that in No. 293 of 1894 was re-presented amended on behalf of Assan. On the same day, seven separate plaints were filed in the Subordinate Court, namely, one by each of the remaining plaintiffs in the two suits Nos. 71 of 1893 and 293 of 1894. On the next day the Subordinate Judge, for the reason that the value of the subject-matter in every one of the nine suits thus filed was below Rs. 2,500, ordered all the plaints to be returned for presentation to the District Munsif's Court. This was done on the 17th December 1894. Two of the said plaints—those of Assan and Packichiumma—were not, however, placed on the file of the District Munsif's Court then. As the said parties had commenced their suit No. 293 of 1894 in that very Court the District Munsif took exception to the order of the Subordinate Judge whereby their plaints were returned, and on the 17th December ordered the same to be taken back. They were, two days later, lodged once more in the Subordinate Court. But on the very next day the Subordinate Judge again returned them for reasons which it is not necessary to refer to. After some intermediate proceedings, also unnecessary to mention, the plaints were re-admitted by the Subordinate Judge on the 25th February 1895 and under the orders of the District Court transferred to the District Munsif's Court, on the file whereof the plaints thus ultimately came for disposal. Among the plaints in these nine cases, seven, viz., the one presented by Packichiumma and the six presented by Kunhi Pathumma's children, were unstamped when presented to the Subordinate Court on the 11th December 1894 and to the District Munsif's Court on the 17th *idem* and remained so till the beginning of 1896. In the view I take of the case of Packichiumma, it is needless to refer to the circumstances connected with the payment of Court-fees in respect of her plaint. In regard to

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the other six cases, however, it is necessary to enter into the details connected with the matter. Though these plaints were unstamped, each of them stated in explicit terms that the duty payable thereon was included in that paid in Kunhi Pathumma's suit. The particulars of payment therein are—

Before the splitting of the claims under the order of the Subordinate Judge, dated the 5th December 1894—

	RS.	A.	P.
On the 22nd December 1893	32	8	0
On the 10th October 1894	237	8	0
(On account of increase as per Commissioner's valuation).			
On the 12th November 1894	163	8	0
Subsequent thereto on the 17th December 1894	68	4	0
Total ...	501	12	0

This sum of Rs. 501-12-0 represents correctly the amount payable upon the value of the shares of the seven plaintiffs calculating the Court-fees on the footing that the share of each formed a distinct subject-matter. The course adopted in the said six cases with reference to the Court-fees as explained above was at first accepted as correct, as will be seen from the endorsements on the plaints by the Head Clerk of the District Munsif's Court bearing date the 17th December 1894, and the documents were treated as duly stamped. But in the beginning of 1896 the District Munsif directed the plaintiffs to pay fresh Court-fees and in compliance with the order they furnished Rs. 416 worth of stamps. The defendants contended that Pokker was not the exclusive owner of the property and that all these suits were barred by limitation. In the lower Courts the plea of limitation was based on the allegation that the suits were not instituted within 12 years of Pokker's death in 1881. But the lower Courts having found that Pokker died in 1882 exclusively entitled to the property, the plea was sought to be supported here on other grounds. It was urged that the period taken up in the litigation mentioned, up to the 12th December 1894, cannot, under section 14 of the Limitation Act, be allowed in favour of the plaintiffs in computing the period of limitation, and, therefore, all the nine suits should be held to have been barred when the plaints were presented in the

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District Munsif's Court on the 17th December 1894, and, further, even if that time is to be allowed, in at least seven of the cases, the plea must prevail inasmuch as the plaints in them remained unstamped till after the expiry of the limitation period.

Now, the two main points arising for determination are whether any, and if so which of these suits are barred, and what is the law governing the devolution of the property. Before entering into the consideration of the questions it is necessary to advert to the nature of the claim made by the plaintiffs. For it is the erroneous view of the Subordinate Judge in the matter that has contributed largely to the subsequent troubles and difficulties. Now what was the nature of the claim? Whichever of the two views that can possibly be taken is adopted, there was no misjoinder of causes as was held by the Subordinate Judge. If the suits be viewed substantially as suits against trespassers, the plaintiffs, as tenants in common, were undoubtedly competent to sue together in respect of what was thus a common injury to them. (Paragraph 2, rule 80, 'Dicey on Parties,' page 380, and the cases referred to in illustration of that paragraph in page 381.) If, on the other hand, they were suits for partition, which, in my opinion, they really were, *a fortiori* the plaintiffs were entitled to join. For in a suit for partition each co-owner, as against another, occupies in himself the rôle of plaintiff as well as defendant. It is in consequence of this reciprocal character of the right which co-owners have in the matter of partition, that even those who are not actual plaintiffs can claim that their shares also be allotted to them by the decree (Domat's 'Civil Law,' paragraph 2757, *Sheik Khoorshed Hossein* v. *Nubbee Fatima*(1)). How, then, can a suit, in which some of the co-owners concerned in the division seek as plaintiffs to enforce it, be objected to on the ground of such joinder? In such a case the reciprocal character of the right of the parties renders the cause of action the same within the meaning of section 26 of the Code of Civil Procedure, each party, however, being entitled to separate relief.

Such being the nature of the claim, Original Suit No. 293 of 1894 was not open to the objection of misjoinder of causes and having regard to the substance of the proceedings, I think that, notwithstanding the presentation of two plaints by Assan and

(1) I.L.R., 3 Calc., 551.

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Packichiumma in pursuance of the Subordinate Judge's erroneous order, the litigation, in so far as they are concerned, ought to be held to be but a continuation of their original joint claim. *Cf. Biru Mahata* v. *Shyama Churn Khawas*(1). In this view their case is clearly not barred by limitation, as the suit was instituted within twelve years from the date of Pokker's death, as found by the lower Court.

Turning now to the remaining seven suits, the matter is not so clear. The plaintiffs therein having given up their suit in the Subordinate Court and instituted these others in a different Court, the latter suits cannot possibly be looked upon as a continuation of the joint suit in the Subordinate Court. In discussing the point of limitation in these cases it is important to bear in mind the effect as between the parties of the order of the Subordinate Judge that Suit No. 71 of 1893 was unsustainable on the ground of misjoinder of causes. The appellants, whose contention to that effect prevailed under that decision, cannot, as against their adversaries, who accepted and acted upon it, be heard to say that the decision is not correct. Taking, therefore, that in No. 71 of 1893 there was a misjoinder which precluded the Courts from entertaining that suit, can the period during which that suit was prosecuted diligently and in good faith, be deducted in calculating the period of limitation with reference to the present suits? In other words, is the inability of a Court to entertain a suit combining causes of action which could not be combined, covered by the words "from other cause of a like nature" in section 14 of the Limitation Act? That it is so seems to my mind to follow almost necessarily from the recent Full Bench decision in *Venkiti Nayak* v. *Murugappa Chetti*(2). There it was held that the time spent in the due prosecution of a suit which failed for the reason that in the plaint therein matters that could have been joined with leave obtained under section 44 of the Civil Procedure Code had been joined without such leave, is allowable under the provision of the law referred to. When the provision thus applies to a proceeding which becomes abortive owing to an unauthorized joinder of matters—the joinder whereof the Court on application of the parties could have authorized—how can it consistently be held that the provision does not apply to a proceeding which fails on account of

(1) I.L.R., 23 Calc., 469. (2) I.L.R., 20 Mad., 46.

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a misjoinder that the Court could not sanction and which is prohibited by the law absolutely? Compare *Mullick Kefait Hossein* v. *Sheo Pershad Singh*(1). That Original Suit No. 71 of 1893 was prosecuted in good faith is unquestionable. And as there was no suggestion and there are no reasons for thinking that the plaintiffs did not prosecute it diligently, the time during which that suit was pending must be deducted and Kunhi Pathumma's present suit held to be in time. A similar conclusion should be arrived at in her children's suits also unless the fact that the plaints therein remained unstamped until after the expiry of the limitation period necessitates a contrary decision.

This leads to the other contention urged as to limitation. No doubt the plaintiffs had, when they presented the plaints in the Munsif's Court, paid, jointly with their mother on account of Court-fees, sums aggregating to an amount equal to that properly payable by them in respect of their shares, taking each share as a distinct subject-matter. But no authority has been shown for holding that they were entitled to claim, as they did, credit for the Court-fees paid before the plaints were put in, *i.e.*, more than three-fourths of the total amount. These plaints, therefore, have to be considered to have been not duly stamped, if not entirely unstamped, when the period of limitation expired. In this view the present cases cannot, in my opinion, be distinguished from *Venkatramayya* v. *Krishnayya*(2), cited for the appellants, and they should be held to be barred by limitation if the decision just referred to is to be followed. It, however, is in conflict with the decision in *Papamma Rao* v. *Sitaramayya*(3). In the latter case, the plea of limitation, raised with reference to a set-off claimed in the written statement of the defendant was similarly based on the fact that the written statement which in regard to the amount of set-off was the plaint (*Chenbappa* v. *Raghunatha*(4)) was not stamped as it should have been until after the period of limitation in respect of the set-off had expired. Parker and Best, JJ., dealt with the point thus: "We now come to the defendant's claim against the plaintiff for "the set-off. We attach no weight to the objection that as no Court-"fee was paid on the written statement when it was first filed, it "cannot be levied afterwards. It was open to the Courts so to levy

(1) I.L.R., 23 Calc., 821. (2) I.L.R., 20 Mad., 319.
(3) Appeal No. 159 of 1893 (unreported). (4) I.L.R., 15 Mad., 29 at p. 34.

"it, and the omission to do so for a considerable time was as much "the mistake of the Court as the default of the party. The written "statement was put in on the 1st of August 1891, though the Court-"fee was only levied in 1892. But the decisions in *Chennappa* v. "*Raghunatha*(1) and *Patcha Saheb* v. *Sub-Collector of North Arcot*(2) "are authority for holding that though the deficient stamp duty "was levied afterwards, the claim must be regarded as presented on "the day on which it was put in. No bar of limitation, therefore, "arises."

And for my own part, with all deference to my learned colleagues who took part in the case relied on by the appellants, I am unable to agree with their conclusion. There is no warrant in the Limitation Act itself for inferring that the term "plaint" in section 4, explanation, means "a plaint duly stamped." According to the well-known rule of interpretation, words must, in the absence of any indication to the contrary, be understood in their ordinary and natural acceptation. Plaint, in law, means (and has, since before the days of Blackstone, whose phraseology in regard to the explanation of the term has been accepted by Lexicographers, meant) nothing more than "a private memorial tendered to a Court in which the person sets forth his cause of action; the exhibition of an action in writing." In the absence of a distinct and direct statutory definition to the contrary we have no right to put a more restricted construction on the term. Certainly, whether any Court-fee is payable in an action commenced by the plaint and, if any is payable, when and how it should be paid, are manifestly matters that are entirely foreign to the question whether the particular document is a plaint or not. It is, however, proposed that section 4 must be read with section 28 of the Court Fees Act. No doubt it is true that in construing an Act, provisions of other statutes which are in *pari materia* may be referred to. But when the two enactments are not in *pari materia* how can one be taken to control and qualify the other? In the present instance the two enactments are quite different in their purpose and scope. See *Dayachand Nemchand* v. *Hemchand Dharamchand*(3). The subject of Court-fees, with which one is concerned, evidently has no real or necessary connection with the limitation of suits and proceedings to which

(1) I.L.R., 15 Mad., 29 at p. 34. (2) I.L.R., 15 Mad., 78.
(3) I.L.R., 4 Bom., 515 at p. 526.

the other is exclusively devoted. If authority were needed against reading together provisions of such unconnected and divergent statutes, reference may be made to *Eyre* v. *Waller*(1) and particularly the judgment of Wilde, B., who, dealing with a similar point, observed:—"With respect to the other Acts referred to in "which the word 'Check' is introduced, they are not in *pari materia* "and have a totally different scope. Nothing can be more dangerous "than to construe one statute by another, especially when we con-"sider the mode in which the statutes are framed in the present "time." Attention may also be drawn to *Knowles and Sons* v. *Lancashire and Yorkshire Railway Co.*(2) where Lord Halsbury, L.C., observed:—"I, for myself, decline to consider any other statute "proceeding on different lines and including different provisions. . . . "I do not think one gets any help from the construction of other "statutes passed at different times and in pursuance of different "lines of thought." I, therefore, find it impossible to see any justification for interpolating, as the case relied on by the appellants in effect assuredly does, in section 4, after the word "plaint" and before the words "is presented," a whole clause, *i.e.*, "duly stamped "in accordance with the law for the time being in force." Such an interpolation must, in not a few cases, cause great hardship, seeing the doubt and difficulty which not infrequently arise with reference to the determination of the exact amount of the Court-fee payable in particular instances and considering, especially, the mistakes which are often committed by the Courts themselves in regard to the matter. I need hardly say that the present cases furnish a remarkable illustration of the disastrous consequences which would be caused undeservedly to suitors by adopting the construction proposed. By the memoranda attached to each of the plaints in explanation of the circumstance why the plaints themselves were not stamped the attention of the Court was admittedly drawn to the fact that the plaintiffs treated the plaints as duly stamped for the reason stated by them—which no doubt was honestly taken by them to be good. Had the Court then informed them, as it ought to have done, that their view was wrong, they certainly would have at once furnished the requisite stamps, as they did when required to do so some months later. But the plaints were received without objection, and, notwithstanding that the plaintiffs had

(1) 5 H. & N., 460 at p. 464. (2) L.R., 14 App. Cas., 248 at p. 253.

eventually to pay, as already mentioned, double the amount, owing to the unfortunate order of the Subordinate Judge referred to, there is no alternative left but to dismiss the suits—according to the decision relied on by the appellants. And the plaintiffs must suffer, though they began the litigation in proper form and in the proper Court some nine months before the expiry of the twelve years prescribed by the law, solely and simply on account of the error committed by the Court in considering, in the first instance, that the stamp duty in respect of the plaints had been duly paid. A result so unjust ought surely to be avoided if it can be reasonably avoided. Certainly such a result would be avoided if the operation of section 28 of the Court Fees Act is confined within its legitimate limits and the section held to mean that so long as any portion of the Court-fees under the Act in respect of a document remains unpaid, the document shall not, for the purposes connected with the Court Fees Act be regarded as valid, although it had been once mistakenly treated with reference to the Court-fees as valid. It is not easy to see why an interpretation so sweeping and drastic as that suggested, tending as it does to deprive the parties of their substantive rights, should be put on what is altogether a mere fiscal enactment; particularly when it is in the power of the Courts to enforce payment up to the very last moment of the smallest fraction of the fee remaining due. It is rather strange that the very clause which is now sought to be interpolated in section 4 should have been once introduced into it by the Legislature but struck out when the Bill became law, on the ground of the hardship it would cause. (See Report of Select Committee, dated the 13th June 1897.) As to the argument drawn from section 582A of the Code of Civil Procedure, I cannot see how that provision, enacted many years after the passing of the Limitation Act and having no reference to suits, can be taken to explain the law as to plaints laid down in the prior enactment. It remains to add that the view which I take, following the decision of Parker and Best, JJ., already referred to, is supported also by *Moti Sahu* v. *Chhatri Das*(1), neither of which decisions appears to have been brought to the notice of the Court when the ruling in question was given.

The other main point for determination in the cases is as to the law governing the devolution of the disputed property. The

(1) I.L.R., 19 Calc., 780.

conclusion of the lower Courts that Pokker's paternal ancestors and Pokker himself had all along been following the Muhmmadan Law was not, and could not have been, impeached considering the satisfactory evidence on which it rests. The learned vakil for the appellants, however, contended that Packichi, Pokker's mother, having been a member of a tarward which held property subject to Marumakkatayam rules, even the exclusive property of Pokker, whether derived from his father or mother, passed according to the rule of that system to his mother's tarward but not to his heirs according to the Muhammadan Law. Though the Marumakkatayam Law applies to joint property held by a Mopla as a member of a tarward, it does not follow that it necessarily applies to property not so held. Now there can be no doubt that even in the case of Moplas of North Malabar the Muhammadan Law, as the law of their religion and their original law, is their general law, the Marumakkatayam rules in regard to Moplas who follow them, being rules of later adoption [Logan's 'Manual,' Vol. I, page 273] and forming, so far as they go in the case of such persons, exceptional rules modifying the general law (compare *Kunhi Bivi* v. *Abdul Aziz*(1)). And though where a custom is proved to exist it supersedes the general law, yet inasmuch as it is the latter that still regulates all beyond the custom, (*Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (2)), the Muhammadan Law must be taken to govern the devolution of the separate and exclusive property of a Mopla, notwithstanding that he is a member of a tarward owning property subject to Marumakkatayam Law, except where it is shown that the Muhammadan Law has, even in regard to the separate and exclusive property of such a person, been superseded by rules established by usage or otherwise. That in the absence of such special rules, the Muhammadan Law ought, in cases like the present, to prevail on principle and in justice becomes evident if the matter is considered somewhat closely. Now Pokker's father was unquestionably subject entirely to the Muhammadan Law. Consequently Packichi (unless there were usage to the contrary and none was set up) must, under that law, be held to have acquired, by virtue of her marriage, a right to claim a share in her husband's estate if she survived him. And as under the said law the right to inherit is mutual in the case of Moslem spouses, as in the present instance,

(1) I.L.R., 6 Mad., 103. (2) 12 M.I.A., 523 at p. 542.

(Amiralli's 'Muhammadan Law,' Vol. II, pages 118 and 158), it must be conceded that Packichi's husband, for his part, became, on his marriage, entitled to claim a share in her exclusive estate if she pre-deceased him. Again, as regards Moslem parents and issue also, since the right of inheritance is reciprocal (Wilson's 'Digest of Muhammadan Law,' page 79) it must be held that Packichi possessed the right to inherit her share of the separate exclusive property left by any of her children dying in her life time and similarly her children surviving her had a right to take by inheritance shares in her separate and exclusive estate. To hold that Packichi did possess a title to claim shares as widow or mother but that the husband and the children did not possess corresponding rights in respect of her separate and exclusive estate would be not only quite anomalous but highly inequitable. It follows, therefore, that the law governing the devolution of Pokkor's property, derived from either parent but not held by him as a member of a tarwad subject to Marumakkatayam Law, is the Muhammadan Law. The conclusion of the lower Courts on this point also is, in my opinion, correct.

I would, therefore, dismiss the appeals with costs of respondents other than Kunhamad Haji.

DAVIES, J.—The question of limitation raised in all the appeals excepting 1951 and 1956 has arisen solely through the Subordinate Judge's erroneous order requiring separate plaints to be put in. The result has been that the disposal of the cases has been greatly delayed owing to their being taken out of his jurisdiction, that the plaintiffs have had to pay Court institution fees twice over, and that their cases have been unnecessarily laid open to attack on the ground (1) that the present plaints were not filed in time, and (2) that when filed they were not duly presented owing to their not being properly stamped. Neither of these points could have been taken, had the Subordinate Judge proceeded, as he ought to have done, with the trial of the cases.

As to the first point I agree with my learned colleague that the plaintiffs are entitled to the benefit of section 14 of the Limitation Act, and so, excluding the time they were before the Subordinate Judge, they were well within the limitation bar when they filed their present plaints.

As to the second point, while I also agree that the objection fails, it is on different grounds from those adopted by my learned

colleague. I am unable to agree with him that the decision in *Venkatramayya* v. *Krishnayya*(1) passed by Mr. Justice Shephard and myself is wrong, and if it was necessary I should be prepared to support that decision by further reasons now. In my opinion, however, that ruling does not affect the present case. There, the fact was that the insufficiently-stamped plaint was not received, filed or acted upon by the Court through mistake or inadvertence, but was at once returned to the plaintiff as not being properly stamped. Here, the Court at first accepted and filed the plaints as being sufficiently stamped (apparently allowing the plaintiffs credit for the duties they had paid on the joint plaints) and it was not until more than a year afterwards that the Munsif came to the conclusion that a mistake had been made and directed further fees to be paid. That order was forthwith complied with by the plaintiffs and thereupon the plaints, under the proviso to section 28 of the Court Fees Act, became "as valid as if they had been "properly stamped in the first instance." But the plaintiffs need not rely on even this protecting clause, if, as I think, their two joint plaints originally presented should be treated as the true plaints in the case, so far as the question of stamp duty is involved, and the subsequent ones as superfluities, because those plaints were admittedly sufficiently stamped. The direction of the Subordinate Judge to split them up, now that we find it was a wrong direction, cannot still operate to enhance the Court-fees truly payable. These were paid at the beginning, so that I hold no question arises as to the insufficiency of stamp duties. This disposes of the appellant's objection on the score of limitation. In other respects, I concur in the judgment of my learned colleague and to the dismissal of these second appeals with costs as directed.

(1) I.L.R., 20 Mad., 319.

PRIVY COUNCIL.

P.C.*
1899.
February 14.
March 4.

PRANAL ANNI (DEFENDANT), APPELLANT,

v.

LAKSHMI ANNI AND OTHERS (PLAINTIFFS), RESPONDENTS.

[On appeal from the High Court at Madras.]

Registration Act—Act III of 1877—Registration—Unregistered agreement incorporated into a judicial proceeding.

A prior suit between the same parties, now contesting the right to part of an ancestral estate, claimed another part of the same estate, without comprising the lands now in suit, which, at the time when the first suit was brought, were outstanding under a mortgage. A decree had been made by consent, excluding the lands now sued for. The defendant's case was that the lands now claimed, together with those decreed by consent, had been made the subject of a compromise of which the terms had been stated in two written agreements not registered. Also, that according to the compromise each of the parties was to take a moiety of the whole estate. Each had obtained possession; but the decree was limited to the part of the estate for which the prior suit, then disposed of, was brought; and only one of the agreements—that one which related to the lands then in suit—was presented to and accepted by the Court which made the consent decree:

Held, that this agreement had a different effect from the other one, as it constituted a step in a judicial proceeding, and did not require registration. The order was pronounced in terms of it. But as regarded the lands now in suit, excluded as they had been from the decree in the former suit, the defendant's title to them had been left to stand or fall by the other unregistered document. The latter by the Registration Act, 1877, conferred no title, and this defence failed.

APPEAL from a decree (26th January 1894) affirming a decree (30th April 1892) of the Subordinate Judge of Kumbakónam.

The suit out of which this appeal arose was brought in 1891 by three collateral relations of the grandfather of the defendant, now appellant, Pranal Anni, who was the grand-daughter, through a daughter, of the last male owner of the lands now in suit. The latter died in 1872, and his widow, daughter, and mother had the estate for their lives in succession. As reversioners, the plaintiffs, Varadaraja Mudali (who, dying pending this appeal, was represented by Lakshmi Anni), Srinivasa Mudali, and Manikka Mudali, sued in 1885 to obtain a decree for the proprietary right

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

in the property by inheritance on the death of the said mother. From their suit they excepted the part of the property which was claimed in the present suit, it having been then outstanding under a mortgage to one Patra Chariar. Besides other defences (including one under section 43 of the Code of Civil Procedure) Pranal Anni, then a minor, represented by her husband and guardian Venkataranga Mudaliar, set up the following:—That in the suit of 1885 it had been agreed between the parties that, in consideration of the plaintiffs' acknowledging the defendant's title to half of the whole estate, the defendant should acknowledge the title of the plaintiffs to the remaining half. A razinamah upon this was executed on the 16th January 1886 and filed in the Court on the 18th January; and a decree in March 1886 was passed in accordance therewith. That, in addition, another deed of even date was executed by the defendant's guardian relinquishing all her rights to one-half of the whole estate; and it was alleged that this had been carried out by giving possession. The Subordinate Judge found in favour of the plaintiffs. He considered that the not filed and unregistered agreement, dated the 16th January 1886, although it divided all the estate between the parties, was inoperative to confer title and inadmissible. He decided that section 43 of the Code of Civil Procedure did not apply and decreed the claim.

The High Court, on the following grounds, dismissed the appeal:—

"We are clearly of opinion that as at the time when the "previous suit was brought the property now in suit had been "conveyed to Patra Chariar, section 43 has no application.

"The only other question raised was that by the document of "the 16th January 1886 a partition of the same land was effected. "The document was not registered and the Subordinate Judge "was right in holding it inadmissible in evidence."

Mr. *J. D. Mayne*, for the appellant, argued that due weight had not been given to the fact of the razinamah, filed on the 18th January 1886, not having required registration inasmuch as it was part of the judicial proceedings.

Mr. *J. H. A. Branson*, for the respondent, was not called upon.

Their Lordships' judgment, on the 4th March, was delivered by Lord WATSON;

PRANAL ANNI v. LAKSHMI ANNI.

JUDGMENT.—Ramasami Mudali, of Kappur, in the presidency of Madras, a Hindu, subject to the Mitakshara law, died in the year 1872, leaving landed estates, part of which are the subject of the present litigation. He left no male descendant, but was survived by a widow, a daughter, and also by his mother. His widow, his daughter, and his mother, successively took a female estate in the lands which he left; and his mother, who was the last taker, died in December 1883. On her death, the lands were taken possession of on behalf of the present appellant, then an infant, who is the granddaughter of the deceased, being the only child of his daughter.

On the 28th January 1885 a suit was raised in the Court of the Subordinate Judge of Kumbakónam against the appellant, then a child eight years of age, as represented by her testamentary guardians, and also against four other defendants, at the instance of Varadaraja Mudali, now deceased, and the present respondents Srinivasa Mudali and Manikka Mudali, who alleged that they were the reversionary heirs of Ramasami. In their plaint, the reversionary heirs concluded for decree against the present appellant and her guardians for possession of certain lands which are not the subject of the present controversy; but it expressly excluded certain other lands, which had admittedly been the property of the deceased Ramasami, and had also been taken possession of on behalf of the appellant as part of the deceased's succession. These lands were purposely excluded from the plaint because the plaintiffs, the reversionary heirs, had, on the 30th December 1884, conveyed their interest in them to one Vijayaraghava Patra Chariar for the sum of Rs. 4,000, in order to provide themselves with funds to meet the expenses of litigation.

The suit of 1885 was, in so far as it concerned the interests of the plaintiffs and of the present appellant, brought to an amicable conclusion; and the present appeal turns upon the effect of the mutual arrangement or compromise which was then made. That arrangement was embodied in two deeds, which bear the same date, the 16th January 1886, the one being a razinamah, and the other an agreement, or, as it is entitled, an 'agreement of union.'

By the deed last mentioned, the agreement of union between the plaintiffs on the one hand, who now are, or are represented by, the present respondents, and the appellant who was then, being still a minor, represented by her husband and guardian, Venkataranga

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Mudaliar, on the other hand, it was agreed that the second contracting parties should have and retain one-half share of the lands which were claimed from the appellant and her guardians in the suit of 1885, and should also have or retain one-half share of the lands which had been excluded from that suit, and had been conveyed to Vijayaraghava Patra Chariar. The deed of agreement was not produced in the suit of 1885, and was not submitted to the Subordinate Judge of Kumbakónam, before whom that litigation depended. It was not registered in accordance with the provisions of the Registration Act III of 1877, although it professes to deal with the title to immoveable property, which is admittedly beyond the value of one hundred rupees.

The second document executed by the same parties, the razinamah, was not registered in terms of the Act of 1877, but it was produced in the suit of 1885; its terms were considered in a judgment delivered by the Subordinate Judge of Kumbakónam on the 31st March 1886; and they were made the foundation of an order passed by the learned Judge, the parties to the document having concurred in moving "that a decree may be passed in "accordance with the razinamah which they have presented under "section 375 of the Code of Civil Procedure, after settling."

The razinamah had incorporated with it four schedules of lands, marked, respectively, A, B, C, and D; schedule D containing a description of the lands which had been expressly excluded from the suit of 1885, and of no others. In the body of the document, the parties, first, set forth in detail the lands as to which they were in controversy in the suit of 1885, and concluded by stating that they had agreed each to take a certain share of these lands and their produce, "in full satisfaction of all claims "within the 15th of Panguni (27th March 1886) next; and "that both the parties shall bear their respective costs of this "suit." In the second place, the document set forth as follows:—

"Remarks.—Not only have we, on this date, entered into a "union agreement in regard to the land, &c., referred to in the "plaint in this suit, and described in schedule D hereof, and "divided thereunder the said lands into two equal shares between "us, but a deed of release has also been taken from the seventh "defendant's (present appellant's) guardian in relinquishment of "the right possessed by the seventh defendant (present appellant) "to the said half share of lands."

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In the judgment delivered by him on the 31st March 1886, the Subordinate Judge, having the razinamah before him, treated the first part of it as the only portion of the contents of the document with which he was desired by the parties to deal. In giving effect to its terms, the learned Judge observed :—"The "seventh defendant (present appellant) is her only daughter (*i.e.*, "of Ramasami's grand-daughter) and she and the plaintiff have "put in a razinamah in respect to items 1, 3, 5, and 7, and a "decree in its terms has been passed." It is admitted that items 1, 3, 5, and 7, specified by the learned Judge, were the lands claimed from the present appellant in the suit of 1885. The learned Judge, plainly, did not understand that he was asked by the parties either to consider or to give effect to the terms of the compromise which the parties narrated, by way of remark, that they had made with respect to the lands contained in schedule D of the razinamah, which are the subject of this appeal. Accordingly, the order passed by him did not include, and had no reference to these lands.

The fact has not been disputed that at, or shortly after, the execution of the two deeds of the 16th January 1886, the parties acted upon the whole of the mutual agreement contained in or narrated by those deeds; that they each took one-half share, not only of the lands in controversy between them in the suit of 1885, but of the lands excepted from that suit, as to which they are in controversy in the present case. The appellant was permitted to enter into possession of her half share of all those lands; and whilst the respondents, the reversionary heirs of Ramasami, do not challenge her title to one-half of the lands for which they sued her in the action of 1885, they claim, in this action, to have right to the half which she possessed of the lands excluded from that action, and described in schedule D of the razinamah. The only defence which their Lordships are asked to sustain on behalf of the appellant is mainly, if not wholly, founded upon the terms of the two deeds of 16th January 1886, and of the proceedings which followed upon them.

There are two suits, subsequent to these proceedings for compromise, which it is necessary to notice, although they do not materially affect the question which their Lordships have to decide. In both these suits, it was the interest of the parties to this appeal to defeat the claims of the plaintiffs, because these, if successful,

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would have carried off the whole or part of the lands which the present parties had chosen to treat as belonging to one or other, or both of them.

In 1886, a suit was brought against the parties to this appeal, by Kappachi Anni, the elder sister of Ramasami, who claimed his estates as his reversionary heir, and pleaded that the proceedings of the defendants with a view to compromise had been fraudulent. The suit was dismissed with costs by the Subordinate Judge of Kumbakónam on the 7th May 1887, and his decree was allowed to become final.

In the year 1888, Vijayaraghava Patra Chariar sued the parties to this appeal for the enforcement of the sale-deed which he had obtained, in December 1884, from the reversionary heirs, of their interest in the lands which are the subject of this appeal. The parties whom he called as defendants joined in defence to the action, and set up the division of the property between them under the compromise of January 1886. The Subordinate Judge, on the 6th November 1889, held that the transaction which the plaintiff sought to enforce was one not of sale but of loan, and gave him decree for Rs. 1,300. On appeal to the High Court, the decree was varied by increasing the sum awarded to Rs. 4,000.

Although the mere statement of the facts of this appeal has necessarily occupied some time, yet the questions to which these give rise lie within a very narrow compass. The respondents rest their claim to possession of the lands in dispute upon their title as the reversionary heirs of the deceased Ramasami; and the appellant does not, in this appeal, defend her possession, except upon the ground that she, as in a question with the respondents, derived a valid title from the compromise embodied in the razinamah and agreement of union, and to the effect which was given to the razinamah by the Subordinate Judge of Kumbakónam, in the suit of 1885.

It is sufficiently obvious that, in maintaining that defence, the appellant can derive no aid from the terms of the agreement of union. The document has not been registered under the provisions of Act III of 1877; and therefore its stipulations are ineffectual in law to create in favour of the appellant any right, title, or interest to or in the lands in dispute.

The razinamah was not registered in accordance with the Act of 1877; but the objection founded upon its non-registration does

PRANAL ANNI v. LAKSHMI ANNI.

not, in their Lordships' opinion, apply to its stipulations and provisions in so far as these were incorporated with, and given effect to by, the order made upon it by the Subordinate Judge in the suit of 1885. The razinamah, in so far as it was submitted to and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal who gave their consent to it.

If the parties, after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit, and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer to her the moiety of land now in dispute. But their Lordships are unable to find that any such course was taken either in the razinamah or in the judicial order which gave effect to it. The razinamah merely referred, by way of remark, to the lands now in dispute; and the Judge was only asked to give effect to a compromise which related to the lands then in dispute before him. This order, accordingly, merely concerns the latter, and has no reference whatever to the lands described in schedule D of the razinamah. So far as regarded these lands, the compromise was not submitted to the learned Judge, but was deliberately left by the parties to stand upon their unregistered agreement of union.

For these reasons, which are substantially the same with those assigned by both Courts below, their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The appellant must pay the costs of the second and third respondents who defended this appeal.

Appeal dismissed.

Solicitor for the appellant: Mr. *R. T. Tasker.*
Solicitors for the respondents: Messrs. *Burton, Yeates & Hart.*

PRIVY COUNCIL.

SUNDARALINGASAMI KAMAYA NAIK (PLAINTIFF), APPELLANT,

v.

RAMASAMI KAMAYA NAIK (DEFENDANT), RESPONDENT.

P.C.* 1899. February 17. March 11.

[On appeal from the High Court at Madras.]

Hindu Law —Customary law of inheritance of certain zamindaris in and about Madura.

The principal issue on this appeal was whether the defendant was entitled, by a custom prevailing in the Saptur zamindari, and in other zamindaris held by zamindars of the same caste connection in Madura, and neighbouring districts, to inherit the impartible raj estate of that, the Saptur, zamindari in preference to the plaintiff. Both the parties were sons of the late zamindar, being half-brothers, sons of their father by different mothers. The plaintiff was the elder of the two, but the mother of the younger had been married by the zamindar before his marriage with the mother of the elder. In virtue of his seniority the elder brother claimed. The younger defended the suit on the title that his mother's marriage with the Raja had preceded the marriage of the plaintiff's mother, alleging the custom to prevail in the zamindari as above stated.

The Courts below, having considered the evidence, found that the custom was proved, in concurrent judgments:

Held, that no error having been shown, and the Courts having decided with reference to what was laid down in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* ((1872) 14 M.I.A., 570) as to the requisites for the proof of such a custom, the findings below were conclusive as to its existence.

APPEAL from a decree (2nd March 1894) of the High Court at Madras affirming a decree (19th December 1890) of the Subordinate Judge of Madura, dismissing the appellant's suit.

The appellant and respondent were the sons of Nagayasami Kamaya Naiker Avargal, the late zamindar of Saptur in the Madura district, an impartible zamindari descending to a single heir. The zamindar died on the 14th October 1886, leaving three sons, two born of his wife Muthuvirammal, who was fourth in the order of the wives married by him, and a third son born of his wife who was sixth in that order. This last-mentioned son in date of birth preceded the other two; and on the ground of his seniority in age claimed the estate as plaintiff, now appellant.

On the death of the father Nagayasami I, the elder of the two sons born of the fourthly-married wife, Muthuvirammal, such elder

* *Present:* Lords WATSON and HOBHOUSE, and Sir RICHARD COUCH.

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of the two being named Nagayasami also, succeeded as zamindar. On the death of the latter, on the 31st December 1887, the question as to the right of succession arose between the younger of the two sons born of Muthuvirammal, now defendant-respondent and the half-brother born before him of the wife whose marriage was later. On the death of Nagayasami I, all the sons being then minors, the estate was taken possession of by the Court of Wards, who held it on behalf of Nagayasami II; and on his death, while still an infant and unmarried, the Court purported to hold the estate for the benefit of the respondent, then still an infant. They repudiated the claim of the appellant, the eldest surviving son of Nagayasami I.

In answer to the plaint filed on the 12th July 1889, which claimed the exclusive title, the question was raised whether the defendant was entitled by the custom alleged to prevail in the Saptur zamindari, and in other zamindaris held by proprietors of the same caste, the Kambla Thotiya, in Madura and neighbouring districts, to succeed in preference to the plaintiff by reason of the priority of the defendant's mother's marriage over that of the mother of the plaintiff.

The principal question on this appeal was whether this rule of descent had been established by the evidence.

The facts are stated in their Lordships' judgment.

The Subordinate Judge of Madura found that the custom was established as alleged for the defence. And this finding was affirmed by the High Court (Muttusami Ayyar and Davies, JJ.).

The judgment of the High Court is reported in the Indian Law Reports, XVII Mad., 422.

Two findings of fact, in which the Courts concurred, and which, for the purposes of this report, should be here stated, were as follow:—

That the appellant's mother was of a lower division of caste than that of the respondent's mother: that the zamindari descended, according to custom, to the sons as single owners, according to priority in the order of the marriages of their mothers respectively.

On this appeal, Mr. *J. D. Mayne* and Mr. *J. H. A. Branson*, for the appellant, argued that no sufficient evidence had been adduced to satisfy the requirements of law for the purpose of establishing a custom such as that now alleged. The custom which

SUNDARA-LINGASAMI KAMAYA NAIK v. RAMASAMI KAMAYA NAIK.

the respondent sought to have regarded as established set aside the general principle of the Hindu law of inheritance, by which principle succession as between brothers proceeded upon, and was regulated by, seniority of birth. *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(1) and *Lakshmipathi* v. *Kandasami*(2) were referred to.

Mr. *A. Cohen, Q.C.*, and Mr. *A. Phillips*, for the respondent, were not called upon.

Afterwards, on the 11th March, their Lordships' judgment was delivered by Sir RICHARD COUCH:

JUDGMENT.—The question in this appeal is which of the two sons of Nagayasami Kamaya Naik deceased, the proprietor of the zamindari or palayapat of Saptur, in the taluk of Tirumangalam, Madura district, an impartible estate descending to a single heir according to the custom of primogeniture, is entitled to succeed to it on the death of their elder brother. The father died on or about the 14th October 1885, leaving three minor sons, Nagayasami Kamaya Naik the deceased, and the respondent, by his wife Muthuvirammal and the appellant by his wife Nagammal, and a daughter. On the death of the father the estate descended to the eldest son Nagayasami and by reason of his minority the Court of Wards took charge of it under Regulation V of 1804. He died on the 21st December 1887 a minor and unmarried. The appellant is the senior in age to the respondent, and as such claimed to be entitled to succeed to the zamindari. The Court of Wards, on behalf of the respondent, asserted his title and assumed charge of the estate on his behalf and continued to manage it. The suit was brought by the appellant, by his mother and guardian, and was defended by the respondent's guardian and the Court of Wards. One ground of the defence was that the appellant's mother was not the wife of Nagayasami, the father, but his mistress and the other that if she was legally married to him the appellant was not entitled to the zamindari in preference to the respondent who is the son of the senior wife and the brother of the last owner. It was admitted at the trial in the first Court that the appellant was the senior in age to the respondent, and that the appellant's mother was married after the

(1) (1872) 14 M.I.A., 570. (2) (1892) I.L.R., 16 Mad., 54,

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respondent's mother. It has been found by both the Lower Courts that the appellant's mother was legally married, but that her status and rank were inferior to those of the respondent's mother, the latter being the daughter of a zamindar, while the former was the daughter of an ordinary raiyat. Upon this finding the First Court held that the appellant could not be preferred to the respondent, but must give way to him. This was also held by the High Court on appeal. It was treated by both Courts as a question of law and was raised by the third of the settled issues. This question has not been argued before their Lordships, and it is not necessary to decide it as the fourth issue was whether, as alleged by the defendant, he is entitled by the custom prevailing in the Saptur zamindari and in other zamindaris held by zamindars of the same caste in Madura and neighbouring districts to succeed in preference to the plaintiff by reason of his mother having been married prior to the plaintiff's mother.

Upon this issue a large quantity of evidence was put in at the trial in the First Court and appears in the judgments to have been fully considered by that Court and by the High Court on the appeal to it. Both Courts have found for the respondent upon this issue. In the argument of this appeal it was attempted to be shown that in this they were wrong in law and what was laid down by their Lordships in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(1) as to the proof which is required of such a custom was referred to. The judgment in that case is noticed by the High Court in its judgment, and their Lordships see no reason to doubt that it has received the attention of both Courts. There is really in this case no pretence for saying that there has been any error in law; the concurrent findings must be held to be conclusive.

An objection was made by Mr. Mayne that some of the land in schedule C appears in it not to be within the limits of the zamindari, and the High Court has held that all the lands in that schedule "were merged in the estate proper and are therefore not partible." This objection is apparently now taken for the first time and cannot be entertained. It should have been taken in the first Court when there might have been an enquiry as to what lands were within the limits of the zamindari.

(1) 14 M.I.A., 570, at pp. 585, 586.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellant will pay the costs.

Appeal dismissed.

SUNDARA-LINGASAMI KAMAYA NAIK v. RAMASAMI KAMAYA NAIK.

Solicitors for the appellant: Messrs. *Lawford, Waterhouse & Lawford.*

Solicitor for the respondent: *The Solicitor, India Office.*

APPELLATE CIVIL.

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

KRISHNASAMI KONAN (DEFENDANT), APPELLANT,

v.

RAMASAMI AYYAR (PLAINTIFF), RESPONDENT.*

1899. February 27.

Hindu Law—Liability of a divided son where debt was incurred by the father before partition—Decree against father and execution proceedings against son's property in father's life time.

In 1890 a person subject to the Hindu Law incurred a debt for purposes that were neither illegal nor immoral. In 1891 he divided the family property with his son, and a house fell to the son's share under the division. In 1893 the creditors sued the father in respect of the debt, and, having obtained a decree, sought, in the father's life time, to make the son's house liable in execution thereof:

Held, that property taken by a son in partition cannot be seized in execution in respect of an unsecured personal debt of his father, even though the debt has been incurred before the partition, provided that the partition is not shown to have been made with a view to defraud or delay creditors.

SECOND APPEAL against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Appeal Suit No. 211 of 1896, reversing the decree of A. David Pillai, District Munsif of Srirangam, in Original Suit No. 151 of 1895.

Suit for a declaration that plaintiff was in possession of a certain house as owner, and that it was not liable to be attached in execution of a decree in Small Cause Suit No. 89 of 1893, which had been obtained by the defendant against plaintiff's father on a promissory note dated 6th June 1890. In execution of the said

* Second Appeal No. 825 of 1898.

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decree, defendant had brought the house to sale, and plaintiff had intervened under section 278 of the Code of Civil Procedure, but without success. Plaintiff's father was still alive but had no property. The plaintiff alleged, and the District Munsif found as a fact, that a division had taken place between plaintiff and his father on 24th September 1891, and that it was not effected in fraud of creditors. By the deed of partition the house in question fell to the plaintiff's share, but no reference was made therein to the debt owing to the defendant which was then outstanding on the promissory note. The District Munsif found that the debt for which the promissory note had been given was incurred by plaintiff's father for buying ploughing cattle, and not for any immoral or illegal purpose, though there was some evidence of extravagance and immorality against the father. Relying on *Bhagbut Pershad* v. *Mussumat Girja Koer*(1), *Mussamut Nanomi Babuasin* v. *Modun Mohun*(2), *Khalilul Rahman* v. *Gobind Pershad*(3), and *Kunhali Beari* v. *Keshava Shanbaga*(4), he held that plaintiff, though not a party to Small Cause Suit No. 89 of 1893, was still liable to pay the decree debt, and that the whole of the house specified in the plaint was liable. He dismissed the suit. On appeal, the District Judge agreed with the finding that the debt secured by the promissory note was proved, and that it was not tainted with illegality or immorality. He said :—"The question then is whether the creditor can, in execution of a money decree against the father, proceed in the father's life-time against the ancestral property in the hands of a separated son. If the father were dead, the decree-holder could proceed against the son in execution as his legal representative by virtue of the provisions of the Civil Procedure Code, and could attach and sell such property as had devolved on him as such representative by inheritance; in the case, that is to say, of a separated son, such property as had fallen to his father's share at the partition or formed his self-acquisition; but he could not proceed in execution against the son's property which fell to him at the partition. That is the son's own share, and though liable for the father's debt, is not liable to be taken on a decree to which

(1) L.R., 15 I.A., 99; I.L.R., 15 Calc., 717.
(2) L.R., 13 I.A., 1; I.L.R., 13 Calc., 21.
(3) I.L.R., 20 Calc., 328.
(4) I.L.R., 11 Mad., 64.

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the son is not a party. But when the father is alive, there is no question of legal representative. Of course, if the family had remained undivided, the whole joint property would be liable for the father's debt and could be taken in execution, though the son were not a party to the decree—but the family being separate, the case is different. When the separation is before the suit, as in this case, I think the creditor is bound to make parties all those whose interests he wishes to bind by his decree. The property is, from the date of separation, the son's property in which the father has no interest, and though the son may be liable to pay the debt, his liability must be enforced in a suit against himself." He reversed the decision and made the declaration prayed for.

The defendant preferred this second appeal, on the ground that the father's debt, not having been incurred for illegal or immoral purposes, was binding on the son, and that the family property in the hands of the son was, under the Hindu Law, liable in respect of it, that liability not being affected by the fact that the son was divided from his father.

Rangachariar for appellant.

Seshagiri Ayyar for respondent.

JUDGMENT.—The principle upon which the son cannot object to ancestral property being seized in execution for an unsecured personal debt of the father is that the father, under the Hindu Law, is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time the property is seized it remains the undivided estate of the father and the son. If the estate were divided the father could not sell what does not fall to him in the division. Ergo, property taken by the son in partition cannot be seized on account of such unsecured personal debt of the father, even though the debt had been incurred before the partition. Of course if the partition had been made with a view to defraud or delay creditors it would be otherwise, but no such case is made out here. On this ground we confirm the decree of the lower Appellate Court and dismiss the second appeal with costs.

APPELLATE CIVIL.

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

1899. February 24.

RAMAKKAL (PLAINTIFF), APPELLANT,

v.

RAMASAMI NAICKAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Division by co-widows of their late husband's estate—Alienation by one after the division—Validity of alienation as against surviving widow on decease of alienor.

A Hindu died, leaving two widows who divided his property by a formal registered partition deed, under which each took possession of her share, with powers of alienation over the property comprised in it. Certain alienations were made by one widow, who subsequently died. On the surviving widow claiming the whole of her late husband's property, including the portions so alienated:

Held, that there is no legal obstacle to prevent one of two co-widows from so far releasing her right of survivorship as to preclude her from recovering from an alienee, after the other co-widow's death, property given by way of partition to the latter and alienated by her. A widow may alienate for her life any estate which comes to her by virtue of her widowhood, and may therefore enter into such a deed as will preclude her from recovering during her life property which she has alienated, to the full extent of such alienation, provided that it does not extend beyond her life interest.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Appeal Suit No. 184 of 1897, reversing the decree of T. A. Ramakrishna Ayyar, District Munsif of Udamalpet, in Original Suit No. 392 of 1897.

Suit to recover a house and two items of land, together with mesne profits. Plaintiff's husband had died leaving plaintiff and another widow him surviving. The widows divided the property of their deceased husband by a formal registered partition deed which, after reciting that each had taken charge of her share under the division, declared that each would be bound to enjoy, separately, the property appertaining to her share, with power of alienation by way of gift, mortgage, sale, &c., and that from that day forward the relationship between them should be that of friendship alone, and that there should be no further relationship in pecuniary matters. One of the widows alienated portions of

* Second Appeal No. 799 of 1898.

the property comprised in her share, selling the house to first defendant and giving the two items of land as stridhanam to second defendant, whom she had adopted as a daughter. She subsequently died. Plaintiff now contended that the partition was an arrangement intended only for the convenient enjoyment of the property by the widows and that she, as surviving widow, was entitled to the whole of her late husband's estate. She claimed the alienated property, and the District Munsif ordered the defendants to surrender it to her as prayed. The District Judge, on appeal, reversed the decree. He said:—"The two widows held this estate together, and on the death of the survivor the estate will pass to the reversioner whoever he then may be. Until the death of plaintiff, no reversioner can claim possession. That being so, the plaintiff is the only person now who can sue to eject defendants, and I am of opinion that plaintiff's suit is barred by the partition deed. It is true that Hindu law does not recognize partition among widows, but that means only that any such arrangement among widows will not affect the right of the reversioner who comes forward at the death of the surviving widow. Such an arrangement among widows will be good until the death of the surviving widow. A widow can alienate and the alienation is good during her life-time. So plaintiff in this case alienated to her co-widow, now deceased, who passed on the land to defendants and the alienation must hold good until plaintiff's death."

The plaintiff preferred this second appeal.

Sivasami Ayyar for appellant.

Kasturiranga Ayyangar for respondents.

JUDGMENT.—We think that there is no legal obstacle to prevent one of two co-widows by apt words in a deed from so far releasing her right of survivorship as to preclude her from recovering from an alienee after the other co-widow's death, property given by way of partition to the latter and alienated by her.

In this case two co-widows entered into a deed which they called a deed of partition, whereby they divided the property between them and each gave the other full power of alienation. One of the widows alienated her share and after her death the other widow, the plaintiff, sued as the surviving widow to recover the property so alienated. The District Judge held that she was estopped by her own deed from recovering. It is argued before

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us that whatever may be inserted in a deed of supposed partition between co-widows, nothing can preclude the surviving widow from recovering, as there is no legal power which enables widows to make a partition except for the period of the life of each. For the property can only be held separately by widows for the purpose of the maintenance of each of them during her life and after the death of any one the share reverts to the survivor. *Bhugwandeen Doobey* v. *Myna Baee*(1), *Gajapathi Nilamani* v. *Gajapathi Radhamani*(2), *Kathaperumal* v. *Venkabai*(3), *Ariyaputri* v. *Alamelu*(4), and *Sri Gajapati Radhamani Garu* v. *Maharani Sri Pusapati Alakarajeswari*(5) were cited as supporting these propositions. We have no doubt that a widow can alienate for her life any estate which comes to her as such and that she can therefore enter into such a deed as will preclude her from recovering during her life property which she has alienated to the full extent of such alienation, provided it does not extend beyond her life interest.

Substantially the analogous case of daughters was so decided in Calcutta (*Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty*(6)).

We, therefore, dismiss the second appeal with costs.

APPELLATE CIVIL.

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

1899. March 7, 13, 14, 23.

THE TRUSTEES OF THE HARBOUR, MADRAS (DEFENDANTS), APPELLANTS,

v.

BEST & Co. (PLAINTIFFS), RESPONDENTS.*

Contract Act—Act IX of 1872, *ss.* 151, 152—*Liability of bailees for hire for loss of goods—Negligence—Onus of proof—Madras Harbour Trust Act* (*Madras*) *—Act II of* 1886, *ss.* 70, 87—*Immunity from action—Breach of contract.*

When goods which have been entrusted to bailees for hire are lost, it lies on the bailees to show that they have taken as much care of the goods as a man of

(1) 11 M.I.A., 487.
(2) L.R., 4 I.A., 212; I.L.R., 1 Mad., 290.
(3) I.L.R., 2 Mad., 194.
(4) I.L.R., 11 Mad., 304.
(5) L.R., 19 I.A., 184; I.L.R., 16 Mad., 1.
(6) I.L.R., 24 Calc., 339.

* Original Side Appeal No. 42 of 1898.

ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss.

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Per SHEPHARD, J.—The provision in section 87 of the Madras Harbour Trust Act, 1886, to the effect that the Board, its officers and servants shall not be liable in damages for any act *bonâ fide* done or ordered to be done by them in pursuance of the Act, does not apply to all causes of action, and, *inter alia*, to a suit in respect of a breach of contract against the Board. The immunity there given applies only to those cases in which there is an act done or purporting to be done in pursuance of the Act. The fact that the Board has worked under the provisions of a statute does not prevent it from entering into a contract; and the section does not apply in a case where the party aggrieved complains of the breach of such a contract on the part of the Board.

By section 70 of the Madras Harbour Trust Act, 1886, the Board is empowered to make bye-laws for the reception, removal and porterage of goods. A bye-law framed under this section provided that importers desiring to store cargo must apply to the Secretary of the Board for such space as they might require, and that such applications would be granted on such terms as the Board might approve, and concluded with the reservation that the Board, while taking all reasonable precautions, would accept no responsibility in respect of property stored upon its premises, which would remain at the risk of the consignees or owners:

Held, (*per* COLLINS, C.J., and BODDAM, J.), that this provision was not a bye-law for the reception or removal of goods, within the meaning of section 70 of the Act, and was *ultra vires*.

APPEAL against a decree passed, on the Original Side of the High Court, in Civil Suit No. 99 of 1897.

Suit to recover a balance of coal alleged to have been landed at defendants' harbour and to have been left in their custody and to have remained undelivered by defendants to plaintiffs; or, in the alternative, for damages in respect of the said non-delivery. The defendants relied upon certain bye-laws duly made under section 70 of the Madras Harbour Trust Act, 1886, the provisions of which were as follows:—"(3) All goods landed at the port of Madras shall be moved from the place or places where the same may be landed to the place or places set apart for the reception thereof, by some person or persons — authorised in that behalf by the Board — who shall in due course deliver the same to the consignees, upon payment by them of all costs and charges of receiving and of so moving such goods, and of delivering the same, including all costs, charges, and expenses of counting, sorting and weighing, and other costs, charges and expenses whatsoever, incurred or payable under the directions and with the sanction of the Board . . . . (7) Coal, coke, patent

[TRUSTEES OF THE HARBOUR, MADRAS, v. BEST & Co.

fuel, timber of all descriptions and firewood shallbe landed only at such place or places as may be approved by the Board for that purpose from time to time. Any person contravening this bye-law shall be liable to a penalty, upon conviction before a Magistrate, not exceeding rupees fifty (50) for each offence . . . (8) Importers or owners desiring to store cargo of the descriptions mentioned in bye-law No. 7, within the limits of the Harbour Trust premises must apply to the Secretary to the Board for such space as they may require. Such applications will be granted on such terms as the Board may approve. Wharfage will be payable for the plots so assigned at the rate fixed by the Board under the provisions of Act II of 1886. The Board, while taking all reasonable precautions to ensure the safety of property stored upon its premises, will accept no responsibility whatever in respect of such cargo as is mentioned in bye-law No. 7, from the time when the same shall have been placed or stored on such plot or plots, and such cargo shall from that time remain at the sole risk of the consignees or owners, who shall however be entitled to employ such servants or others as they may consider necessary for the due protection of such cargo." Defendants contended that they had delivered and accounted to plaintiffs in respect of all the coal landed, and denied liability. They also demurred to the suit and contended that it was not maintainable inasmuch as even assuming that the non-delivery complained of was caused by the act or default of any officer or servant appointed under Madras Harbour Trust Act II of 1886, they were exempted and relieved from liability for such act or default by virtue of the provisions in that behalf of section 87 of the said Act. They further contended that the suit was not maintainable on the ground that assuming that the non-delivery complained of had been caused by an act or omission on the part of themselves or their agents, such act or omission was done or omitted to be done *bonâ fide*, and that they were, therefore, exempted and protected from liability in damages by the said section 87.

Mr. *E. Norton* for the plaintiffs.

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

The case was heard, in the first instance, by SHEPHARD, J., when the following issues were tried :—" (3) Are the defendants exempt from responsibility for any undelivered portion of coal either under bye-laws in force under section 70 of the Madras

Harbour Trust Act or under and by virtue of section 87 of that Act? (4) Is the eighth bye-law *ultra vires?*" His Lordship delivered the following judgment on 2nd September 1897 :— [TRUSTEES OF THE HARBOUR, MADRAS, v. BEST & Co.

"I have had an opportunity of considering this matter, and therefore see no reason for delaying to give my judgment. The plaintiffs state that on the 10th of July 1896 the defendants, for reward, received from the plaintiffs certain coal. Of this coal, a certain quantity was removed by the plaintiffs. The remainder—2,769 tons, the plaintiffs say—was left in the care and custody of the defendants, and was stored by them on a place set apart by them on their premises at the plaintiffs' request to be there kept for reward by the defendants in their care and custody until the plaintiffs should require delivery thereof. The plaint then goes on to say that certain other quantities of coal were delivered and that then the plaintiffs called upon the defendants to deliver the balance of 816 tons of coal. The plaint further goes on to say that the defendants did not deliver or account for the same. Then in the alternative the plaintiffs charge that the defendants are liable to pay the sum of Rs. 20,400 for damages resulting from the failure of the defendants to take reasonable care and on account of the negligence of themselves and their servants. To this plaint two legal objections are taken. First of all it is stated in the written statement that a certain rule has been passed under section 70 of the Madras Act II of 1886 under which the defendants are constituted. On that rule the defendants rely, as far as I can understand, as an absolute answer to the plaint. They also rely on section 87 of the same Act and say that the suit is not maintainable. With regard to this section, viz., section 87, the question is whether it is applicable to a cause of action such as is disclosed in the plaint. It must be assumed that that cause of action really exists, that is to say, that the plaintiffs did leave with the defendants certain coal, and that the defendants stored it for them as paid warehousemen. It is argued on behalf of the defendants that section 87 gives the defendants absolute immunity from action in a case such as the present. The section is very difficult to construe. Fortunately, however, a part of it has already received an interpretation. The first paragraph of it, that paragraph which provides that notice should be given in certain cases, is a provision which is not uncommon in English statutes, and it has been held with regard to this provision that it

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does not apply in cases where the plaintiff is suing on a specific contract made with the public body which relies upon the requirement of notice. The difficulty in the case lies in seeing to what class of cases the second paragraph of the section applies, and that paragraph as far as I have learnt is not to be found in any English statute. It is quite clear that the general words in that second paragraph must receive some limitation. The last sentence of the section (which contains a not unusual provision, see, *e.g.*, Dangerous Epidemic Act, III of 1897) provides that the Board, its officers and servants shall not be liable in damages for any act, *bonâ fide* done or ordered to be done by them in pursuance of this Act. That is one class of cases in which exemption from suit is absolutely given to the Board and its servants. Another class of cases is that in which damage has been sustained by any vessel in consequence of any defect in any of the moorings belonging to the Board. There, again, absolute exemption is given in special words by the section. It appears to me that having those two instances before me I can hardly be asked to say that the second paragraph of the section covers all causes of action which may be brought against the Board. There must be some limitation put upon the meaning of the words in the second paragraph of section 87. There is another reason why some limitation must be put on the general words of the second paragraph, and that is that the first paragraph provides that notice shall be given in a certain class of cases. Some attempt was made to show that the word 'person', occurring in the first paragraph, did not include the Board mentioned in the second paragraph. I do not think this argument can be accepted. It is clear, I think, that the word 'person' mentioned in the first paragraph, includes, among other persons, the Board. Therefore we have it that there is a provision to the effect that notice is to be given in certain instances. It follows necessarily, if the Legislature contemplated notices to be given in certain actions against the Board, that there must be certain actions against the Board which are maintainable. For this reason again I think the second paragraph must have an interpretation put upon it, more limited than would at first sight appear to be the right one. One of the difficulties which I feel in the case arises from the construction which has been put upon the first paragraph of the section. It has been held, as I have said, with regard to that

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paragraph, that it does not apply to cases where the action is on contract. It may be asked to what cases then does the first paragraph apply. It appears to me that it may be taken to apply properly to those cases in which there is an act done or purporting to have been done in pursuance of the Act—an Act of such a character as not to deserve the immunity which the last clause of the section gives. That is to say, if the officers or servants of the Board are charged with doing an act not *bonâ fide* done, but purporting to have been done in pursuance of the Act, then they will be entitled to notice. Then, clearly, according to the last clause there will be nothing to prevent the action being brought, and they will be entitled to the notice provided for in the first paragraph. The question still remains to what cases the second paragraph applies. It appears to me that the Legislature must be taken to have intended those cases in which there was an act done or default made in pursuance of the Act. As an instance of a case to which that paragraph might apply I would refer to section 57 of the Act, which in certain instances gives the power of distraint and arrest. That is a case to which, it appears to me, the second paragraph might be applicable. It is argued that in the present case the defendants in keeping the coal of the plaintiffs were really acting under the statute, and were not governed by any contract between themselves and the plaintiffs. The fact, however, that the defendants are working under the provisions of a statute does prevent them from making a contract, and rightly or wrongly it is alleged in the plaint that they did contract with the plaintiffs. That being so it appears to me that the ordinary consequences must follow, namely, that the defendants must incur liabilities which ordinary persons do incur under contracts. That the defendants are at liberty to make contracts there can be no question. Whether they did make the contract or not in this particular case is a matter of fact. But assuming that they did make the contract with regard to this coal with the plaintiffs then I consider that the second clause of this section cannot be applicable, because if it were applicable it would lead to this absurd result that the Legislature would be authorizing a public body to make contracts, and at the same time providing that they were not to be sued upon them. That, to my mind, is an absurdity. Some meaning must be given to the words of the section, which, I admit, is an extremely difficult

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one, in order to avoid the absurd result that would otherwise follow. I must, therefore, hold that whatever may be the meaning of this section it does not apply in a case where the party aggrieved complains of a breach of contract on the part of the Board. (See *Brabant & Co.* v. *King*(1).)

"The other question is whether the bye-law made under section 70 is a valid bye-law. According to the written statement it was made under the following provision:—Section 70 says the Board may from time to time make bye-laws 'for the 'reception, removal and porterage of goods brought within the 'premises of the Board and for the exclusive conduct of these 'operations by the Board or persons employed by them.' What I understand to be admitted to be the course of business is that goods are brought to the shore by the consignees and then are placed in the hands of the defendants. They are received by the defendants and, under certain circumstances, may be retained by them under section 53 of the Act. The goods are received by the defendants and it is also competent to the defendants to make arrangements for storing them. That is provided for in section 61 of the Act which states that the works to be executed by the Board may include warehouses, sheds and other appliances for storing goods landed. There is also a provision in section 45 enabling the Board to frame a scale of rates to be levied for the storage of goods. It appears that it is obligatory on the consignees to have their goods come through the hands of the Board, inasmuch as they must be landed on the Board's premises. On the other hand it is optional with consignees to leave them in the Board's premises or not, an exception being made however, as I have said, in the case where the Board is at liberty to retain the goods under section 53. Section 70 says that the Board may make bye-laws for the reception, removal and porterage of goods. The rules which they made under this section are the seventh and the eighth. The seventh rule says that coal and other things of that sort shall be landed only at such place or places as may be approved by the Board for that purpose from time to time. That, clearly, is a rule for the reception of the goods. The eighth rule says that importers or owners desiring to store cargo of the

(1) [1895] A.C., 632.

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descriptions mentioned in the last bye-law must apply to the Secretary to the Board for such space as they may require. No objection is taken to that part of the rule, nor to the part which says 'such applications will be granted on such terms as the 'Board may approve.' Then the rule ends with this:—'The 'Board, while taking all reasonable precautions to ensure the safety 'of property stored upon its premises will accept no responsibility 'whatever in respect of such cargo as is mentioned in bye-law 'No. 7 from the time when the same shall have been placed or 'stored on such plot or plots and such cargo shall from that 'time remain at the sole risk of the consignees or owners, who 'shall, however, be entitled to employ such servants or others 'as they may consider necessary for the due protection of such 'cargo.' I am clearly of opinion that this cannot be called a bye-law for the reception or removal of the goods. As a matter of plain English that appears to me clear. Mr. Grant argues that finding the words 'reception' and 'removal' I ought to imply an intention to make provision for the storage of goods. I cannot think that the Legislature so intended. The matter of storage must have been present in the minds of the Legislature, because, as I have shown, they have made provision for it in other parts of the Act. They provided for the rates of the storage. That being so, they deliberately leave out the word storage when they authorize the Board to make rules. It seems to me, therefore, impossible to hold that it was intended that the rule which they made in these words could include rules for storage of coal, and that on the contrary the intention must have been to have the terms of any contract of storage so far as not provided for in the Act to be settled in the ordinary way by contract between the parties. Even if it were otherwise, even if it were competent for the Board to make a rule for the storage of coal, I should have the greatest difficulty in holding that a rule claiming for the Board or purporting to claim for the Board immunity from action could be deemed to be a rule for the storage of coal. It is enough for me, however, to say that I am clearly of opinion that the rule in question, viz., the latter part of rule 8 cannot be called a bye-law for the reception or removal of the goods. Some attempt was made to show that the general words at the end of the section might cover the case. Applying the ordinary principles of interpretation I do not think that

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argument can be accepted. I have pointed out that in my view the word storage was deliberately omitted in the place where it might have been inserted in the clause.

"Several other questions were argued, namely, the question as to the meaning of the rule and the question as to its reasonableness. These questions it seems to me unnecessary to enter upon. It is enough to hold that this rule is a rule which it is not competent for the Board to make under section 70.

"The answer, therefore, that I give to these two issues is in both cases in favour of the plaintiffs."

Against the above judgment the defendants preferred an appeal (Original Side Appeal No. 43 of 1897), which was heard by COLLINS, C.J., and BODDAM, J.

Mr. *R. A. Nelson* for the appellants.

Mr. *E. Norton* and Mr. *K. Brown* for the respondents.

Their Lordships delivered the following judgment on 30th November 1897:—

"We think the judgment of Mr. Justice Shephard is right.

"The defendants admittedly received the goods sued for, for "hire under and by virtue of the Madras Harbour Trust Act, "1886, and their bye-laws purporting to have been made under "section 70 of that Act. They contend, however, that both the "87th section of the Act and the eighth bye-law or one of them "relieves them from all liability in respect of the goods so received.

"It is clear that the eighth bye-law contemplates that terms "should be arranged for the storage of goods received under "it, and it must be assumed for the purpose of dealing with "the defendants' present contention that the goods sued for "were received by them under and by virtue of some contract "made between the plaintiff and the defendants in accordance "therewith.

"Counsel for the defendants admits that if the goods were "received under a contract, section 87 of the Act does not protect "them.

"The only remaining question is whether the eighth bye-law "protects them. We agree with Mr. Justice Shephard that the "bye-law is *ultra vires*, for the reasons given in his judgment. "We also think that it is unreasonable. The bye-law, therefore, "affords the defendants no protection.

"We accordingly dismiss the appeal with costs."

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The case then came on for hearing, on 26th October 1898, before SUBRAMANIA AYYAR, J., for the determination of the following issues:—

"(1) How much coal was delivered by the plaintiffs to the defendants between the 11th and 17th July 1896 with reference to the consignment referred to in the plaint?

"(2) Whether the defendants failed to account for any and how much of the coal so delivered?

"(3) If the defendants did fail to account to any extent whether they, as bailees, are liable in respect of such failure."

On the first of these issues the finding of the Court was that 3,385 tons of coal had been delivered by the plaintiffs to the defendants; on the second issue, that only 2,569 tons had been re-delivered by the defendants, and that the balance not accounted for, after allowing five per cent. for wastage, amounted to 640 tons. His Lordship then dealt with the remaining issue in the latter part of his judgment as follows:—

"The remaining question is whether the defendants are liable for the said balance. A great deal was said in the argument about the onus of proof in such cases. The point, however, seems to be free from doubt, upon the authorities. The cases cited for the defendants are not similar to the present in their facts. But two English and two Indian decisions cited for the plaintiffs are in point, and I shall refer to them only. In *Mackenzie* v. *Cox* (1) the plaintiff gave no evidence as to how the animal which was the subject of bailment there was lost. Gurney, B., laid down that the onus was on the defendant—the bailee—to acquit himself by showing that he was not in fault with respect to the loss. In *Reeve* v. *Palmer*(2) a deed was lost while in the hands of the bailee. Cockburn, C.J., observed:—'Now, the jury have found that the 'defendant lost it (the deed). That, in the absence of any explanation, must, I think, be taken to be a loss without there having 'been that proper care which it was the defendant's duty to take 'of the deed. Unless, therefore, this be qualified by showing the 'loss to have arisen from circumstances which could not have 'been prevented from occurring by ordinary care, it must be

(1) 9 C. & P., 632. (2) 5 C.B., (N.S.), 84; 27 L.J., C.P. 327, at p. 329.

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'considered that the defendant, who had the deed as an attorney, 'lost it in consequence of the absence, on his part, of ordinary care.' In *Raisett Chandmull Hamirmull* v. *Great Indian Peninsula Railway Company*(1) Starling, J., dealing with the question of onus said:—'In the absence of any evidence as to how the 'parcel (which contained the property lost) was treated between 'Itarsi and Saugor, it is impossible to hold that the defendants 'have discharged the onus, which lay upon them, of showing 'that they had in respect thereof fulfilled the duties of a bailee as 'laid down in section 151 of the Contract Act.' Lastly in *Sesham Patter* v. *L. S. Moss*(2) decided in this Court, Muttusami Ayyar, J., laid down the rule thus:—'The plaintiffs must show in the 'first instance the alleged loss or deficiency, and then the Railway 'Company will be bound to show that the loss occurred under 'circumstances which would exempt a bailee from responsibility 'for it.' Now, turning to the present case, the coal to which the dispute relates has been undoubtedly lost. Have the defendants then shown that the loss arose from circumstances which could not have been prevented from occurring by that care which they were bound to take?" [His Lordship, referring to the evidence, held that no explanation had been established.] . . . . The loss remains unexplained and that, as already stated, is evidence of negligence for which the defendants are liable."

"I therefore direct the defendants to pay to the plaintiffs rupees sixteen thousand with 6 per cent. interest from the date of the plaint and costs throughout."

Against this judgment the defendants preferred an appeal.

The Advocate-General (Hon. *C. Arnold White*) and Mr. *R. A. Nelson* for appellants.

Mr. *E. Norton* and Mr. *K. Brown* for respondents.

This appeal was heard by the Bench as above constituted, and their Lordships delivered the following judgment:—

COLLINS, C.J.—There are three questions to be decided in this appeal:—

First—How much coal was delivered by the plaintiffs to the defendants between the 11th and 17th days of July 1896 with reference to the consignment referred to in the plaint? On this issue the evidence is all one way. It is proved beyond reasonable

(1) I.L.R., 17 Bom., 723, at pp. 729, 730. (2) I.L.R., 17 Mad., 445, at p. 446.

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doubt that the steamship *Graffoe* was loaded with 3,385 tons of coal at Newcastle-upon-Tyne consigned to the plaintiffs, Messrs. Best & Co. at Madras. On this part of the case the Advocate-General, who appears for the defendants, the Harbour Trust Board of Madras, admits that he is unable to dispute this fact. The further question then arises,—was the whole of the coal delivered to the plaintiffs at Madras and by them delivered to the defendants? It appears to me that the evidence called by the plaintiffs establishes both those propositions. . . . [His Lordship then dealt with the evidence.]

The second question is:—Did the defendants fail to account for any, and how much, of the coal so delivered? There is no dispute upon this point of the case. If 3,385 tons were delivered the defendants admit a deficiency of 816 tons.

The third question is:—If the defendants did fail to account to any extent, whether they, as bailees, are liable in respect of such failure to account. It is not denied that the defendants charge wharfage and the ordinary dues for the coal deposited with them, or that they have the sole dominion over the coal. No coal can be removed from their wharf without the permission of their authorized servants; but they contend that unless the plaintiffs can prove negligence on the part of the defendants a suit will not lie. The defendants are unable to account for the deficiency in any way and can give no explanation of the loss. The defendants further rely upon section 151 of the Indian Contract Act which enacts that "in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed."

The cargo of coal was discharged between the 11th and 17th July 1896, and the deficiency was discovered on the 3rd November 1896—a period of about three and a half months. (It may be here stated that the learned Judge who tried this case was of opinion that a wastage of 5 per cent. ought to be allowed; so he reduced the deficiency to 640 tons.)

It appears to me, upon the facts proved or admitted, that the defendants did not take such ordinary care of the bailment as prudent men would take, under similar circumstances, of their own goods.

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The case of *Reeve* v. *Palmer*(1) appears somewhat in point. Cockburn, C.J., (Williams and Willes., JJ., concurring) says:—"The deed for the recovery of which this action of detinue is brought, was a deed which was in the care and keeping of the defendant as attorney for and on behalf of his client, the plaintiff, and consequently it was his duty to take ordinary care of it. The jury have found that he lost it: and I am of opinion that that must be taken to mean, in the absence of any explanation, that he lost it for want of that due and proper care, which it was his duty to apply to the keeping of it, unless it is qualified by circumstances showing that the loss of the deed could not have been prevented by the application of ordinary care." Can it be said that the defendants in this case used ordinary care in the storage and keeping of this coal? I think not. 640 tons of coal out of 3,385 tons disappear in three and a half months, and the Traffic Manager of the defendants can give no explanation. He says:—"I have not made up my mind as to (how) the 800 and odd tons have been lost. On that point, my mind is still in a state of flux." [After dealing further with the evidence his Lordship held it to be clear that the coal was lost through the negligence of the defendants.]

I would dismiss this appeal and with costs.

BENSON, J.—The plaintiffs are a firm of merchants at Madras and the defendants are the trustees of the Harbour of Madras. The learned Judge who tried the case on the Original Side of the Court found that in July 1896 the defendants, as bailees for hire, took charge of 3,385 tons of coal, ex S.S. *Graffoe*, consigned to the plaintiffs and (after making due allowance for wastage) failed to account for 640 tons of the same. He, therefore, gave judgment for plaintiffs for Rs. 16,000, the value of the coal, with interest from date of plaint.

Against this decree, the defendants appeal, partly on the facts and partly on the legal question as to their liability.

They contend that it is not shown that 3,385 tons of coal were given into their charge. They also contend that even if that question of fact is found against them, still the onus of affirmatively proving the negligence of the defendants lies on the plaintiffs, and that they have not discharged it.

(1) 5 C.B., (N.S.), 84, at p. 90; 27 L.J., C.P., 327.

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Lastly, the defendants contend that if the onus lies on them of showing that they are not guilty of negligence they have discharged the onus, and are protected by sections 151 and 152 of the Indian Contract Act (IX of 1872), which provides that, in the absence of a special contract, a bailee is not responsible for the loss of the thing bailed if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value. . . . [His Lordship then dealt with the evidence.]

The defendants contend that the plaintiffs must show affirmatively that the defendants were guilty of negligence. It seems to me that no evidence could establish the defendants' negligence more clearly and affirmatively than a bare statement of the fact that in the short space of hundred days they lost no less than 640 tons of coal in their sole custody without being able to give the slightest explanation of its loss.

In my view, when the loss is established it lies on the defendants to show that they took as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss. In the present case the proved facts negative the existence of such care. It is not suggested that the 640 tons of coal evaporated into the air, or sank into the earth, or were washed away by floods, or were burned by fire for which the defendants were not responsible, or were carried away by violence. If the coal were lost in any of these ways the defendants might not be liable. But in the present case the only possible explanation seems to be that the coal was either stolen or was wrongly delivered to other persons, and neither of these things could, in the circumstances of this case, have happened if the defendants were not negligent in dealing with the coal. In other words, if the defendants had exercised ordinary care they could not have lost so great a quantity of coal in so short a time without knowing how the loss occurred. I would, therefore, confirm the decree and dismiss this appeal with costs.

Messrs. *Wilson & King*—Attorneys for appellants.

Messrs. *Barclay, Orr & David*—Attorneys for respondents.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice O'Farrell.

1899. April 21, 24, 25, and 26, May 4.

VENKATA NARASIMHA NAIDU AND OTHERS (DEFENDANTS), APPELLANTS,

v.

BHASHYAKARLU NAIDU AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Authority of Counsel, vakils or other agents—Abandonment of issue—Scope of authority in conduct of litigation—Compromise—Civil Procedure Code—Act XIV of 1882, *s.* 462—*Hindu Law—Impartible zamindari—Son's legal incompetence to intervene in the suit on the footing of the impartibility of the estate—Partial partition—Omission to include some joint properties in plaint in suit for partition where they can be ascertained and decree given.*

A vakil appointed to conduct a case on behalf of a client has power to ask for an issue to be framed, or to abandon one that has been framed, and, in the absence of fraud or misconduct or of express instructions prohibiting the adoption of such a course, his action will be binding on his client. There is no distinction, in this respect, between the acts of Counsel, vakils and other agents. The abandonment of an issue does not amount to a compromise, and if the suit is being conducted by a guardian on behalf of a minor, leave of the Court is not necessary under section 462 of the Code of Civil Procedure for such abandonment.

Where an estate is impartible, the sons of the present holder have, since the decision in *Sartaj Kuari* v. *Deoraj Kuari* (L.R., 15 I.A., 51; I.L.R., 10 All., 272), recently affirmed as to this Presidency in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (L.R., 26 I.A., 83; I.L.R., 22 Mad., 383), no *locus standi* to question the acts of their father.

In a suit for partition, plaintiff, when filing his plaint and schedules, made no mention of certain jewels in the possession of his wife. Defendant having filed a schedule in his written statement showing the existence of the said jewels plaintiff admitted that they were with his wife but declined to allow them to be divided unless a division were also made of the jewels which were in the possession of the defendants' wives and children. He, however, before the examination of witnesses, withdrew this condition and expressed his willingness to give defendant credit for half their value:

Held, that the suit was, on these facts, not one for partial partition.

Per O'FARRELL, J.—That where a suit is brought for division of the whole of the family properties, an omission, whether accidental or fraudulent, to specifically include in the plaint certain of the joint properties, where such properties are ascertained and a decree can be given for partition, will not convert the suit into one for partial partition.

* Appeal No. 238 of 1897.

APPEAL against the decree of A. F. Pinhey, Acting District Judge of Kistna, in Original Suit No. 16 of 1896.

Suit by the younger of two sons of a deceased zamindar for partition of the zamindari. The first defendant, the elder son, on behalf of himself and the second and third defendants, his two minor sons, alleged that the properties described in the plaint were impartible properties appertaining to what was usually known as the zamindari of Vallur, and that the said properties had always been treated as impartible by the members of the family; and that the succession to the said zamindari had always been governed by the rule of primogeniture, the junior members of the family enjoying only such maintenance as might be granted to them by the zamindar for the time being. The first issue, framed on this plea, was as follows:—"Whether all or any and which of the properties sued for are partible or impartible for the reasons given in the written statement." At the District Court, the vakil for the defendants, after adducing some evidence and filing documents, abandoned this issue. The Acting District Judge declared plaintiff to be entitled to a half share in the family properties as prayed. The defendants preferred this appeal on the grounds, among others, that the so-called abandonment of the first issue was illegal, unauthorised and not binding on the defendants, whether it was made by the pleaders independently or under instructions from the dewan; that neither the pleaders, under the terms of their vakalats, nor the dewan, under the general power of attorney that he held, had authority so to abandon the issue as to prejudicially affect the defendants; and that the Court ought not to have recognised the so-called abandonment without calling for the production of proper power or authority in that behalf. The vakalats referred to authorized the vakils to appear and file documents and necessary statements for conducting and hearing the suit, to conduct all proceedings, to apply for and execute proceedings, to satisfy the order of or decree given by the Court, and to file, if necessary, razinamah or withdrawal petitions; and they declared that all proceedings carried on should be deemed to have been personally executed. The power of attorney given by first defendant to the dewan, and dated 26th May 1891, authorized him to conduct personally or through the agents and vakils appointed by him, all proceedings to be conducted in the civil, criminal, revenue and registry courts in regard to first defendant's zamindari

or any other affairs belonging to him; and to do personally or through agents appointed by him everything in the matter of complaints, written statements, razinamahs, withdrawals, and affidavit and other petitions, whether the first defendant should be present or not in those Courts. It was claimed that defendants were entitled to a re-trial of the first issue, and that, at any rate, the abandonment of it ought not to bind the minor defendants. It was further alleged for the defence that plaintiff was in possession of property of great value in the form of jewellery which he had not mentioned in the plaint or brought into hotchpot so as to render it available for division with the rest of the family property. Plaintiff, while admitting that a portion of the said jewellery was with his wife, claimed that it was not liable to partition, but offered to bring it into hotchpot if certain jewellery belonging to first defendant were similarly treated. He subsequently offered to give first defendant credit for half the value of the jewellery. On the question whether a suit so framed would lie, the Acting District Judge referred to *Chinna Sanyasi* v. *Suriya*(1), *Venkatarama* v. *Meera Labai*(2), *Venkayya* v. *Lakshmayya*(3), *Hari Narayan Brahme* v. *Gangatrav Daji*(4), *Haridas Sanyal* v. *Pran Nath Sanyal*(5), *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji*(6), *Nanabhai Vallabhdas* v. *Nathabhai Haribhai*(7), and Mayne's 'Hindu Law,' 5th edition, section 444. He said:—"The earlier decisions against allowing a suit for partial partition were, no doubt, correct but it is very doubtful if it was ever anticipated that by applying such decisions the result would be ultimately arrived at that an omission, either by ignorance or accident, to include all the partible property would lead to the dismissal of a suit for partition. Yet that is the result to which a course of Judicial decisions would seem to have led. If this is the correct view of the law, it is hardly intelligible how any suit can succeed. The accidental omission to include a fifty rupees note lying in plaintiff's cash box when the plaint is filed might result in the dismissal of a suit for lakhs of rupees. It is true that Petheram, C.J., in *Jogendra Nath Mukerji* v. *Jugobundhu Mukerji*(6), gave permission to file another suit, but in the present

(1) I.L.R., 5 Mad., 196.
(2) I.L.R., 13 Mad., 275.
(3) I.L.R., 16 Mad., 98.
(4) I.L.R., 7 Bom., 272.
(5) I.L.R., 12 Calc., 566.
(6) I.L.R., 14 Calc., 122.
(7) 7 Bom. H.C.R., (A.C.J.), 46.

case even such a concession would press very hardly on the plaintiff, who would have to pay the costs on both sides to date,—a penalty out of all proportion to his laches. Such a decision would be not consistent with equity and good conscience, for I have already found that the omission to include plaintiff's own ornaments in the plaint schedule was originally a *bonâ fide* error, and his subsequent plea was the result of first defendant's action in the Criminal Court, which apparently found that first defendant's charge was baseless, and there is little doubt in my mind that it was made for the purpose of defeating this suit. Such an attempt should not be allowed to succeed. On this ground I decide not to follow the authorities quoted, even if I have interpreted them rightly; I find that the suit is maintainable."

The defendants preferred this appeal.

Mr. *E. Norton* for the first appellant.—The vakalats filed do not clothe the vakils with authority to compromise, and such authority cannot be implied (*Jagapati Mudaliar* v. *Ekambara Mudaliar*(1)); nor should the Courts act upon statements made by vakils out of the ordinary scope of their authority, (*Venkataramanna* v. *Chavela Atchiyamma*(2)). It is not within the scope of a vakil's authority to relinquish a portion of his client's case and the client is not bound by such relinquishment, (*Gour Pershad Doss* v. *Sookdeb Ram Deb*(3) and *Skeikh Abdul Sabhan Chowdhry* v. *Shibkisto Daw*(4)). See also *Chunder Coomar Deo* v. *Mirza Sudakat Mahomed Khan*(5) and the observations in the first paragraph at page 83 in *Krishnasami Ayyangar* v. *Rajagopala Ayyangar*(6).

Mr. *K. Brown* for the second appellant.—The abandonment of the first issue amounted to a decree by consent. This appellant being a minor, sanction was necessary under section 462 of the Code of Civil Procedure, and there being none, the compromise was invalid. Even if the estate were to be taken to be impartible it was still family property, (*Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatrazu Bahadur Garu*(7) and *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing*(8)), and the second defendant's interests were therefore prejudiced.

(1) I.L.R., 21 Mad., 274.
(2) 6 M.H.C.R., 127 at p. 130.
(3) 12 W.R., (C.R.), 279.
(4) 3 B.L.R., Appx., 15.
(5) 18 W.R., (C.R.), 436.
(6) I.L.R., 18 Mad., 73.
(7) L.R., 24 I.A., 118; I.L.R., 20 Mad., 256.
(8) L.R., 17 I.A., 128; I.L.R., 18 Calc., 151.

Ramachandra Rao Saheb, *Seshachariar* and *Ganapati Ayyar* also appeared for appellants.

Hon. *V. Bhashyam Ayyangar*, with him Hon. *Subba Rao*, *Gopalasami Ayyangar* and *Subramania Ayyar*, for respondents.—The son of the holder of an impartible estate, though he be the eldest son, has no more rights than the eldest son in a family governed by the rule of primogeniture. If the estate is impartible the second defendant has no *locus standi*; if partible, whatever is binding on the father is also binding on the son. If an inalienable custom be shown to exist, there can be a right by birth, and the holder for the time being is in the position of a manager with the right to take profits. Section 462 of the Code of Civil Procedure has no application. No collusion is alleged as between plaintiff and first defendant. The abandonment of the first issue is as much binding on the second defendant as it is on the first, (*Chengal Reddi* v. *Venkata Reddi*(1)). The next friend of an infant can withdraw a suit provided there is no fraud or collusion, (*Eshan Chundra Safooi* v. *Nundamoni Dassee*(2)). Even in the present appeal some of the issues have been abandoned by Counsel for the first appellant; and there can be no difference between the authority of Counsel and that of a vakil in the conduct of a suit. It would be impossible to conduct any case properly without power to exercise discretion as to matters that can or cannot be supported. Nor does the abandonment of an issue amount to a compromise or an agreement by consent. In the case of impartible estates the holder for the time being is the absolute owner, (*Sartaj Kuari* v. *Deoraj Kuari*(3)). See also *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*(4).

Ramachandra Rao Saheb in reply.—The nature of the estate will have to be decided before the cases of *Sartaj Kuari* v. *Deoraj Kuari*(5) and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*(6) can be applied. In this case the son's position is different from that of a samanodaka, who has no interest by birth, whatever the nature of the estate may be.

(1) I.L.R., 12 Mad., 483. (2) I.L.R., 10 Calc., 357.
(3) L.R., 15 I.A., 51; I.L.R., 10 All., 272.
(4) L.R., 26 I.A., 83; I.L.R., 22 Mad., 383.
(5) L.R., 15 I.A., 51; I.L.R., 10 All., 272.
(6) L.R., 26 I.A., 83; I.L.R., 22 Mad., 383.

MOORE, J.—[After referring to the facts, and the first issue, and its abandonment by the defendants' pleader]. . . . . It is now pleaded that the vakils for the appellants (defendants) were not justified in abandoning the first issue and that they had received no instructions from the zamindar authorising them to do so, and it is urged that the issue should now be tried. One of the main grounds on which Mr. Norton bases his application for the re-trial of this issue is that it was abandoned in consequence of certain remarks which the District Judge made with reference to some documents which had been received by him from the Board of Revenue, but which the vakils for the defendants had no opportunity of perusing. The District Judge's account of what took place with reference to these documents will be found in paragraphs 12 and 13 of his judgment, while the allegations made on behalf of the appellants are set forth in the affidavit of the 21st September 1897 by the late dewan of the zamindar and affidavits Nos. 9, 10, 11 and 12 by the zamindar and three of the vakils employed by him before the District Judge. It is perfectly clear that no weight can possibly be attached to the argument now put forward. Whether the vakils were influenced by the remarks of the Judge or not it is impossible to say, but the question, it is scarcely necessary to observe, is quite immaterial. The vakils deliberately abandoned the issue and it would be idle to enquire as to whether they were led to do so because they were apprehensive that the Judge would decide it against them or not.

It is further urged that the late dewan was not empowered to authorise the vakils, to abandon the issue. The power of attorney granted to him by the zamindar is among the printed papers, but it has not been filed as an exhibit. It is not, however, necessary to consider the question as to the dewan's power to instruct the vakils. The only point for consideration is as to whether it was within the ordinary powers given to the vakils for the conduct of the suit to abandon an issue when they, whether rightly or wrongly, arrived at the conclusion that their contentions as to it were untenable. I am clearly of opinion that this question must be answered in the affirmative. It must be held that a vakil appointed to conduct a case on behalf of his client has the power to ask for an issue or to abandon an issue, to get a witness summoned or to dispense with his evidence. Without such powers no

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case could be tried without frequent adjournments and endless references to the parties.

Whether the vakils in the present case acted wisely or not in giving up this issue it is impossible to say in the absence of evidence as to it on the record, but it is perfectly clear that their action was taken deliberately and was not objected to by their client till he went to Madras to give instructions as to the filing of this appeal in September 1897. The record and the arguments now adduced show that the zamindar's legal advisers here have thought it advisable to adopt a very different line of action from that followed by his vakils in Masulipatam. There the issues that were keenly contested were Nos. 2, 3 and 4, while No. 1 was given up. Here Nos. 2, 3 and 4 are abandoned while it is urged that No. 1 is the most important issue in the suit. The zamindar (first appellant) in his affidavit (No. 9) of the 21st September 1897 drawn up in Madras, states that he was absent from Masulipatam when that issue was abandoned and did not return there till the 26th March 1897. He then ascertained for the first time that the issue had been given up and wanted to apply to the District Court to get it re-opened, but was informed that it was useless to do so. It is not easy to accept this statement. It is most improbable that, if the zamindar really at the time objected to the action of his vakils, he would have done nothing to repudiate it till he was in Madras in the following September. It is difficult to resist the inference that the relinquishment of the issue was not opposed to his wishes, and that it was not till he was arranging in Madras for the presentation of his appeal that he changed his opinion on this point. However this may be, I have no hesitation in holding that the zamindar's vakils did not exceed their powers in abandoning the issue before the District Judge, and that it cannot be re-opened now. . . . .

The sixth issue is as to whether the first plaintiff is in possession of any of the family properties in addition to those admitted by him in the plaint and whether, if so, this suit is maintainable. It is urged that the first plaintiff has been shown to be in possession of the jewels shown in schedule II, that he has not brought these jewels into "hotch-pot," as it is called, so as to render them available for division with the rest of the family property and that consequently it should be held that this suit is one for a partial division of family property and as such should be dismissed. The

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District Judge deals with this question in paragraphs 36 to 38 of his judgment. It is shown that the first defendant, with his written statement filed on the 7th December 1895, put in a schedule (II) of jewels alleged by him to be in the first plaintiff's possession. The first plaintiff on the 24th July 1896 filed a petition (Miscellaneous Petition No. 508 of 1896) in the Court of the District Judge in which he stated that some of the jewels mentioned in schedule II were in the possession of his wife and that he had no objection to their being divided if the first defendant consented to the partition of the jewels which were in the possession of his wives and children. The order passed on this by the District Judge is as follows :— "The Hon. Mr. Subba Rao (who appeared for the plaintiffs) says that the property in schedule II is not available for partition and that he declines to make any further statement in regard to its nature."

Subsequently, however, as will be seen from the Judge's B form diary, this line of action was abandoned. It will there be found that on the 15th March 1897 Mr. Subba Rao stated that his client was willing to give the first defendant credit for half the value of the property mentioned in Miscellaneous Petition No. 508 of 1896. It is quite clear from this recital of facts that this is not a case of a plaintiff suing for a partial division of property. What is shown is that the first plaintiff, when filing his plaint and schedules, made no mention of the jewels in the possession of his wife. When the first defendant filed a schedule with his written statement showing jewels alleged to be in the first plaintiff's possession the latter admitted that the greater portion of these jewels were with his wife, but declined to allow them to be divided unless the jewels in the possession of the first defendant's wives and children were also divided. He, however, subsequently withdrew this plea. Here it is evident that there is no suit for partial division. As regards certain property which he never denied was in his possession the first plaintiff in the first instance put forward a plea that it should not be divided except on certain conditions but subsequently abandoned that contention. The decision of the District Judge on the sixth issue must be upheld. . . . .

Nothing was heard of the allegations reflecting on the conduct of the first defendant as set forth in this petition from the date that it was filed till this appeal came on here for disposal. An appeal petition has been filed here on behalf of the three defendants

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jointly in which no allusion has been made to those allegations and no separate petition urging them has been put in on behalf of the second appellant. When, however, Mr. Norton had finished his arguments in support of the first appellant, Mr. Brown on behalf of the second appellant reverted to the allegations made in the petition of the 30th March 1897 and urged, *inter alia*, that the first appellant was not authorised to abandon the first issue in so far, at all events, as the second appellant was concerned. His argument briefly was that the abandonment of the first issue, which, he maintained, was the most important issue in the suit, amounted to a compromise, and that the guardian was not entitled to enter into any such agreement or compromise on behalf of the minor without the leave of the Court given under section 462 of the Civil Procedure Code. It does not appear to be necessary to consider this argument at any length or to refer to the several decisions referred to by Mr. Brown as it is, in my opinion, absolutely impossible to hold that the giving up of the first issue amounted to an agreement or compromise. All the proceedings in the case show clearly that there was no such agreement between the first defendant or his vakils and the plaintiffs and that no compromise was entered into by them. What took place was, as has already been pointed out, that the vakils for the defendants, whether wisely or not it is impossible to say, came to the conclusion that it was hopeless to continue the contest on the first issue and allowed it to be decided against them. There was no compromise or agreement, and no sanction of the Court was therefore required by section 462 before the abandonment of the issue. This ground of appeal must be negatived. . . . .

O'FARRELL, J.— . . . . The only questions pressed upon us are those with which I now proceed to deal. The first is the contention covered by the first issue in the suit as to the alleged impartibility of the estate. The District Judge has recorded a finding adverse to the defendants on this issue in consequence of its abandonment by the defendants' pleader. It is contended before us that the abandonment was without authority and the result of remarks which fell from the Judge in the Court below and that the defendants are entitled to have the issue re-tried. Dealing first with this contention as it is put by counsel on behalf of the first defendant, the vakalats of the pleaders in the lower Court have been read to us, but they appear to be in the general terms usual in such

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documents and nothing seems to turn upon them. There is, further, no allegation of fraud or misconduct on the part of the vakils. The simple question, then, is whether a pleader's general powers in the conduct of a suit include the abandonment of an issue which, in his discretion, he thinks it inadvisable to press. No case has been cited which, in my opinion, goes the full length contended for by the learned Counsel for the appellant of declaring, in distinct terms, that a pleader has no such general authority. On the contrary, it was held in a case decided by the Privy Council in 1839 (*Rajunder Narain Rae* v. *Bijai Govind Sing*(1)) that the admission and consent of a vakil made with due authority (which would appear to mean properly authorised to conduct proceedings in the suit) will bind his client though not present at the time of making it. In that case Lord Brougham observed that if it were held otherwise "it would not be safe to see any agent or counsel, without letting the parties appear in the most trifling matter. The Courts must in all cases see the parties themselves if they are not to be bound by their agents." No distinction is drawn, it will be observed, between counsel, whose consent, unless against the express wish of his client, will be binding (*Carrison* v. *Rodrigues*(2)) and vakils or other agents. The principle enunciated in that case is followed in *Jagapati Mudaliar* v. *Ekambara Mudaliar*(3), where a distinction is drawn between giving up a right by way of compromise and "the power to bind by admissions which, in effect, is but dispensing with proof of the facts admitted, and is one of the well-recognised incidents of a pleader's general authority." In the light of that decision which is the only one of this Court of those cited to us which deals with the precise question at issue, I do not think there is any need to consider, so far as the first defendant is concerned, the Bengal decisions which have been cited. I may observe, however, that from the observations of Hobhouse, J., in *Gour Pershad Doss* v. *Sookdeb Ram Deb*(4), the case mainly relied upon by Counsel for the appellants, it would rather seem that what the vakil there gave up was a claim already admitted or proved and which the Court below was prepared to decree in favour of the client. If so the case is not in point. I can see no valid ground for the distinction that has been attempted to be drawn between making admissions as to relevant facts and abandoning an issue,

(1) 2 M.I.A., 253.
(2) I.L.R., 13 Calc., 115.
(3) I.L.R., 21 Mad., 274.
(4) 12 W.R., (C.R.), 279.

which is only another form of admission. It is true that in the present case it is alleged that the defendants' pleaders improperly took certain documents off the record after the issue was abandoned, but the defendant was not prejudiced by their action, inasmuch as the learned Counsel does not contend that on those documents coupled with the oral evidence still on the record, a finding in favour of his client could have been arrived at without further evidence.

As regards the allegation that the vakils were influenced by any remarks made by the District Judge in the course of the trial I attach no importance to it. I entertain little doubt that the issue was abandoned, rightly or wrongly, because the pleaders thought it could not be sustained. In this connection I may refer to a decision of a Division Bench of this Court in 1893, the substance of which is embodied in the Privy Council decision in *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatrasu Bahadur Garu*(1). In that suit, the subject matter of which was an estate granted in 1803, it was held by Parker and Shephard, JJ., that evidence of conduct extending over a period of about seventy years was insufficient to prove a special custom. This decision applies strictly to the Vallur estate now in question which was founded in 1802 and is also alleged to be impartible by reason of a family custom. In the present suit there was the additional difficulty that all the cases of devolution prior to the death of the father of plaintiffs and defendants in 1869 had been to sole surviving heirs and could therefore afford no evidence of any special custom of impartibility. I mention these matters as showing the difficulties with which the defendants would have had to contend in the event of the issue having been pressed, and as removing any ground for the contention that the pleaders must necessarily have been influenced by any remarks which fell from the District Judge. The affidavits, Nos. 10, 11 and 12, of the pleaders in the Court below which are presented to us in support of the defendants' contention do not allege that the remarks attributed to the District Judge were more than one among several reasons for abandoning the issue. I would also remark that there were good grounds for inferring that the defendant himself at that time acquiesced in the abandonment of the issue. His own statement in the affidavit

(1) L.R., 24 I.A.,118; I.L.R., 20 Mad., 256, at p. 264.

No. 9 that he has filed before us is that he came to know of the abandonment on the 26th March 1897. Judgment was not delivered in the suit till the 22nd April, and the defendant made no attempt in the interval to move the Court to re-open the issue. I would, on all these grounds, hold that the first defendant is bound by the acts of his legal advisers in the Court below. As regards the second defendant (and the same thing applies to the third defendant also) it is ingeniously contended by his learned Counsel that the abandonment of the first issue amounted to a decree by consent for partition and as such falls within the spirit, if not within the strict letter, of section 462 of the Civil Procedure Code, which prohibits the entering into a compromise so as to affect the interests of minors without the leave of the Court. I agree with the view taken by Mr. Justice Moore in the judgment just pronounced that section 462, Civil Procedure Code, has no application to a case of this kind; but, without going into this question, I think a sufficient answer is found to the contention in the argument put forward by the learned vakil for the respondents, that if the estate is impartible, the sons have, since the decision of the Judicial Committe in *Sartaj Kuari* v. *Deoraj Kuari*(1) recently affirmed as to this Presidency in the Pittapur appeal, no *locus standi* to question the acts of their father. Of the two Privy Council cases cited by Mr. Brown for the second defendant on this point, one (*Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing*(2)), is explained by the Judicial Committee in their recent decision in the Pittapur case (*Sri Raja Rao Venkata Surya Mahipati Ramakrishna Rao Bahadur* v. *The Court of Wards*(3)), and the *dictum* to be found in the other *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatrasu Bahadur Garu*(4) that "even if impartible the estate may still be part of the family property and descendible as such" is probably to be understood in the sense that it may be so by special custom. It is noticeable that the case of *Sartaj Kuari* v. *Deoraj Kuari*(5) was not referred to in the argument and it was probably tacitly assumed, according to the notion prevalent till recently, that that decision was inapplicable to the Madras

(1) L.R., 15 I.A., 51; I.L.R., 10 All., 272.
(2) L.R., 17 I.A., 128; I.L.R., 18 Calc., 151.
(3) L.R., 26 I.A., 83; I.L.R., 22 Mad., 383.
(4) L.R., 24 I.A., 118; I.L.R., 20 Mad., 256, at p. 264.
(5) L.R., 15 I.A., 51; I.L.R., 10 All., 272.

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Presidency. I would, therefore, hold that the abandonment of the issue in the Court below cannot now be questioned by any of the defendants. . . . .

The next contention relied upon by the appellants is that the suit is, in effect, one for partial partition and ought to have been dismissed. The contention is based on the finding of the District Judge at paragraph 37 of his judgment, which is accepted for the purposes of this argument, to the effect that the plaintiff was in possession of certain jewels forming part of the joint family property, but which he falsely alleged were in his wife's possession. It is pointed out that he persistently refused to bring these into hotch-pot, except upon conditions, and it is urged that he was therefore, in effect, seeking a partition of only a portion of the family property and his suit should, according to the decisions quoted by the District Judge in paragraph 38 of his judgment, have been dismissed. As a matter of fact, however, it is pointed out by the learned vakil for the respondents that the plaintiff did on the 15th March 1897 unconditionally agree to the division of the property in dispute, and the Judge has given a decree accordingly. I cannot see that the consent, which was given before decree, and before even the examination of witnesses began, was given too late. The District Judge rightly observes that fraud or concealment of property will not disentitle a plaintiff from maintaining a suit for partition. He has, I think, misunderstood the scope of the cases cited by him which are all, with the exception of *Hari Narayan Brahme* v. *Ganpatrav Daji*(1) (where the point did not directly arise), authorities merely for the proposition that a suit brought expressly for the purpose of effecting a partition of a portion only of joint family property, will not lie. The present is not such a suit. It is one brought for the division of the whole of the family properties, moveable and immoveable, and the mere omission, whether accidental or fraudulent, to specifically include in the plaint certain of the joint properties, where such properties are ascertained and a decree can be given for partition, will not convert the suit into one for partial partition. . . . .

Appeal dismissed.

(1) I.L.R., 7 Bom., 272.

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ALLUVION—*Gradual accretion to a formation of dry land already existing, and appropriated to an owner of land, on a river's bank—The ownership of the bed of the river was not the subject of contest below—Variation of claim disallowed:*

Although there is not in Madras, as there is in Bengal, an express law embodying the principle that gradual alluvion enures to the land to which the accretion is made, following the ownership of that land, the rule is equally well established in both those provinces. Both parties were riparian proprietors of adjoining estates on both banks of the river Gódávari. The plaintiff claimed the right to newly-formed land in mid-stream, which she alleged to have been formed by accretion upon an already existing lanka or alluvial island which belonged to her. On that point there were concurrent findings against her. The accretion had taken place upon a lanka owned, not by her but by the Government, and higher up stream than hers:—*Held*, that the plaintiff must abide by the ground of claim which she had presented below, that being that the new land was formed by gradual accretions to definite and visible portions of a lanka previously belonging to her. This she could not now vary to a claim founded on an ownership of the river-bed on the strength of her being zamindar and owner of the land on both banks of the river, without either issue or evidence directed to such subaqueous ownership.

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ASSESSMENT OF LAND REVENUE ACT (MADRAS)—ACT I OF 1876—*Regulation XXV of* 1802 (*Madras*), *s.* 9—*Regulation XXVI of* 1802 (*Madras*), *s.* 2:

An application to a Collector to grant separate registration of a portion of a permanently-settled estate which has been alienated by a court-sale, is one under the provisions of Regulations XXV and XXVI of 1802 and not under Act I of 1876.

Bommarasu v. *Seshamma* 438

2. ——— *Separate registration and assessment of a village alienated from a zamindari—Regulation XXV of* 1802 (*Madras*), *s.* 8—*Invalid order of Government—Declaratory decree—Specific Relief Act—Act I of* 1877, *s.* 42—*Construction of agreement:*

By the effect of sections 5 and 6 of the Madras Act I of 1876 the decision of the Collector, in a case within his jurisdiction, whether for or against separate registration of a portion alienated from a zamindari, when once duly sanctioned as provided by that Act, can only be questioned in a Civil Court. Under sections 7 and 8, the apportionment of the assessment may be appealed from the Collector to the Board of Revenue, and power is reserved to the Governor in Council to order re-adjustment of the separate assessment if fraud or material error should appear. Separate registration, on the other hand, is a matter of private right. The grantee of the perpetual lease of a village, alienated thereby from a zamindari, sued for a declaration of the invalidity of an order of the Government, inasmuch as it directed the cancellation of the Collector's order, after sanction by the Board, for the separate registration of the village:—*Held*, that this declaration should be decreed. The objection that the suit was contrary to the law enacted in section 42 of the Specific Relief Act, 1877, was not sustainable. No further relief could have been required by the plaintiff. The effect of the declaration itself, for which he had sued, would be sufficient to maintain the Collector's original order, which was valid in law, while the order of the Government directing its cancellation was not legal and was void. Nor was the suit defective for want of parties. Another suit, heard on appeal with the above, having been brought by the lessees of the entire zamindari, against the same grantee, raised the question,—what was the obligation entered into by him in respect of payment of the revenue upon separate registration and separate assessment of the village. This involved the construction of terms in the documents entitling the grantee to the village, and these, according to the plaintiffs, obliged him to pay a fixed sum to the zamindari:—*Held*, that he was only liable, after the registration and assessment, for burdens lawfully incident to the separate holding, and that they were to be discharged by direct payment by him to the Collector.

Robert Fischer v. *The Secretary of State for India in Council* 270

BOTTOMRY BOND—*Owner's covenant to pay—Construction of deed of hypothecation—Uncertainty of agreement:*

The owners of a vessel for the purpose of repairing it borrowed a sum of Rs. 10,000 from the plaintiff and executed an instrument stating the purpose of the loan and hypothecating the vessel to him and promising to repay the principal with interest by the 12th of March 1891. The instrument proceeded as follows:—"You have no connection with the "security or sea worthiness (yogyam) of the said ship up to the above "stipulated time. If the money is not paid in the said stipulated time "we shall add vattam at Rs. 20 per cent. per annum on the amount of "principal and interest accruing on that date, adding vattam once in "twelve months until date of payment after the said stipulated time on "the hypothecation security (adamana yogyam) of the said ship, and "shall get back this mortgage bond." The money was not repaid on the stipulated date and the vessel after making several voyages foundered in port:—*Held*, that the instrument was not a bottomry bond, and the plaintiff was not entitled under it, regarded as an instrument of hypothecation merely, to recover the enhanced interest referred to in the passage above quoted, because that part of the agreement was void for uncertainty.

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CHAMPERTY—*Purchase for an inadequate consideration—Speculative suit not necessarily champertous:*

A suit having been dismissed on the ground that a sale upon which it was based had been made for a consideration so inadequate as to support the belief that it was in the nature of champerty:—*Held*, that the elements required to bring the case within the authorities on the law of champertous transactions in this country were wanting. It was not a case in which an improper interest had been acquired in the unrighteous litigation of other people. The fact that a suit may be speculative does not render it champertous.

Siva Ramayya v. *Bilamma* 310

CITY OF MADRAS MUNICIPAL ACT (MADRAS)—ACT I OF 1884, s. 100—*Profession tax:*

The Inspector-General of Police, whose official place of business with the main body of clerks is in Madras, went on tour, and during his absence the Assistant Inspector-General in Madras signed letters for him:—*Held*, that the Inspector-General was not assessable to profession tax under the City of Madras Municipal Act in respect of the period when he was absent on tour.

Hammick v. *President, Madras Municipal Commission* 145

CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 12, 48, 244—*Proceeding in execution—Pending suit:*

A suit, according to section 48 of the Code of Civil Procedure, must commence with a plaint, and a proceeding which is capable of terminating in a decree or an order having the force of a decree cannot, on that ground alone, be deemed to be a suit within the meaning of the Code, if it has not commenced with a plaint. Such a proceeding is, in strictness, only a proceeding in a suit:—*Semble*, that a proceeding under section 244 is not a suit within the meaning of section 12 of the Code of Civil Procedure.

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2. ——————————————————, s. 13—Res judicata—*Suit for land based on plaintiff's title—Prior suit alleging that defendants held on lease from plaintiff—Dismissal of prior suit no bar to subsequent claim:*

In a previous suit in which plaintiff had been a party, it had been attempted to assert plaintiff's title to a piece of land occupied by the defendants by proving that they held the same by virtue of an alleged specific lease. The Court had held that no such lease had been executed. Plaintiff now claimed the land as belonging to his devasom, and sued to

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recover it on the strength of his title; he also set up the alleged lease once more:—*Held*, that, though the question of the validity of the lease was *res judicata*, plaintiff was at liberty to sue also on the strength of his title, independently of the lease, and he was not estopped from so suing by the fact that the former suit had been based on the lease alone. If the relation of landlord and tenant were shown to have existed prior to the specific lease sued upon, it was for the tenant to prove that such relation had ceased to exist. In the absence of such proof the relation would be presumed to continue, and the tenant's possession in that case could not be adverse.

Zamorin of Calicut v. *Narayanan Mussad* 323

3. ——————————————————, ss. 13, 43, 244—Res judicata—*Trespass on land—Conversion of moveables lying on land—Grounds of attack:*

Defendants having forcibly taken possession of plaintiff's land upon which was (1) standing timber and (2) logs of timber lying stored on the ground, plaintiff had, in a prior suit, recovered possession and damages. Subsequently to the institution of such prior suit defendants (1) cut and removed certain standing trees, and (2) removed the logs which lay stored on the ground. Upon plaintiff bringing a second suit to recover damages on both grounds, objection was raised (1) as to the standing timber, that plaintiff's remedy was under section 244 of the Civil Procedure Code, and (2) as to the logs, that a claim for their value might have been included in the former suit, since their conversion was effected when the plaintiff was dispossessed of the land upon which they lay and that, under section 43, no claim could now be made in respect of them:—*Held*, (1) that the proceeds obtained from cutting and removing saleable timber on the land were in the nature of mesne profits, and these having been taken since the institution of the previous suit, plaintiff could recover; (2) that a trespass on a piece of land is by itself no proof of any conversion of moveables lying upon the land at the time that the trespass takes place; that notwithstanding plaintiff's eviction from the land, possession of the timber lying stored upon it should be presumed to have continued in him in the absence of proof of any act on the part of the defendant with special reference to such timber and showing unequivocally that the plaintiff was entirely deprived of the use of it; and that conversion of the logs was not effected by the trespass, but only by their removal subsequently to the institution of the previous suit; and (3) that the causes of action now relied on were therefore different from those relied on before, and the previous suit did not operate as a bar to the present claim under section 43 of the Civil Procedure Code.

Moyi v. *Avuthraman* 197

4. ——————————————————, s. 43—*Decree for specific performance of a contract for sale of land—Subsequent suit for possession:*

The defendant having agreed to sell land to the plaintiff but failed to execute a conveyance, the plaintiff sued for specific performance and obtained a decree and the Court executed a conveyance of the land to him. He now sued for possession:—*Held*, that the right to possession having arisen at the same time as the right to the execution of a conveyance, the suit was not maintainable.

Narayana Kavirayan v. *Kandasami Goundan* 24

5. ——————————————————, s. 43—*Relinquishment by guardian of minor of part of claim—Subsequent suit for part relinquished:*

While plaintiff was a minor, his guardian had sued for and obtained a decree for arrears of shrotriem in respect of faslis 1290 and 1291. Having attained his majority, plaintiff now sued for similar arrears alleged to be due in respect of the previous faslis 1287, 1288 and 1289, contending that the relinquishment of a portion of a claim in a suit by a guardian could not preclude a suit for the portion relinquished from being subsequently brought, on the attainment of his majority, by the person on

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whose behalf the guardian had acted:—*Held*, that it cannot be said that section 43 of the Code of Civil Procedure has no application to a suit in which the plaintiff is a minor. The acts of a guardian in the conduct of a suit must be upheld unless it be shown that they were unreasonable or improper.

Gopal Rao v. *Narasinga Rao* 309

6. ———————————————, s. 43—*Whole claim in respect of cause of action—Mortgage—Redemption—Mortgage sued on not proved—Admissions by defendants of mortgage right—Subsequent suit on admissions:*

In a previous suit plaintiff had sued to redeem a kanom of 1859. The kanom not being established, the suit failed. At the time of bringing the suit, plaintiff was aware that the defendants in possession had in various documents admitted that they were kanomdars under the plaintiff's predecessor in title. On the plaintiff now bringing a suit based on the admissions referred to:—*Held*, that plaintiff could and should in the previous suit have based his claim in the alternative on the admissions instead of confining that suit to the specific mortgage which he failed to prove. Having chosen to take the course which he did, he was barred from bringing a fresh suit by section 43 of the Civil Procedure Code, as it must be taken that he abandoned or relinquished his claim on the basis of the admissions when he brought his first suit on the kanom specifically alleged.

Rangasami Pillai v. *Krishna Pillai* 259

7. ———————————————, ss. 96, 102, 108—*Order dismissing suit for default of appearance—Appeal:*

The decision of a Court passed under section 102 of the Civil Procedure Code, dismissing a suit in default of appearance by a plaintiff, is an order and not a decree, and there is no first or second appeal therefrom.

Gilkinson v. *Subramania Ayyar* 221

8. ———————————————, s. 206—*Finding in judgment not embodied in decree—Amendment of decree—Appeal against amended decree—Time how calculated:*

In a suit for a declaration of title to land and for possession, which was based upon a will alleged to have been made in plaintiff's favour, the Subordinate Judge, finding the document to be a forgery, dismissed the suit. The fourth defendant had been made a party inasmuch as he claimed a portion of the land as alienee. Though the case for the plaintiff failed, the Subordinate Judge, on the above finding, dealt in his judgment with an issue which had been framed regarding the validity or otherwise of the alleged alienation to the fourth defendant. He held that it had been made for no consideration and found the issue against the fourth defendant. The decree dismissing the suit, which bore date the 22nd of June 1896, contained no reference to the finding against the fourth defendant on that issue. The fourth defendant applied for a review of the judgment, complaining that as the suit had been dismissed, the reference in the judgment to the alleged alienation in his favour was unnecessary, and might, if permitted to stand, operate against him as *res judicata* in any subsequent suit that might be brought; and praying that the finding might be either expunged or modified in his favour. Upon this being refused, fourth defendant applied, under section 206 of the Code of Civil Procedure, that the decree might be brought into conformity with the judgment, and an order was made on 27th October 1896, adding to the decree a clause to the effect that the issue referred to had been found against the fourth defendant. On 12th December 1896, fourth defendant preferred an appeal against the decree of the Subordinate Judge, but the District Judge rejected it as being out of time:—*Held*, that the decree being in conformity with the judgment, the Subordinate Judge had no power to vary it; and that the words which had been

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added must be expunged, and the decree restored to its original state. Also, that the finding on the issue against the fourth defendant was, in fact, no finding except with regard to the question of consideration. *Per* SUBRAMANIA AYYAR, J.—That where a decree which is at variance with the judgment is brought into conformity with the latter under section 206 of the Code of Civil Procedure, the date of the rectification is immaterial with reference to the calculation of the time in which any appeal may be preferred against such decree. But where a decree is wrongly varied, a party affected by such variation should be entitled to calculate the time during which an appeal may be preferred as commencing from the date of the variation.

Parameshraya v. *Seshagiriappa* 364

9. ———————————————, ss. 206, 551—*Amendment of decree—Power of Court of First Instance after appeal:*

On the hearing of an appeal by a District Court, certain special costs were directed to be paid by the defendant, but, by a clerical error, that direction was omitted from the decree when it was drawn up. Plaintiff applied to the District Judge under section 206 of the Code of Civil Procedure for rectification of the error in the decree, but the Court refused to amend, it appearing that defendant had appealed to the High Court, which had dismissed his appeal and confirmed the decree of the District Court. The appeal had in fact been dismissed under section 551 of the Code of Civil Procedure. Plaintiff then petitioned the District Court to review its order refusing to amend. This was rejected, the District Court holding that the decree, of which amendment was asked, was the decree of the High Court, which a District Court had no power to amend. On plaintiff petitioning the High Court to revise this order of the District Court:—*Held*, (1) that the case was governed by the ruling of the Full Bench in *Pichuvayyangar* v. *Seshayyangar* (I.L.R., 18 Mad., 214) where it was held that the jurisdiction of a Court of First Instance to amend a decree under section 206 was ousted by the confirmation of that decree on appeal; (2) that the decision referred to applies equally to second appeals dismissed under section 551 of the Code of Civil Procedure, and to second appeals tried after notice to the respondent.

Munisami Naidu v. *Munisami Reddi* 293

10. ———————————————, s. 208—*Limitation Act—Act XV of 1877, sched. II, art. 49—Claim to recover goods in hands of third parties—Alternative claim for value as compensation—Specific Relief Act—Act I of 1877, ss. 10, 11:*

In execution of a decree obtained by the defendants against one M in the Court of Small Causes, certain goods were attached, to which plaintiff preferred a claim. That claim being disallowed, plaintiff filed in the City Civil Court, Madras, a suit for and obtained a declaration of his title to the goods, but prior to the date of the decree, namely, in October 1895, the goods attached had been sold by the Court of Small Causes, and certain third parties had become purchasers thereof. On plaintiff, in December 1897, suing "for the recovery of the goods or their value as compensation":—*Held*, (1) that the goods not being in the possession or under the control of the defendants, plaintiff was not entitled to a decree for their recovery in specie: and that plaintiff's only remedy was by way of damages for the wrongful taking of his goods at the instance of the defendants; (2) that the suit being framed for the recovery of specific moveable property was governed by article 49 of schedule II of the Limitation Act, 1877, and was therefore not barred by limitation. The alternative prayer for the value of the goods as compensation must be read as ancillary to the main relief asked for with reference to section 208 of the Code of Civil Procedure, and did not alter the character of the suit or bring it within any other category of the schedule.

Murugesa Mudali v. *Jotharam Davay* 478

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11. ———————————————————, s. 230—*Practice—Costs of guardian* ad litem*—Advance by plaintiff for costs of minor defendants—Contract Act—Act IX of* 1872, *ss.* 68, 70*—Right to recover amount advanced:*

Plaintiff having, in a prior suit, sued the defendants, who were minors, and their father, for specific performance, was ordered by the Court to advance money to the guardian *ad litem* of the minors (who was appointed by the Court), to enable him to conduct their defence. Plaintiff succeeded, but the Court refused to provide, in its decree, for the repayment to plaintiff of the amount so advanced. On the plaintiff bringing this suit to recover that amount:—*Held, per* SUBRAMANIA AYYAR, J., (1) that the Court in which the prior suit had been brought had power neither to direct the plaintiff to make the advances to the guardian, as had been done, nor to award the amount so paid as costs in the cause. The present suit, therefore, was not unsustainable for the reason that the subject matter of it was one for the Court to have dealt with in the previous suit; (2) that the circumstances of the case were not such as to render the amount recoverable under section 70 of the Contract Act, inasmuch as the defendants could not be said to have enjoyed the benefit of the expenditure; (3) that payments or charges connected with legal expenses in which infants are concerned, may, in certain circumstances, come under the head of necessaries within the meaning of section 68 of the Contract Act. Disbursements properly made in defence of the suit by the guardian *ad litem* out of the plaintiff's advances might be allowable if it be alleged and proved that there were reasonable grounds for the defence put forward, though proved unsuccessful. But that this ground could not now be relied upon on second appeal, inasmuch as it had not been put forward in the Court below, when an issue relating to it could have been framed; *Per* DAVIES, J., that a matter of this nature can and should be settled in the suit in which it arises: and that where a plaintiff is successful, a supplementary issue should be framed and tried as to the amount due to him on account of advances made by him to the guardian *ad litem* for conducting the defence, and a decree passed in his favour for the total amount of costs found to have been properly incurred in the case by the guardian out of such advances.

Venkata Vijaya Gopalaraju v. *Timmayya Pantulu* 31

12. ———————————————————, s. 230—*Execution of decree prevented by "fraud or force" of judgment-debtor—Period of limitation:*

Where a judgment-debtor, knowing that a warrant of attachment had been issued against his moveable property, locked up his house and so prevented the moveable property therein from being attached:—*Held*, that his action amounted to "fraud" within the meaning of section 230 of the Code of Civil Procedure. In order to obtain the benefit of the proviso in that section, it is not necessary that a judgment-creditor should prove that the fraud of the judgment-debtor continued so as to prevent execution of the decree at any time. "Fraud" or "force" on the part of a judgment-debtor gives a new starting point for the period of limitation, and an application for the execution of a decree may be granted at any time within twelve years after the date on which a judgment-debtor has by "fraud" or "force" prevented execution of a decree.

Venkayya v. *Raghava Charlu* 32

13. ———————————————————, s. 234—*Execution of decree against deceased judgment-debtor—Probate and Administration Act—Act V of* 1881, *s.* 104*—Equal and rateable distribution:*

The right of a decree-holder, under section 234 of the Civil Procedure Code, to have his decree executed against the legal representative of a deceased judgment-debtor is not affected by section 104 of the Probate and Administration Act, which directs debts to be paid equally and rateably out of the assets.

Venkatarangayan Chetti v. *Krishnasami Ayyangar* 19

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14. ———————————————————, ss. 234, 298 — *Execution—Petition to set aside sale—Death of judgment-debtor after proclamation and before sale—Non-joinder of executors:*

An order for the sale of a debt of Rs. 70,000 (previously attached) owing by H and W to the judgment-debtor was made in execution in two decrees, and on 4th May 1895 a sale proclamation for 20th idem was issued. On 11th May the judgment-debtor died leaving a will, of which W was one of the executors. W brought these circumstances to the notice of the Court stating that the executors would proceed to apply for probate and asking for an adjournment of the sale. The adjournment was refused and the sale proceeded and the decree-holders, who had previously agreed with H and W to sell the debt to them for the amount of the purchase money, purchased the debt for Rs. 80,000, the estate of the judgment-debtor being unrepresented. The Administrator-General, to whom the administration of the estate of the judgment-debtor was afterwards transferred, applied to be brought on to the record and to have the sale set aside:—*Held*, that the sale was vitiated by the omission to bring the legal representative of the judgment-debtor on to the record and should be set aside on the application of the Administrator-General, no separate suit being necessary for the purpose.

Groves v. *Administrator-General of Madras* 119

15. ———————————————————, s. 244—*Application by exonerated defendant:*

A defendant, against whom no decree has been passed, but whose rights are invaded in execution, is entitled to come in under Civil Procedure Code, section 244, and to appeal against an order made in such proceedings.

Vishudapriya Thirthasami v. *Vidianidhi Thirthasami* 131

16. ———————————————————, s. 244—*Transfer of Property Act—Act IV of* 1882, *s.* 99*—Mortgage of annuity—Sale of attached property at instance of mortgagee—Right of son not party to suit to redeem his share—Hindu Law—Rights of Hindu debtor's son after attachment and sale:*

In 1848 an annuity had been settled on plaintiff's ancestor and his heirs in consideration of his withdrawal from a suit for partition then pending. In 1878 plaintiff's father and others then enjoying the annuity executed a bond for money due by them, mortgaging their rights under the said annuity. Instalments due under the bond having fallen into arrears, a suit was brought, in 1889, in respect of them, and a decree obtained, which contained a provision that the right to the annuity should be liable to be proceeded against for the amount so due. Plaintiff was born in 1891. In 1893 an application was made for the issue of a proclamation of sale, and a sale ensued and a certificate was given to the purchaser, who was the decree-holder. Plaintiff having instituted this suit to set aside the said sale or to have it declared that it did not affect his right under the said annuity:—*Held*, (1) that if there was in fact a decree for sale, plaintiff, as son of the judgment-debtor, born after the date of the decree, though before the sale, could not question the sale; nor would any right of redemption be left to the plaintiff; (2) that inasmuch as the decree was, on its true construction, not a decree for sale, the case was one of attached property being sold at the instance of the mortgagee in execution of a money decree, and so within the prohibition of section 99 of the Transfer of Property Act. The conditions under which a sale of mortgaged property is permissible under that section are not satisfied unless there is a decree for sale; and in the absence of such decree the sale is prohibited; (3) that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained; (4) that the rights of a Hindu debtor's son may be concluded by a proper mortgage decree and sale thereunder, or, if there is no mortgage, by a decree for

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money and sale of the attached property, but they are not affected by a sale brought about in defiance of section 99; (5) that the suit was not barred by section 244 of the Code of Civil Procedure; and that plaintiff was entitled to a decree for the redemption of his share.

Muthuraman Chetti v. *Ettappasami* 372

17. ——————————————————————, s. 244—*Transfer of Property Act—Act IV of* 1882, *s.* 99—*Sale by mortgagee in execution of decree:*

Property subject to a mortgage having been sold by the mortgagee as holder of a decree against the mortgagors, a separate suit was brought by the mortgagors to set aside the sale as being in contravention of section 99 of the Transfer of Property Act. On objection being taken that the suit was not maintainable, the matter being one for determination in execution proceedings under section 244 of the Code of Civil Procedure:—*Held*, (1) that although the sale was contrary to the provisions of section 99 of the Transfer of Property Act, that section being for the benefit only of a particular class of persons, namely, those concerned with a right to redeem mortgaged property, such a sale was not void but voidable; (2) that the question being one arising between the parties to the suit wherein the sale was made, and relating to execution, could not be raised and decided in a suit, but should be raised and tried only in execution proceedings taken under section 244 of the Code of Civil Procedure, and the sale set aside if such relief were not, for any reason, barred; (3) that the sale having been confirmed, such confirmation was final, and precluded the mortgagors from seeking the relief to which they would otherwise have been entitled; and (4) that, notwithstanding such sale and confirmation, the mortgagors might not be precluded from suing to redeem the mortgaged property on payment of the amount given credit for by the mortgagee in respect of the sale.

Mayan Pathuti v. *Pakuran* 347

18. ——————————————————————, ss. 244, 258—*Execution of decrees—Money decree—Limitation Act—Act XV of* 1877, *sched. II, art.* 178*A:*

Section 258, Civil Procedure Code, refers only to the execution of decrees under which money is payable, and is not applicable to decrees for possession of immoveable property.

Sankaran Nambiar v. *Kanara Kurup* 182

19. ——————————————————————, s. 253—*Execution of decree against surety:*

A surety entered into a bond, undertaking to produce certain debt bonds in case the defendant in a suit should fail to produce them, or to pay the amount mentioned therein. Upon an application being made that execution should issue against the surety:—*Held*, that a bond so worded did not make the surety liable for the performance of the decree so as to bring the case within section 253 of the Code of Civil Procedure, and that the liability of the surety could not be enforced in execution.

Narayanamma v. *Ramayya Chetti* 208

20. ——————————————————————, s. 285—*Execution—Sale—Attachment of same property by different Courts—Sale by both Courts—Titles of the respective purchasers:*

Where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, section 285 of the Code of Civil Procedure does not take away the jurisdiction of the inferior Court, and any proceedings by such inferior Court in contravention of that section will be vitiated only where there has been notice of the proceedings in the superior Court.

Kunhayan v. *Ithukutti* 295

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21. ——————————————————————, s. 295, proviso (*b*)—*Same judgment-debtor—Sale of lands under attachment—Disposal of amount realised—Rateable distribution:*

A father and son having mortgaged certain villages, the mortgagee obtained against both mortgagors a decree for the amount due, which was transmitted for execution to a District Court. The villages were subsequently, by order of the District Court, attached, and plaintiff, as receiver representing the mortgagee then obtained an order that the villages under attachment should be sold free from the mortgage, and that plaintiff should have the same rights against the proceeds of sale, as he, as such receiver, had against the property to be sold. Some of the villages were sold accordingly and the amount realised paid into the District Court. The defendant, who had obtained a separate decree against the son alone (the father having meanwhile died) in the same District Court, applied for, and was granted, a rateable distribution of the moneys realised by the sale of the villages attached and sold as aforesaid, towards satisfaction of his decree. On plaintiff bringing a suit for the recovery of the amount so obtained by defendant from the District Court:—*Held*, (1) that the judgment-debtor against whom plaintiff and defendant held decrees was the same within the meaning of section 295 of the Code of Civil Procedure, it being immaterial that in plaintiff's suit there had been a co-defendant against whom the decree might have been separately executed; and (2) that the order for sale of the villages under attachment was illegal and invalid in so far as it gave plaintiff the same rights against the proceeds of sale as he had by virtue of the mortgage against the property to be sold.

Grant v. *Subramaniam* 241

22. ——————————————————————, s. 310A—*Execution of decrees—Transfer of Property Act—Act IV of* 1882, *s.* 88—*Application to set aside sale of mortgaged property:*

Section 310A of the Code of Civil Procedure applies where a sale of immoveable property has taken place under a mortgage decree, so as to enable the owner of such property who duly complies with its provisions to have such sale set aside. Where the owner of immoveable property applies under that section to have a sale of property set aside, he is under a liability to deposit a sum equal to five per cent. on the purchase money, for payment to the purchaser, even where the land has been purchased by the decree-holder.

Tirumal Rao v. *Syed Dastaghiri Miyah* 286

23. ——————————————————————, s. 375—*Razinamah not in terms of plaint—Dismissal of suit:*

A decree should not be passed in terms of a compromise where the latter does not give to the plaintiff any of the reliefs claimed in the suit, and deals with matters not forming the subject-matter of the suit. Upon such a compromise being presented, the Court should inform the parties that its terms cannot be embodied in a decree and if it appear that the compromise was arrived at conditionally upon its being incorporated in the decree, the suit should be proceeded with.

Muthu Vijaya Raghunatha Udayana Tevar v. *Thandavaraya Tambiran* ... 214

24. ——————————————————————, s. 462—*Authority of Counsel, vakils or other agents—Abandonment of issue—Scope of authority in conduct of litigation—Compromise—Hindu Law—Impartible zamindari—Son's legal incompetence to intervene in the suit on the footing of the impartibility of the estate—Partial partition—Omission to include some joint properties in plaint in suit for partition where they can be ascertained and decree given:*

A vakil appointed to conduct a case on behalf of a client has power to ask for an issue to be framed, or to abandon one that has been framed, and, in the absence of fraud or misconduct or of express instructions prohibiting the adoption of such a course, his action will be binding on

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his client. There is no distinction, in this respect, between the acts of Counsel, vakils and other agents. The abandonment of an issue does not amount to a compromise, and if the suit is being conducted by a guardian on behalf of a minor, leave of the Court is not necessary under section 462 of the Code of Civil Procedure for such abandonment. Where an estate is impartible, the sons of the present holder have, since the decision in *Sartaj Kuari* v. *Deoraj Kuari* (L.R., 15 I.A., 51; I.L.R., 10 All., 272), recently affirmed as to this Presidency in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (L.R., 26 I.A., 83; I.L.R., 22 Mad., 383), no *locus standi* to question the acts of their father. In a suit for partition, plaintiff, when filing his plaint and schedules, made no mention of certain jewels in the possession of his wife. Defendant having filed a schedule in his written statement showing the existence of the said jewels, plaintiff admitted that they were with his wife but declined to allow them to be divided unless a division were also made of the jewels which were in the possession of the defendants' wives and children He, however, before the examination of witnesses, withdrew this condition and expressed his willingness to give defendant credit for half their value:—*Held*, that the suit was, on these facts, not one for partial partition. *Per* O'FARRELL, J.—That where a suit is brought for division of the whole of the family properties an omission, whether accidental or fraudulent, to specifically include in the plaint certain of the joint properties, where such properties are ascertained and a decree can be given for partition, will not convert the suit into one for partial partition.

Venkata Narasimha Naidu v. *Bhashyakarlu Naidu* 538

25. ——————————————————, s. 462—*Compromise of suit by guardian* ad litem—*Leave of Court not obtained—Withdrawal from compromise by guardian—Inability of Court to enforce it:*

The guardian *ad litem* of three minors having agreed to compromise a suit and having signed a petition embodying the terms arrived at, undertook to present the petition at the next sitting of the Court. Leave of the Court had not been obtained; and at the time appointed the guardian declined to present the petition and opposed a decree being passed in its terms. Upon the plaintiff seeking to have the compromise enforced:—*Held*, that inasmuch as leave of the Court had not been asked for, and the guardian had objected to the Court passing a decree in terms of the compromise, the Court had no power to enforce the compromise, even though the terms of it might appear to be beneficial to the minors.

Ranga Rao v. *Rajagopala Raju* 378

26. ——————————————————, ss. 508, 521—*Delivery of an award:*

A suit was, at the instance of the plaintiff and defendants, referred to an arbitrator. The arbitrator made his award within the period fixed by the order of reference, but did not submit it to the Court until two days later:—*Held*, that the award was valid under Civil Procedure Code, section 508.

Arumugam Chetti v. *Arunachalam Chetti* 23

27. ——————————————————, s. 521—*Legality of order remitting award for re-consideration—Appeal:*

An award submitted by arbitrators to whom all matters in dispute had been referred, stated that "defendant has not produced any witnesses in "support of his contention raised in issues Nos. 1, 2, 5 and 6, hence we "have only to deal with issues Nos. 3, 4 and 7," and dealing with those issues, the arbitrators gave their finding. The award was remitted, on the ground that the ...

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and 6:—*Held*, (1) that the legality of an order remitting an award for the re-consideration of the arbitrators may be challenged on appeal against the decree ultimately passed; and (2) that the award ought not to have been remitted: there was no illegality on the face of it, and there was a decision on the whole matter in issue between the parties.

George v. *Vastian Soury* 202

28. ——————————————————, ss. 522, 562—"*Preliminary point*"—*Order determining validity of an award—Decree in accordance with an award—Appeal:*

Objection was unsuccessfully taken before a District Munsif to the validity of an award on the ground of the arbitrator being interested, and a decree was passed in accordance with the award. The defendant appealed and the Subordinate Judge held that the objection was well founded and should prevail; and, setting aside the award, he remanded the case for trial. The plaintiff appealed to the High Court:—*Held*, (1) that the appeal to the High Court was maintainable; (2) that no appeal lay to the Subordinate Court as to the validity of the award and that the decree of the District Munsif should be restored.

Krishnan Chetti v. *Muthu Palandi Vacha Makali Tevar* 172

29. ——————————————————, ss. 523, 540—*Agreement to refer—Decision thereon is a decree—Right of appeal:*

In a suit to file an agreement to refer a matter to arbitration, a decision was passed refusing a reference on the ground that the agreement to refer was not proved. On the plaintiff appealing against such refusal:—*Held*, that a decision passed under section 523 of the Code of the Civil Procedure is a decree and an appeal lies therefrom under section 540 of the Code.

Gowdu Magata v. *Gowdu Bhagavan* 299

30. ——————————————————, s. 543—*Memorandum of appeal—Scandalous matter therein—Duty of the Appellate Court:*

A memorandum of appeal presented to a District Court alleged, *inter alia*, actual partiality against the Judge whose decree was in question. The memorandum was returned for amendment on the ground that it contained language disrespectful to the Court of First Instance. The appellant's pleader presented the appeal memorandum unamended, stating that he wished to rely in the appeal on the passages objected to, and asking that the Court would, if necessary, strike them out. The District Judge thereupon rejected the memorandum of appeal under Civil Procedure Code, section 543. It appeared that the objectionable portions of the memorandum were separable from the rest:—*Held*, that an appeal lay to the High Court against the order rejecting the appeal to the District Court. *Per* SUBRAMANIA AYYAR, J.—The District Judge should have ordered the objectionable matter to be expunged and then to have admitted the appeal. *Per* MOORE, J.—(Holding that the statement which accompanied the memorandum of appeal on its re-presentation contained expressions amounting to contempt of Court), the District Judge should have returned the appeal memorandum and have refused to receive it until the objectionable remarks had been expunged. *Per* SUBRAMANIA AYYAR, J.—"It is open to an appellant to set up any circumstance showing that a Judge whose decision is appealed against was disqualified from trying and deciding the case . . . When a Judge is shown . . . to stand in such a position that he might be reasonably suspected of being biased he must be held to have been disqualified. . . . In cases where any bias can be presumed the party is entitled to show the grounds which raise the presumption. . . . But where there is no such presumption the party must not be allowed to question the impartiality of the Judge."

Zamindar of Tuni v. *Bennayya* 155

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31. ———————————————, s. 574 — *Contents of appellate judgment :*

The judgment of an Appellate Court should show on the face of it that the points in dispute were clearly before the mind of the Judge and that he exercised his own discrimination in deciding them.

Sitarama Sastrulu v. *Suryanarayana Sastrulu* 12

32. ———————————————, s. 574—*Contents of judgment in appeal—Duty of Appellate Court to hear appeal after remand for findings, though no memorandum of objections :*

On the hearing of a plaintiff's appeal against an order dismissing his suit, the District Judge, finding the issues that had been framed futile, struck them all out, substituted others, and remanded the suit for findings after evidence had been taken. On the appeal coming on for hearing after the return of those findings, neither party having filed any objections, the District Judge dismissed the suit on the ground that by his failure to file objections plaintiff must be taken to have consented to the new findings, which were against him :—*Held*, that the Judge was not absolved from hearing the appeal by reason of the absence of a memorandum of objections.

Subbayya v. *Rami Reddi* 344

33. ———————————————, s. 582—*Minors—Guardian ad litem—Appeal by a person other than guardian :*

Two defendants in a suit, being minors, were represented by a properly appointed guardian *ad litem*. Upon a decree being passed in favour of the plaintiff, an appeal was filed on behalf of the minors, by their mother, without any order obtained by her constituting her guardian, and without any previous removal of the properly appointed guardian *ad litem* :—*Held*, (1) that the appeal could not be heard ; and (2) that the appointment of guardian in a Court of First Instance enures not only for the term of the proceeding in that Court, but also for purposes of appeal.

Venkata Chandrasekhara Raz v. *Alakarajamba Maharani* 187

34. ———————————————, s. 586—*Provincial Small Cause Courts Act—Act IX of 1887, s. 15, sched. II, art. 8—Suits for rent—" Suits of the nature cognizable in Courts of Small Causes "—Second Appeal :*

A suit for the recovery of rent other than house-rent does not become a suit of the nature cognizable in Courts of Small Causes within the meaning of section 586 of the Code of Civil Procedure because a Judge of a Court of Small Causes has been invested by the Local Government with authority to exercise jurisdiction with respect thereto under section 15 and schedule II, article 8, of the Provincial Small Cause Courts Act, 1887. A second appeal will lie in such a suit, though the amount or value of the subject-matter of the original suit does not exceed Rs. 500.

Vedachala Mudali v. *Ramasami Raja* 229

35. ———————————————, s. 586—*Second Appeal—Provincial Small Cause Courts Act—Act IX of 1887, sched. II, art. 31—Jurisdiction—Suit for mesne profits under Rs. 500 :*

A suit for mesne profits is cognizable in Courts of Small Causes where the value of the subject-matter in dispute is less than Rs. 500, and article 31 of schedule II of the Provincial Small Cause Courts Act does not apply thereto. Such a suit falls within the provisions of section 586 of the Civil Procedure Code, and no second appeal lies from a decision in it.

Seshagiri Ayyar v. *Marakathammal* 196

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———————————————, s. 646B — *Provincial Small Cause Courts Act—Act IX of 1887, s. 15, sched. II, art. 35 (j)—Suit for the value of property illegally retained—Jurisdiction of Small Cause Courts :*

Certain moveable property having been distrained under section 15 of the Rent Recovery Act (Madras), 1865, such distraint was set aside and the property ordered to be restored to the owners. That order not having been carried out, the owners filed suits on the Small Cause side of the Courts of the Subordinate Judge and the District Munsif for the value of the property so illegally retained :—*Held*, that the suits were not excepted from the jurisdiction of the Small Cause Courts by article 35 (*j*) of schedule II of the Provincial Small Cause Courts Act, 1887.

Chakradharudu v. *Venkataramayya* 457

[PANIES ACT—ACT VI OF 1882, s. 4—*Illegal contract—Bond to secure payments under a kuri—Penal Code—Act XLV of 1860, s. 294A :*

An agreement is not illegal whereby a number of persons subscribe, each a certain sum, by periodical instalments, with the object that each in his turn (to be decided by lot), shall take the whole subscription for each instalment, all such persons being returned the amount of their contributions, the common fund being lent to each subscriber in turn. Nor is such an agreement rendered illegal by section 294A of the Indian Penal Code.

Vasudevan Nambudri v. *Mammod* 212

———————————————, ss. 169, 214—*Practice—Companies—Winding up—Notice of appeal :*

Notice of an appeal from any order or decision made or given in the matter of the winding up of a Company by the Court must, under section 169 of the Indian Companies Act, 1882, be given to the respondent within three weeks after the order complained of has been made, unless such time is extended by the Court of Appeal.

Ramanappa v. *The Official Liquidator, Bellary Brucepetta Stock and Loan Transacting Company* 291

[TRACT ACT—ACT IX OF 1872, s. 64—*Guardians and Wards Act—Act VIII of 1890, ss. 29, 30—Mortgage by guardians on estate of minor—" Previous permission of the Court "—Transfer of Property Act—Act IV of 1882, s. 35 :*

Guardians duly appointed under the Guardians and Wards Act, 1890, having mortgaged property belonging to a minor to enable them to discharge debts binding on his estate, the mortgagee sued to recover the amount of principal and interest due. The necessity had been urgent, the terms of the deed fair, and the money had been duly applied ; but the guardians had not obtained the sanction of the Court as directed by section 29 of the Guardians and Wards Act, 1890. On its being contended that the mortgage was invalid and incapable of being enforced :—*Held*, that a mortgage so executed was not void but only voidable ; and that the defendant was entitled to avoid the mortgage, but only on the condition of restoring any benefit received by him thereunder to the person from whom it had been received. The fact that the person who had received the benefit was the defendant, did not alter his position.

Sinaya Pillai v. *Munisami Ayyan* 289

———————————————, ss. 68, 70—*Civil Procedure Code—Act XIV of 1882, s. 220—Practice—Costs of guardian ad litem—Advance by plaintiff for costs of minor defendants—Right to recover amount advanced :*

Plaintiff having, in a prior suit, sued the defendants, who were minors, and their father, for specific performance, was ordered by the Court to advance money to the guardian *ad litem* of the minors (who was appointed

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by the Court), to enable him to conduct their defence. Plaintiff succeeded, but the Court refused to provide, in its decree, for the repayment to plaintiff of the amount so advanced. On the plaintiff bringing this suit to recover that amount :—*Held*, *per* SUBRAMANIA AYYAR, J., (1) that the Court in which the prior suit had been brought had power neither to direct the plaintiff to make the advances to the guardian, as had been done, nor to award the amount so paid as costs in the cause. The present suit, therefore, was not unsustainable for the reason that the subject-matter of it was one for the Court to have dealt with in the previous suit; (2) that the circumstances of the case were not such as to render the amount recoverable under section 70 of the Contract Act, inasmuch as the defendants could not be said to have enjoyed the benefit of the expenditure; (3) that payments or charges connected with legal expenses in which infants are concerned, may, in certain circumstances, come under the head of necessaries within the meaning of section 68 of the Contract Act. Disbursements properly made in defence of the suit by the guardian *ad litem* out of the plaintiff's advances might be allowable if it be alleged and proved that there were reasonable grounds for the defence put forward, though it proved unsuccessful. But that this ground could not now be relied upon on second appeal, inasmuch as it had not been put forward in the Court below, when an issue relating to it could have been framed: *Per* DAVIES, J., that a matter of this nature can and should be settled in the suit in which it arises: and that where a plaintiff is successful, a supplementary issue should be framed and tried as to the amount due to him on account of advances made by him to the guardian *ad litem* for conducting the defence and a decree passed in his favour for the total amount of costs found to have been properly incurred in the case by the guardian out of such advances.

Venkata Vijaya Gopalaraju v. *Timmayya Pantulu* 8

8. ——————————————, ss. 151, 152—*Liability of bailees for hire for loss of goods—Negligence—Onus of proof—Madras Harbour Trust Act (Madras)—Act II of 1886, ss. 70, 87—Immunity from action—Breach of contract:*

When goods which have been entrusted to bailees for hire are lost, it lies on the bailees to show that they have taken as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss. *Per* SHEPHARD, J.—The provision in section 87 of the Madras Harbour Trust Act, 1886, to the effect that the Board, its officers and servants shall not be liable in damages for any act *bonâ fide* done or ordered to be done by them in pursuance of the Act, does not apply to all causes of action, and, *inter alia*, to a suit in respect of a breach of contract against the Board. The immunity there given applies only to those cases in which there is an act done or purporting to be done in pursuance of the Act. The fact that the Board has worked under the provisions of a statute does not prevent it from entering into a contract; and the section does not apply in a case where the party aggrieved complains of the breach of such a contract on the part of the Board. By section 70 of the Madras Harbour Trust Act, 1886, the Board is empowered to make bye-laws for the reception, removal and porterage of goods. A bye-law framed under this section provided that importers desiring to store cargo must apply to the Secretary of the Board for such space as they might require, and that such applications would be granted on such terms as the Board might approve, and concluded with the reservation that the Board, while taking all reasonable precautions, would accept no responsibility in respect of property stored upon its premises, which would remain at the risk of the consignees or owners:—*Held* (*per* COLLINS, C.J., and BODDAM, J.), that this provision was not a bye-law for the reception or removal of goods, within the meaning of section 70 of the Act, and was *ultra vires*.

Trustees of the Harbour, Madras v. *Best & Co.* 1

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COURT FEES ACT—ACT VII OF 1870—*Appeal under Agency Rules, No. 22, under Act XXIV of 1839—Court-fee:*

An appeal preferred to His Excellency the Governor in Council under Rule No. 22 of the Agency Rules framed under Act XXIV of 1839 against the decision of the Governor's Agent at Vizagapatam and referred by Government to the High Court for disposal is not chargeable under the Court Fees Act.

Reference under Court Fees Act, s. 5 162

9. ——————————————, s. 29—"*Plaint*"—*Suit filed before period of limitation expired, but stamp duty not paid, till afterwards—Limitation Act—Act XV of 1877, ss. 4, 14—Exclusion of time of proceeding bonâ fide in Court without jurisdiction—Joinder of causes of action—Muhammadan Law—Suit for partition of property of deceased by his heirs—Law governing devolution where deceased's paternal ancestors had been subject to Muhammadan Law, but his mother was a member of a tarwad holding property subject to Marumakkatayam Law:*

Two suits were brought for partition of the property of a deceased by his heirs under the Muhammadan Law:—the first, by his widow and six children in the Court of the Subordinate Judge; the second, by two other children by his first wife, in the Court of the District Munsif, from which Court it was transferred to the Court of the said Subordinate Judge. The Subordinate Judge having ruled that the plaintiffs in each suit were not entitled to sue jointly, the plaints were permitted to be amended. The first plaint was accordingly re-presented in the Subordinate Court as that of the widow; the second, also in the Subordinate Court, as that of the first child of the first wife: and seven further plaints were filed in the Subordinate Court on behalf of the remaining children, respectively. These seven further plaints were unstamped. Six of them, presented by the widow's children, stated explicitly that the duty payable thereon was included in that already paid on the widow's plaint, which sum correctly represented the duty payable on the footing that the share of each formed a distinct subject-matter. All the plaints were by order placed on the file of the District Munsif's Court. The plaints were at first treated at the Munsif's Court as being duly stamped; though payment of fresh Court-fees was subsequently ordered after the expiration of the period of limitation. The deceased had died in 1882; the two original suits had been filed in 1893 and 1894, respectively—within twelve years of his death; and the two amended suits and the seven fresh plaints had been filed in December 1894, more than twelve years from his death:—*Held*, (on the question of joinder), that there was no misjoinder of causes of action. If the suits were viewed substantially as suits against trespassers, the plaintiffs, as tenants in common, were competent to sue together in respect of what was thus a common injury to them. If, on the other hand, the suits were suits for partition, the plaintiffs were *a fortiori* entitled to join. (On the question of limitation), that the suits by the two children of the first wife were not barred as they should be treated as a continuation of their original joint claim, which had been instituted in the same Court before the period of limitation had expired. That where there has been a misjoinder which has precluded a Court from entertaining a suit, the period during which such suit has been prosecuted diligently and in good faith may be deducted in computing the period of limitation: the inability of the Court to entertain a suit combining causes of action which could not be combined, being covered by the words "from other cause of a like nature," —in section 14 of the Limitation Act. That with reference to the widow's amended suit, inasmuch as her original suit (on behalf of herself and her six children) had been filed before the period of limitation had expired and had been prosecuted diligently and in good faith, the time during which that original suit had been pending must be deducted and her amended suit held to be not barred. That for similar reasons, a like deduction should be made in favour of the six fresh suits of her children (unless a

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contrary decision were necessitated by the fact that their plaints had remained unstamped until after the expiration of the extended period of limitation). *Per* SUBRAMANIA AYYAR, J., that although an amount equal to the fees properly payable in respect of the widow's amended suit and of the six fresh suits filed by her children had in fact been paid on the joint suit originally filed, credit could not be claimed out of that original payment for the Court-fees due on the six fresh suits subsequently instituted. These plaints must, therefore, be considered to have been not duly stamped, if not entirely unstamped, at the time when the period of limitation expired. That, the said plaints having been filed in time, the fact that they were not duly stamped or were entirely unstamped when the period of limitation had expired, did not render them time-barred; since the plaints must be regarded as having been presented on the day upon which they were filed. It cannot be inferred from the Limitation Act, 1877, that the word "plaint" as used in section 4, explanation, means "plaint duly stamped." A "plaint" in law means merely "a private memorial tendered to a Court, in which the person sets forth his cause of action: the exhibition of an action in writing." Whether any Court-fee is payable in an action commenced by the plaint, and if so when and how it should be paid, are matters that are foreign to the question whether the document is a plaint or not. The Court Fees Act and the Limitation Act are entirely different in their purpose and scope, and neither can be taken to control or qualify the other. *Per* DAVIES, J., that inasmuch as the order of the Subordinate Judge requiring separate plaints was erroneous it could not operate to enhance the Court-fees truly payable. The true plaints in the case, in so far as stamp duty was concerned, were the two joint plaints originally presented. These were filed in time, and were sufficiently stamped. The fees having been paid at the beginning, no question arose as to the insufficiency of stamp duty, and the objection on the ground of limitation was thereby disposed of. A deceased as well as his paternal ancestors had followed the Muhammadan Law; but his mother had been a member of a tarwad which held property subject to Marumakkatayam Law. On its being contended that in such a case the property of the deceased, whether derived from his father or mother, passed according to the rule of Marumakkatayam Law to his mother's tarwad, and not to his heirs according to the Muhammadan Law:—*Held*, that the law governing the devolution of the property of the deceased, derived from either parent but not held by him as a member of a tarwad subject to Marumakkatayam Law, is the Muhammadan Law. *Venkatramayya* v. *Krishnayya* (I.L.R., 20 Mad., 319) referred to.

Assan v. *Pathumma* 494

3. ——————————————————, s. 31—*Criminal Procedure Code—Act X of* 1882, *s.* 423 (d):

An Assistant Magistrate having convicted the accused persons sentenced them to pay a fine, out of which Rs. 2 was to be paid to the complainant for his expenses; the Deputy Magistrate, on appeal having confirmed the conviction, passed an order under Court Fees Act, section 31, directing the accused to pay a further sum to the complainant:—*Held*, that the order was illegal and should be set aside.

Queen-Empress v. *Tangavelu Chetti* 153

CRIMINAL PROCEDURE CODE—ACT X OF 1882, s. 191 (c)—*Act V of* 1898, *ss.* 190, 191:

A Magistrate, when a valid objection is taken under Criminal Procedure Code, section 191, that he cannot try a case, is not bound to transfer it, but may elect to commit the case to a Court of Session.

Queen-Empress v. *Felix* 148

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2. ——————————————————, ss. 269, 307, 533—*Penal Code —Act XLV of* 1860, *ss.* 395, 396, 412—*Verdict of jury and their opinion as assessors—Confessional statement:*

Ten persons were committed to a Sessions Court charged with offences under Indian Penal Code, sections 395 and 396, and some of them were also charged with offences under section 412. One of the accused had made a confessional statement before the Magistrate, who recorded it but did not make on it a memorandum to the effect stated in Criminal Procedure Code, section 164, and did not admit it in evidence for the reasons that the accused was produced from the custody of the police in which he had been detained for five days, and there was a proposal on the part of the police to treat him as an approver. It appeared that a perusal of the preliminary register would have shown that the accused were either guilty under section 396 or not guilty under section 395 at all. The accused were tried by the Sessions Judge with a jury. The confessional statement was not admitted in evidence. The jury found the accused not guilty of dacoity, but the Judge disagreeing with the verdict referred the case to the High Court under Criminal Procedure Code, section 307:—*Held*, (1) that the Procedure adopted by the Judge was wrong and that he should have tried the accused with the aid of assessors under Indian Penal Code, section 396; (2) that the Judge should have enquired under Criminal Procedure Code, section 533, whether the confessional statement had been duly made; and (3) that, under the circumstances, the High Court should determine on the evidence on record after giving due weight to the opinions of the Judge and the jury whether the accused were guilty under section 395.

Queen-Empress v. *Anga Valayan* 15

3. ——————————————————, s. 350—*Transfer of Magistrate —Part-heard case:*

A Head Assistant Magistrate during the pendency of a criminal case of which the trial was almost finished was appointed to the office of Deputy Magistrate in another part of the same district. The case was transferred by an order of the District Magistrate to the file of the Deputy Magistrate:—*Held*, that the Deputy Magistrate could proceed with the trial from the point at which he had arrived as Head Assistant Magistrate.

Queen-Empress v. *Sri Ahobalamatam Jeer* 47

4. ——————————————————, s. 423 (d)—*Court Fees Act—Act VII of* 1870, *s.* 31:

An Assistant Magistrate having convicted the accused persons sentenced them to pay a fine, out of which Rs. 2 was to be paid to the complainant for his expenses; the Deputy Magistrate, on appeal, having confirmed the conviction, passed an order under Court Fees Act, section 31, directing the accused to pay a further sum to the complainant:—*Held*, that the order was illegal and should be set aside.

Queen-Empress v. *Tangavelu Chetti* 153

CRIMINAL PROCEDURE CODE—ACT V OF 1898, s. 260—*Charges under Penal Code* (*Act XLV of* 1860), *ss.* 147 *and* 324—*Summary procedure under Penal Code, s.* 323:

A First-class Magistrate took a case on his file and commenced a regular enquiry therein under sections 147 and 324 of the Indian Penal Code; but, after hearing evidence, being of opinion that only an offence under section 323 of the Indian Penal Code had been made out, he proceeded to deal with the case summarily:—*Held*, that inasmuch as the evidence adduced was not sufficient to justify a committal, but clearly disclosed an offence over which he had summary jurisdiction, the Magistrate was right in acting as he did. Such a course is different to disregarding part of a charge for the purpose of dealing with a case summarily. The High Court will not interfere where a Magistrate has *bonâ fide* acted in the interests of justice. *Empress* v. *Abdool Karim* (I.L.R., 4 Calc., 18) distinguished.

Queen-Empress v. *Rangamani* 459

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2. ——————————————————————, s. 488—*Usage in Malabar —Order for maintenance of child—Marumakkatayam law as observed by Nayar community.*

The father of a child born during the continuance of the form of marriage known as sambandham, under the Murumakkatayam law as observed by the Nayar community in Malabar, is liable to have an order made against him for its maintenance under section 488 of the Code of Criminal Procedure.

Venkatakrishna Patter v. *Chimmukutti* 24

DISTRICT MUNICIPALITIES ACT (MADRAS)—ACT IV OF 1884, ss. 188, 189— *Keeping a private cart-stand without a license:*

In a prosecution for using a place as a cart-stand without a license, under the Madras District Municipalities Act, 1884, it was proved that carts resorted daily to the premises of the accused, laden with produce for sale to the general public and not only to the accused, who acted as a broker and permitted the carts to stand on his premises until the sale and removal of the goods was completed:—*Held*, that the place was used as a cart-stand within the meaning of section 188, and that the accused had committed an offence punishable under section 189 of the Act.

Queen-Empress v. *Ayyakannu Mudali* 4

DIVORCE ACT—ACT IV OF 1869, ss. 12, 13—*Divorce—Conduct of petitioner conducing to adultery—Just and reasonable cause for desertion—Drunkenness of wife—Leaving wife without provision for maintenance:*

Evidence adduced at the hearing of a petition by a husband for the dissolution of his marriage with his wife showed that the petitioner had left his wife voluntarily on account of her drunkenness; that he had not maintained her or contributed to her support since so leaving her; that he had no reason for believing that his wife had committed adultery during the time he had lived with her; and that she had (if the evidence were believed) been leading an immoral life since the petitioner had so left her. The petition was dismissed, whereupon the petitioner appealed:—*Held*, that the petitioner having deserted his wife without just or reasonable cause, and without making any provision for her, had conduced to the adultery (if any had been committed), and the petition had been rightly dismissed.

X v. X 1

EJECTMENT—*Defence of right of permanent occupancy—Onus of proof—Defence of special character:*

In suits by the trustee of a temple to recover possession of certain lands with mesne profits, defendants set up in defence that they were absolute owners of the land in question, or, at least, were entitled to rights of permanent occupancy. In support of the latter contention they relied, *inter alia*, upon certain pymash documents, which contained the word *ulabadai* the use of which term, they contended, established the alleged right of permanent occupancy:—*Held*, (1) that where the occupier of land resists a suit for ejectment by setting up a claim of a right of permanent occupancy, the onus of establishing such a right lies on the defendant, inasmuch as by it he seeks to derogate from the ordinary incidents of property; and (2) that the right expressed by the term *ularadai* (which means an act or right of ploughing or cultivating lands) cannot be assumed to be a permanent right.

Rangasami Reddi v. *Gnana Sammantha Pandara Sannadhi* ... ...

EVIDENCE ACT—ACT I OF 1872, ss. 30, 114, ILLUS. (b)—*Joint trial—Confession of co-accused—Plea of guilty by one—Evidence:*

On the trial of more persons than one, jointly, for the same offence, where one of them pleads guilty, the person so pleading is no longer on his trial and cannot be treated as being jointly tried with the others. A confession by that person affecting himself and others cannot, therefore, be taken into consideration as against such others under section 30 of the Indian Evidence Act.

Queen-Empress v. *Lakshmayya Pandaram* 491

2. ——————————————————————, s. 92, Proviso 4—*'Oral agreement'—Variation of terms of registered instrument:*

The lessor of certain land, held by the lessee under a registered deed of lease, agreed to a reduction in the rent. The agreement was not reduced to writing, but rent was thereafter paid and accepted at the reduced rate. On a suit being brought to recover arrears of rent at the rate reserved in the registered deed:—*Held*, that under section 92, proviso 4, of the Evidence Act, an agreement to accept a reduced rent cannot be implied or inferred from the acts and conduct of the parties; and an unwritten agreement, if so implied, amounts to an oral agreement within the meaning of the proviso. The word 'oral' is used in section 92, proviso 4, of the Evidence Act, in the sense of being not committed to writing, and the words 'oral agreement' in that section include all unwritten agreements, whether arrived at by word of mouth or otherwise.

Mayandi Chetti v. *Oliver* 261

3. ——————————————————————, s. 122—*Privileged Communication—Letter from husband to wife—Letter taken on search of wife's house:*

On a trial for the offence of breach of trust by a public servant, a letter was tendered in evidence for the prosecution which had been sent by the accused to his wife at Pondicherry and had been found on a search of her house made there by the Police:—*Held*, that the letter was admissible in evidence against the accused.

Queen-Empress v. *Donaghue* 1

EXECUTION SALE—*Sale of right, title and interest of zamindar—Impartible primogenitary zamindari—Interest taken by purchaser:*

In 1873 and 1876, portions of an impartible primogenitary zamindari, which were in the possession of a lessee from the zamindar, were attached and brought to sale in execution of decrees against the zamindar. The purchase money was very inadequate as the price of the full ownership of the property (subject to the lease), but what was sold according to the sale certificate was the right, title and interest of the judgment-debtor without any restriction. The judgment-debtor died in 1881, and the lease having run out, the purchaser now sued in 1893 for possession:—*Held*, that the plaintiff must be taken to have purchased an interest for the life only of the judgment-debtor.

Abdul Aziz Khan Sahib v. *Appayasami Naickar* 110

FOREIGN JUDGMENT, SUIT ON—*Judgment not for an ascertained sum of money—Maintainability of suit:*

Plaintiff, having obtained a decree in a District Court in the province of Mysore, applied to that Court, in execution of the said decree, for an account of certain proceeds alleged to be due to him under the decree. The application having been refused, and the refusal being upheld by the Chief Court of Mysore, plaintiff now brought a suit for an account in the District Court of South Canara:—*Held*, that as the foreign judgment on which the action purported to be brought was not a judgment for an ascertained sum of money, it constituted no foundation for an action.

Smith v. *Coelho* 382

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GENERAL CLAUSES ACT—ACT X OF 1897, s. 10 (1)—*General Clauses Act (Madras)—Act I of* 1891, *s.* 11—*Rent Recovery Act (Madras)—Act VIII of* 1865, *ss.* 15, 18, 51—*Summary suit to set aside distraint—"Within thirty days"—Sunday :*

Suits to set aside a distraint under section 15 of the Rent Recovery Act (Madras), 1865, were filed on the thirty-first day after the distraint complained of, the thirtieth day being a Sunday, and the Court closed. On objection being taken that the suits were barred under sections 18 and 51 of the Act:—*Held*, (1) that the suits were filed in time; (2) that the provisions of the Limitation Act do not extend the period of thirty days limited by sections 18 and 51 of the Rent Recovery Act (Madras), 1865, for bringing a summary suit to set aside a distraint; neither does section 10 of the General Clauses Act, nor section 11 of the General Clauses Act (Madras), inasmuch as the latter Acts are not retrospective; and (3) that there is a generally recognised principle of law under which parties who are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the Court itself, are entitled to do it at the first subsequent opportunity.

Sambasiva Chari v. *Ramasami Reddi* 179

GUARDIANS AND WARDS ACT—ACT VIII OF 1890, ss. 29, 30—*Mortgage by guardians on estate of minor—"Previous permission of the Court"—Contract Act—Act IX of* 1872, *s.* 64—*Transfer of Property Act—Act IV of* 1882, *s.* 35 :

Guardians duly appointed under the Guardians and Wards Act, 1890, having mortgaged property belonging to a minor to enable them to discharge debts binding on his estate, the mortgagee sued to recover the amount of principal and interest due. The necessity had been urgent, the terms of the deed fair, and the money had been duly applied; but the guardians had not obtained the sanction of the Court as directed by section 29 of the Guardians and Wards Act, 1890. On its being contended that the mortgage was invalid and incapable of being enforced:—*Held*, that a mortgage so executed was not void but only voidable; and that the defendant was entitled to avoid the mortgage, but only on the condition of restoring any benefit received by him thereunder to the person from whom it had been received. The fact that the person who had received the benefit was the defendant did not alter his position.

Sinaya Pillai v. *Munisami Ayyan* 289

HINDU LAW—*Agreement between members of a Hindu family—Construction—Their estate managed by one in the relation of ordinary agent to principal—Liability to account :*

Three brothers of a joint Hindu family agreed that their estate should remain joint, excepting the share of a separated fourth brother, which was excluded. It was in the agreement that the eldest of the three should manage the family estate, and that after twelve years, and after an account rendered by him of the profit and loss, a division among them should be made: any one of them to obtain his share on giving up his portion of the profits. In a suit for partition commenced by one of the brothers and carried on by his representatives, the term having expired:—*Held*, that the true construction was that the above was not a mere agreement to postpone partition, leaving the family status of the brothers uninterrupted, but was an agreement which put them on a new footing. Upon reference to several terms of the agreement it appeared that the elder had become liable on the footing of an ordinary agent, accountable for receipts and expenditure, and that he was not in the position of the managing member of a joint family liable only to account as to the then existing state of the property.

Raja Setrucherla Ramabhadra v. *Raja Setrucherla Virabhadra Suryanarayana.* 47(

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2. ———— *Alienation of family property—Right of son whose share is unaffected—Purchaser's equity for refund of purchase money :*

There is no equity in favour of the purchaser of property belonging to a Hindu family entitling him to a refund of purchase money paid in respect of a share afterwards held to have belonged to a son and to be unaffected by the sale. The words "on payment" occurring in the last sentence of the judgment in *Sabapathi* v. *Somasundaram* (I.L.R., 16 Mad., 76) do not appear in the original judgment, and are due to a printer's error.

Virabhadra Gowdu v. *Guruvenkata Charlu* 312

3. ———— *Civil Procedure Code—Act XIV of* 1882, *s.* 462—*Authority of Counsel, vakils or other agents—Abandonment of issue—Scope of authority in conduct of litigation—Compromise—Impartible zamindari—Son's legal incompetence to intervene in the suit on the footing of the impartibility of the estate—Partial partition—Omission to include some joint properties in plaint in suit for partition where they can be ascertained and decree given :*

A vakil appointed to conduct a case on behalf of a client has power to ask for an issue to be framed, or to abandon one that has been framed, and, in the absence of fraud or misconduct or of express instructions prohibiting the adoption of such a course, his action will be binding on his client. There is no distinction, in this respect, between the acts of Counsel, vakils and other agents. The abandonment of an issue does not amount to a compromise, and if the suit is being conducted by a guardian on behalf of a minor, leave of the Court is not necessary under section 462 of the Code of Civil Procedure for such abandonment. Where an estate is impartible, the sons of the present holder have, since the decision in *Sartaj Kuari* v. *Deoraj Kuari* (L.R., 15 I.A., 51; I.L.R., 10 All., 272), recently affirmed as to this Presidency in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (L.R., 26 I.A., 83; I.L.R., 22 Mad., 383), no *locus standi* to question the acts of their father. In a suit for partition, plaintiff, when filing his plaint and schedules, made no mention of certain jewels in the possession of his wife. Defendant having filed a schedule in his written statement showing the existence of the said jewels plaintiff admitted that they were with his wife but declined to allow them to be divided unless a division were also made of the jewels which were in the possession of the defendant's wives and children. He, however, before the examination of witnesses, withdrew this condition and expressed his willingness to give defendant credit for half their value:—*Held*, that the suit was, on these facts, not one for partial partition. *Per* O'FARRELL, J.—That where a suit is brought for division of the whole of the family properties an omission, whether accidental or fraudulent, to specifically include in the plaint certain of the joint properties, where such properties are ascertained and a decree can be given for partition, will not convert the suit into one for partial partition.

Venkata Narasimha Naidu v. *Bhashyakarlu Naidu* 588

4. ———— *Customary law of inheritance of certain zamindaris in and about Madura :*

The principal issue on this appeal was whether the defendant was entitled, by a custom prevailing in the Saptur zamindari, and in other zamindaris held by zamindars of the same caste connection in Madura, and neighbouring districts, to inherit the impartible raj estate of that, the Saptur, zamindari in preference to the plaintiff. Both the parties were sons of the late zamindar, being half-brothers, sons of their father by different mothers. The plaintiff was the elder of the two, but the mother of the younger had been married by the zamindar before his marriage with the mother of the elder. In virtue of his seniority the elder brother claimed. The younger defended the suit on the title that his mother's marriage with the Raja had preceded the marriage of the plaintiff's mother, alleging the custom to prevail in the zamindari as above stated. The

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Courts below, having considered the evidence, found that the custom was proved, in concurrent judgments :—*Held*, that no error having been shown, and the Courts having decided with reference to what was laid down in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* ((1872) 14 M.I A., 570) as to the requisites for the proof of such a custom, the findings below were conclusive as to its existence.

Sundaralingasami Kamaya Naik v. *Ramasami Kamaya Naik* 515

5. ————*Debt incurred by managing members of a joint family—Personal liability of other members :*

Three brothers, being the managing members of their joint Hindu family, borrowed money from the plaintiff for a family purpose. The plaintiff now sued the survivor of the brothers and the sons of all three to recover the amount of the debt, and he obtained a decree that the debt was recoverable from the family estate and also personally from the survivor of the three borrowers :—*Held*, on appeal, that the plaintiff was not entitled to a personal decree against the other defendants.

Chalamayya v. *Varadayya* 166

6. ———— *Decree against father—how far binding against sons—Question of fact—Acquiescence by sons in father's defence :*

In a suit against a Hindu father a decree had been obtained, the execution of which interfered with land belonging to the undivided family of which the father was the manager and his two sons members. The sons had not been joined as defendants in that suit, though they were of age at the time; but they had known of it and had not objected to family funds being spent in its defence. On their suing for an injunction to restrain the decree-holder from executing the decree, on the ground that it was not binding on them :—*Held*, that the question how far the sons are bound by a decree against the father must be decided with reference to the particular facts of each case. If the father is manager and the question in issue is one which equally affects him and the other members of the family, and if the suit is properly defended, the adjudication will bind all the persons interested with the father, since in that case it will be presumed that the father represents their interests. The sons will still more clearly be bound if, being of full age, and knowing of the litigation, they acquiesce in the conduct of it by the father.

Kunjan Chetti v. *Sidda Pillai* 461

7. ————*Decree for mesne profits of her late husband's land in favour of his widow—Assignment of decree—Execution proceedings by assignee—Validity of assignment :*

The widow of a deceased Hindu, having been kept out of possession of land forming portion of her late husband's estate, obtained a decree for possession thereof, and for mesne profits. She assigned the decree for mesne profits and subsequently died. Upon the assignee attempting to execute the decree in respect of mesne profits, the reversionary heirs contended that he had no right to do so on the ground that his assignor, the widow, could not alienate the mesne profits so as to enure beyond her lifetime :—*Held*, that the right to mesne profits under a decree is not immoveable property and that the decree was validly assigned.

Saminatha Pillai v. *Manikkasami Pillai* 356

8. ————*Division by co-widows of their late husband's estate—Alienation by one after the division—Validity of alienation as against surviving widow on decease of alienor :*

A Hindu died, leaving two widows who divided his property by a formal registered partition deed, under which each took possession of her share, with powers of alienation over the property comprised in it. Certain alienations were made by one widow, who subsequently died. On the

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surviving widow claiming the whole of her late husband's property, including the portions so alienated :—*Held*, that there is no legal obstacle to prevent one of two co-widows from so far releasing her right of survivorship as to preclude her from recovering from an alienee, after the other co-widow's death, property given by way of partition to the latter and alienated by her. A widow may alienate for her life any estate which comes to her by virtue of her widowhood, and may therefore enter into such a deed as will preclude her from recovering during her life property which she has alienated, to the full extent of such alienation, provided that it does not extend beyond her life interest.

Ramakkal v. *Ramasami Naickan* 522

9. ————*Duration of a grant held by a Hindu widow made to her by her husband in his lifetime :*

On the distribution of compensation under the Land Acquisition Act, 1870, the title of a widow to a village, she alleging it to be her property by absolute right, as a jaghir granted to her by her husband, came into contest. Her late husband's adopted son, being now possessed of the zamindari within which the village was, disputed her right, alleging that the grant had been only for her maintenance, and claiming the whole compensation. The terms of the grant, if any had been expressed, were unknown. No written grant was produced. The Judicial Committee pointed out that an inquiry, directed by the Appellate Court below, as to whether a local custom existed for zamindars to grant to their wives for life only, and if such custom was valid, was inappropriate; inasmuch as no custom at all, in its legal sense of something exceptional to the general law, was in question. The power of the husband as zamindar to have made such a grant for life, or for more, was not in dispute. All that was known was that the widow had received rents for about twenty-six years. There was no sufficient evidence for holding that the village had been alienated in perpetuity. The judgment of the District Judge, dividing the compensation equally between the parties, was maintained, the widow being treated as holding for life.

Sri Braja Kisora Devu Garu v. *Sri Kundana Devi Patta Mahadevi Garu* ... 431

10. ————*Iluvans of Palghat—Custom relating to partibility of property—Tiyans :*

In a suit for partition amongst parties belonging to the caste of Iluvans of Palghat it having been contended that the ordinary Hindu Law relating to partibility of property had no application :—*Held*, that *Raman Menon* v. *Chathunni* (I.L.R., 17 Mad., 184), relating to the Tiyans, could not be taken to lay down that the rule of partibility does not prevail among the Iluvans of Palghat, even assuming that the Iluvans and the Tiyans had at one time been of one class. Upon the evidence adduced to the effect that the former class had for long been treating themselves as separate from the latter and that partition was enforced as a matter of right amongst the Iluvans, the Courts were entitled to find the custom relating to partibility among the Iluvans proved.

Velu v. *Chamu* 297

11. ————*Impartible zamindari—Alienation by the owner by his will—Adopted son's claim—False description of the legatee—Designated person :*

A zamindari in Madras, by custom descending to a single heir by primogeniture, and impartible, is not inalienable in virtue only of its impartibility, in the absence of proof of a custom having the force of law, or of some tenure attaching to the zamindari, rendering it inalienable. *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (L.R., 15 I.A., 51; I.L.R., 10 All., 272), a case which is applicable in Madras, decides that where there is an impartible estate descending by primogeniture, and in other respects the

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Mitakshara governs the rights of the parties, the eldest son does not become a co-sharer with his father; and decides that the inalienability of the estate would depend upon custom which must be proved, or in some cases upon the nature of the tenure attaching to the zamindari:—*Held*, that there was no proof in this case of a custom which the Courts could recognise, as having the force of law, not resting on the Mitakshara, but argued to have been established by a long course of decision in the Madras Courts, against the validity of absolute alienation of an impartible zamindari:—*Held*, also, that this was not a case to which should be applied the doctrine that where there is a long course of decision that course should be supported, and the law not altered:—And *held*, that, inasmuch as here there was no coparcenary subsisting between the zamindar and any member of his family, in the estate, the zamindar had power to alienate it; and that he might exercise that power by will. A Hindu adopting a son does not thereby deprive himself of any power that he may have to dispose of his property by will. There is no implied contract, on the part of the adopter, in consideration of the gift of his son by the natural father, not to make a will. A bequest was made to a person whom the testator falsely described as his "aurasa," or "naturally-born" son. This false description, not involving any condition that the legatee should be the testator's son, did not invalidate the bequest to the designated person. *Fanindra Deb Raikat* v. *Rajeswar Dass* (L.R., 12 I.A., 72; I.L.R., 11 Calc., 468) distinguished.

Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. *The Court of Wards* 383

13. ———*Inheritance of property left by ascetic—Rules relating to ascetic persons of the Sudra caste:*

It being clearly implied by all the authorities that a Sudra cannot enter the order of yathi or sannyasi, the devolution of property left by a deceased person of the caste referred to, who has become an ascetic and renounced the world, is regulated by the ordinary law of inheritance, in the absence of proof of any general or special usage to the contrary.

Dharmapuram Pandara Sannadhi v. *Virapandiyam Pillai* 302

13. ———*Lessee from widow—Quarries worked for purposes of State Railway—Compensation money:*

Land inherited by a widow from her husband was leased by her. The authorities of a State Railway worked quarries on part of it and Government paid Rs. 5,000 as compensation to the lessee. The reversionary heirs sued to establish their right to the money:—*Held*, that the money paid by Government whether regarded as the price of stone bought or compensation for wrong done should be regarded as part of the produce of the estate, and should not be treated as part of the estate itself or as proceeds of the conversion of part of it into money. The right of a widow to work quarries on land inherited from her husband considered.

Subba Reddi v. *Chengalamma* 126

14. ———*Liability of a divided son where debt was incurred by the father before partition—Decree against father and execution proceedings against son's property in father's life time:*

In 1890 a person subject to the Hindu Law incurred a debt for purposes that were neither illegal nor immoral. In 1891 he divided the family property with his son, and a house fell to the son's share under the division. In 1893 the creditors sued the father in respect of the debt, and, having obtained a decree, sought, in the father's life time, to make the son's house liable in execution thereof:—*Held*, that property taken by a son in partition cannot be seized in execution in respect of an unsecured personal debt of his father, even though the debt has been incurred before the partition, provided that the partition is not shown to have been made with a view to defraud or delay creditors.

Krishnasami Konan v. *Ramasami Ayyar* 519

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15. ———*Maintenance of son's widow—Self-acquired property—Property inherited from maternal grandfather:*

A Hindu died, leaving property with his widow, of which a portion was self-acquired and the remainder had been inherited by him from his maternal grandfather. He had also, by will, devised certain items to his wife. His son, who had pre-deceased him, had also left a widow, who now claimed maintenance from her mother-in-law:—*Held*, that inasmuch as property inherited from a maternal grandfather is not self-acquired, the rule of non-liability for maintenance relating to self-acquired property ought not to be extended to property of this description, which was therefore liable to the maintenance claimed. *Semble*, that the moral obligation to support a son's widow, to which her father-in-law is subject, acquires, on his death, the force of a legal obligation as against his self-acquired assets in the hands of his heir; and that a testamentary disposition of such self-acquired assets, made in favour of volunteers by a person morally bound to provide maintenance, cannot affect the position of a party whose moral claim has become a legal right. *Ammakannu* v. *Appu* (I.L.R., 11 Mad., 91) considered.

Rangammal v. *Echammal* 305

16. ———*Parties—Bond in favour of one undivided brother for the benefit of himself and others—Suit by promisee alone—Payment to younger undivided brother—Discharge—Onus of proof:*

In a suit on a bond executed by the deceased father of defendants in favour of the plaintiff, the defendants, while admitting the bond and the consideration for which it had been given, contended that inasmuch as plaintiff had four undivided brothers and the deed had been executed in his name for the benefit of himself and his brothers, the latter should have been joined as plaintiffs, and that plaintiff could not maintain the suit alone. They also pleaded payment to plaintiff's undivided younger brother, which payment they contended was binding on the plaintiff:—*Held*, that plaintiff was entitled to sue for the family debt without joining his undivided brothers, the contract on which the suit was based being in plaintiff's sole name and not purporting to have been obtained on behalf of any others but himself. And that as to the payment pleaded, if true, plaintiff was, as regards the promisor, the only person *primâ facie* entitled to payment; it therefore lay on the promisor to show that a payment to a third party was binding on the plaintiff, which had not been done. The contention that payment to any member of the family was by itself necessarily binding on the member who took the contract could not be supported.

Adaikkalam Chetti v. *Marimuthu* 326

17. ———*Rights of Hindu debtor's son after attachment and sale—Transfer of Property Act—Act IV of 1882, s. 99—Civil Procedure Code—Act XIV of 1882, s. 244—Mortgage of annuity—Sale of attached property at instance of mortgagee—Right of son not party to suit to redeem his share:*

In 1848 an annuity had been settled on plaintiff's ancestor and his heirs in consideration of his withdrawal from a suit for partition then pending. In 1878 plaintiff's father and others then enjoying the annuity executed a bond for money due by them, mortgaging their rights under the said annuity. Instalments due under the bond having fallen into arrears, a suit was brought, in 1889, in respect of them, and a decree obtained, which contained a provision that the right to the annuity should be liable to be proceeded against for the amount so due. Plaintiff was born in 1891. In 1893 an application was made for the issue of a proclamation of sale, and a sale ensued and a certificate was given to the purchaser, who was the decree-holder. Plaintiff having instituted this suit to set aside the said sale or to have it declared that it did not affect his right under the said annuity:—*Held*, (1) that if there was in fact a decree for sale, plaintiff, as son of the judgment-debtor, born after the date of the decree, though before the sale,

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could not question the sale; nor would any right of redemption be left to the plaintiff; (2) that inasmuch as the decree was, on its true construction, not a decree for sale, the case was one of attached property being sold at the instance of the mortgagee in execution of a money decree, and so within the prohibition of section 99 of the Transfer of Property Act. The conditions under which a sale of mortgaged property is permissible under that section are not satisfied unless there is a decree for sale; and in the absence of such decree the sale is prohibited; (3) that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained; (4) that the rights of a Hindu debtor's son may be concluded by a proper mortgage decree and sale thereunder, or, if there is no mortgage, by a decree for money and sale of the attached property, but they are not affected by a sale brought about in defiance of section 99; (5) that the suit was not barred by section 244 of the Code of Civil Procedure, and that plaintiff was entitled to a decree for the redemption of his share.

Muthuraman Chetti v. *Ettappasami* 372

18. ———*Son's liability for father's debts in life-time of father—Suit against father and sons—Decree against sons:*

A creditor of a Hindu brought a suit against him and his sons whom it was sought to make liable on the ground that the debts were incurred for the benefit of the family, but he did not obtain a decree against the sons:—*Held*, that the plaintiff could have prosecuted his claim against the sons in that suit, and have obtained a decree making their shares in the family property liable for the father's debt.

Ramasami Nadan v. *Uluganatha Goundan* 49

19. ———*Succession Certificate Act—Act VII of 1889, s. 4—Suit by person claiming property of undivided family by right of survivorship—Succession certificate:*

Where a plaintiff claimed by right of survivorship to recover money due on a mortgage bond which had been executed by the defendants in favour of the former managing member of the plaintiff's undivided family:—*Held*, that the Succession Certificate Act did not apply and that plaintiff need not produce a succession certificate under that Act.

Pallamraju v. *Bapanna* 280

20. ———*Validity of the adoption of the only son of his natural father:*

On the general question as to the validity by Hindu Law of the adoption of an only son of his natural father, decided in one judgment upon these two appeals:—*Held*, that such an adoption is not contrary to Hindu Law, but valid. The authority of a widow, in reference to adoption, not being identical in different schools of Hindu Law, it was *held*, on a question peculiar to the appeal from Madras, that it is there established in regard to the giving of a boy in adoption by the widowed mother that unless there has been some express prohibition by the husband, the wife's power, with the concurrence of sapindas, where that is required, is co-extensive with the power of the husband. The adoption of an only son is not an act so improper but that a widow has power to effect it with the assent of the sapindas in the absence of express power from her husband.

Sri Balusu Gurulingaswami v. *Sri Balusu Ramalakshmamma* (Mad.). *Radhamohun* v. *Hurdai Bibi* (All.). 398

21. ———*Widow's second suit for maintenance—Enhancement of rate of maintenance*—Res judicata:

A Hindu widow in 1867 obtained a decree for maintenance against her husband's coparceners, but the decree created no charge on the land. The family estate having passed to a collateral relative the widow now sued him for maintenance at an increased rate with arrears, and asked for

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a charge on the estate alleging that prices had risen and that in other respects also circumstances had changed:—*Held*, that the decree in the suit of 1867 was not a bar to the present suit.

Bangaru Ammal v. *Vijayamachi Reddiar* 175

22. ———*Will—Disposition in favour of a widow and an adopted son—Nature and extent of widow's interest thereunder:*

By his will a Hindu testator, after providing for various bequests, dealt "with the residue of his estate as follows:—"My daughter-in-law and grand "daughters shall receive half of my whole estate, and my wife and my "adopted son shall receive the other half." On the question as to what was the nature and extent of the interest to which the testator's widow was entitled thereunder:—*Held*, that having regard to the rule of construction which has been repeatedly applied to gifts by Hindus in favour of their wives, the intention of the testator was not that his wife should take an absolute estate. The supposition is that a Hindu donor intends to act in accordance with the ordinary notions and wishes of Hindus regarding the devolution and enjoyment of property among the members of his family. Though it was competent for the testator to provide for his wife in such a way that she should have absolute control over the property given her, that is not the provision which the Hindu Law makes for a widow. The language of the will was not inconsistent with an intention on the part of the testator that the son, with his adoptive mother, should take a moiety with the incidents attaching to property held by an undivided family. Upon the true construction of the will, therefore, the widow was not intended to take any other estate than she would have taken if there had been an intestacy.

Seshayya v. *Narasamma* 357

23. ———*Woman's estate—Power of alienation—Gift of land on daughter's marriage:*

A Hindu, in whom the whole of the family property had vested, died without issue and his mother took the estate. She subsequently gave a portion of the property to her son-in-law on the occasion of his marriage with her daughter. The gift was not found to be otherwise than reasonable in extent:—*Held*, that the gift was binding on the reversioner.

Ramasami Ayyar v. *Vengidusami Ayyar* 113

INAM—*Inam Commissioner's grant—Hereditary office-holder—Enfranchisement:*

A grant of a portion of inam lands by Government, on enfranchisement, is not illegal because the grantee, though a member of the family of hereditary office-holders, was not himself actually in office at the time of enfranchisement.

Tariya Gowdu v. *Vonamo Gowdu* 204

INTEREST 'POST DIEM'—*Provision in bond for annual payments of interest and repayment of principal sum on day fixed:*

A bond, which had been executed in December 1881, contained a stipulation that interest should be paid on 11th April every year, and that the principal sum borrowed should be repaid in December 1884. Repayment not having been so made, a suit was brought in December 1896 to recover the principal sum together with interest up to the date of plaint:—*Held*, that inasmuch as the bond contained a stipulation for the payment of interest annually and there was nothing in it to suggest that the liability should cease on the day upon which the principal was repayable, interest could be recovered.

Jivanna Pandithar v. *Appalu* 339

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KANOM—*Suit for sale of mortgaged property—Rights of kanomdar:*

A kanomdar having sued to recover the amount of his kanom and for sale of the mortgaged property in default of payment:—*Held*, that such a suit is unsustainable; that a kanom, in the mortgage aspect of it, is a usufructuary mortgage; and there is no authority to support the contention that it is a simple mortgage apart from an observation in *Ramunni* v. *Brahma Dattan* (I.L.R., 15 Mad., 366 at p. 379).

Sridevi v. *Virarayan* 350

KASAVARGAM TENANCY—*Right to buildings—Compensation on eviction:*

A kasavargam tenant has a proprietary right to his house on the land, and when evicted he is entitled to compensation for his buildings.

Blake v. *Savundarathammal* 116

KATTUBADI—*Rent—Charge:*

Kattubadi is rent and does not constitute a charge on the land.

Gajapati Rajah v. *Suryanarayana* 11

LANDLORD AND TENANT—*Agricultural land—Change in the nature of cultivation—Waste:*

The defendant held from the plaintiff irrigable land which was cultivated with paddy, raggi, &c.; he had an occupancy right in his holding and paid a fixed money rent. The defendant having planted cocoanut trees on the land, the plaintiff sued to eject him and to have the trees removed:—*Held*, that the acts of the defendant did not constitute waste or a breach of the terms of his tenancy, and that the suit should be dismissed.

Venkayya v. *Ramasami* 89

LAND REVENUE, MADRAS TOWN—ACT XII OF 1851, ss. 1, 17—*Act VI of 1867, ss. 4, 31—Penal assessment—Jurisdiction of Civil Court—Limitation:*

The plaintiff was in occupation of certain land in Madras, and in May 1895 he received a notice from the Collector stating that the land belonged to the Government and that a penal assessment of Rs. 100 a month was imposed upon him for the current month, and calling upon him to pay that sum within three days, failing which his property would be distrained, and stating that if he did not vacate the land at once a further penal assessment would be imposed and levied every month. In June 1896 a like notice was served upon the plaintiff, calling upon him to pay Rs. 1,800, the amount chargeable up to date. The plaintiff having appealed to the Board of Revenue without success, paid under protest the penal assessment in various sums amounting together to Rs. 3,004-1-0. He now sued to recover that amount and prayed for a declaration of his title:—*Held*, by BODDAM, J., that the High Court had jurisdiction to entertain the suit in respect of the claim for money, but that the suit was barred as to so much of it as had been paid more than six months before the institution of the suit:—*Held*, by SHEPHARD, OTTO. C.J., and MOORE, J. (affirming the judgment of BODDAM, J.), that the land belonged to Government and the plaintiff was in occupation without title; and that it was accordingly competent to Government to impose the assessment. In order to enable one having paid money under protest to recover money so paid, it is necessary for him to show that the payment was made under illegal coercion.

Muthayya Chetti v. *Secretary of State for India* ... ... 10(

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LETTERS PATENT, s. 15—*Appeal from judgment of a single Judge made under Civil Procedure Code, s. 622:*

An appeal lies against an order made by a single Judge of the High Court under Civil Procedure Code, section 622, when such order amounts to a judgment.

Chappan v. *Moidin Kutti* 68

2. ——————, s. 15—*Civil Procedure Code—Act XIV of 1882, s. 622—Rejection of petition by a single Judge—Appeal:*

No appeal lies under Letters Patent, section 15, against an order made by a single Judge dismissing an application under section 622.

Sriramulu v. *Ramasam* 109

LIMITATION ACT—ACT XV OF 1877, ss. 4, 14—*Exclusion of time of proceeding bonâ fide in Court without jurisdiction—Joinder of causes of action—Court Fees Act—Act VII of 1870, s. 28—"Plaint"—Suit filed before period of limitation expired, but stamp duty not paid till afterwards—Muhammadan Law—Suit for partition of property of deceased by his heirs—Law governing devolution where deceased's paternal ancestors had been subject to Muhammadan Law, but his mother was a member of a tarwad holding property subject to Marumakkatayam Law:*

Two suits were brought for partition of the property of a deceased by his heirs under the Muhammadan Law:—the first, by his widow and six children in the Court of the Subordinate Judge; the second, by two other children by his first wife, in the Court of the District Munsif, from which Court it was transferred to the Court of the said Subordinate Judge. The Subordinate Judge having ruled that the plaintiffs in each suit were not entitled to sue jointly, the plaints were permitted to be amended. The first plaint was accordingly re-presented in the Subordinate Court as that of the widow; the second, also in the Subordinate Court, as that of the first child of the first wife: and seven further plaints were filed in the Subordinate Court on behalf of the remaining children, respectively. These seven further plaints were unstamped. Six of them, presented by the widow's children, stated explicitly that the duty payable thereon was included in that already paid on the widow's plaint, which sum correctly represented the duty payable on the footing that the share of each formed a distinct subject-matter. All the plaints were by order placed on the file of the District Munsif's Court. The plaints were at first treated at the Munsif's Court as being duly stamped: though payment of fresh Court-fees was subsequently ordered after the expiration of the period of limitation. The deceased had died in 1882; the two original suits had been filed in 1893 and 1894, respectively—within twelve years of his death; and the two amended suits and the seven fresh plaints had been filed in December 1894, more than twelve years from his death:—*Held*, (on the question of joinder), that there was no mis-joinder of causes of action. If the suits were viewed substantially as suits against trespassers, the plaintiffs, as tenants in common, were competent to sue together in respect of what was thus a common injury to them. If, on the other hand, the suits were suits for partition, the plaintiffs were *a fortiori* entitled to join. (On the question of limitation) that the suits by the two children of the first wife were not barred as they should be treated as a continuation of their original joint claim, which had been instituted in the same Court before the period of limitation had expired. That where there has been a misjoinder which has precluded a Court from entertaining a suit, the period during which such suit has been prosecuted diligently and in good faith may be deducted in computing the period of limitation: the inability of the Court to entertain a suit combining causes of action which could not be combined, being covered by the words "from other cause of a like nature,"—in section 14 of the Limitation Act. That with reference to the widow's amended suit, inasmuch as her original suit (on behalf of herself and her six children) had been filed before the

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Period of limitation had expired and had been prosecuted diligently and in good faith, the time during which that original suit had been pending must be deducted and her amended suit held to be not barred. That for similar reasons, a like deduction should be made in favour of the six fresh suits of her children (unless a contrary decision were necessitated by the fact that their plaints had remained unstamped until after the expiration of the extended period of limitation). *Per* SUBRAMANIA AIYAR, J., that although an amount equal to the fees properly payable in respect of the widow's amended suit and of the six fresh suits filed by her children had in fact been paid on the joint suit originally filed, credit could not be claimed out of that original payment for the Court-fees due on the six fresh suits subsequently instituted. These plaints must, therefore, be considered to have been not duly stamped, if not entirely unstamped, at the time when the period of limitation expired. That the said plaints having been filed in time, the fact that they were not duly stamped or were entirely unstamped when the period of limitation had expired, did not render them time-barred; since the plaints must be regarded as having been presented on the day upon which they were filed. It cannot be inferred from the Limitation Act, 1877, that the word "plaint" as used in section 4, explanation, means "plaint duly stamped." A "plaint" in law means merely "a "private memorial tendered to a Court, in which the person sets forth his "cause of action: the exhibition of an action in writing." Whether any Court-fee is payable in an action commenced by the plaint, and if so when and how it should be paid, are matters that are foreign to the question whether the document is a plaint or not. The Court Fees Act and the Limitation Act are entirely different in their purpose and scope, and neither can be taken to control or qualify the other. *Per* DAVIES, J., that inasmuch as the order of the Subordinate Judge requiring separate plaints was erroneous it could not operate to enhance the Court-fees truly payable. The true plaints in the case, in so far as stamp duty was concerned, were the two joint plaints originally presented. These were filed in time, and were sufficiently stamped. The fees having been paid at the beginning, no question arose as to the insufficiency of stamp duty, and the objection on the ground of limitation was thereby disposed of. A deceased as well as his paternal ancestors had followed the Muhammadan Law; but his mother had been a member of a tarwad which held property subject to Marumakkatayam Law. On its being contended that in such a case the property of the deceased, whether derived from his father or mother, passed according to the rule of Marumakkatayam Law to his mother's tarwad, and not to his heirs according to the Muhammadan Law:—*Held*, that the law governing the devolution of the property of the deceased, derived from either parent but not held by him as a member of a tarwad subject to Marumakkatayam Law, is the Muhammadan Law. *Venkatramayya* v. *Krishnayya* (I.L.R., 20 Mad., 319), referred to.

Assan v. *Pathumma* 494

2. ——————————, s. 19—*Acknowledgment—Muchalka under the Rent Recovery Act (Madras), 1865:*

A muchalka given by a tenant at the end of a fasli, containing an undertaking to pay instalments of rent at dates then passed, amounts to an acknowledgment of liability for the purposes of the Limitation Act, 1877, section 19.

Venkatagiri Rajah v. *Sheik Bade Saheb* 32

3. ——————————, sched. II, arts. 2, 36, 89, 90—*Chairman of Municipal Council—Principal and Agent—Liability for embezzlement by manager:*

During the tenure of his office by the Chairman of a Municipal Council, the manager embezzled sums of money. On the council, within three years, but more than two years thereafter, suing its late chairman to recover the amount lost by reason of the embezzlement on the ground that he was liable as its agent:—*Held*, that the relation of principal and agent did not exist, and that therefore articles 89 and 90 of schedule II to the Limitation Act did not apply; that the case was governed by article 36, and that the suit was therefore barred by limitation.

Srinivasa Ayyangar v. *Municipal Council of Karur* 342

4. ——————————, sched. II, art. 49—*Claim to recover goods in hands of third parties—Alternative claim for value as compensation—Specific Relief Act—Act I of* 1877, *ss.* 10, 11—*Civil Procedure Code—Act XIV of* 1882, *s.* 208:

In execution of a decree obtained by the defendants against one M in the Court of Small Causes, certain goods were attached, to which plaintiff preferred a claim. That claim being disallowed, plaintiff filed in the City Civil Court, Madras, a suit for and obtained a declaration of his title to the goods, but prior to the date of the decree, namely, in October 1895, the goods attached had been sold by the Court of Small Causes, and certain third parties had become purchasers thereof. On plaintiff, in December 1897, suing "for the recovery of the goods or their value as compensation:"—*Held*, (1) that the goods not being in the possession or under the control of the defendants, plaintiff was not entitled to a decree for their recovery in specie: and that plaintiff's only remedy was by way of damages for the wrongful taking of his goods at the instance of the defendants; and (2) that the suit being framed for the recovery of specific moveable property was governed by article 49 of schedule II of the Limitation Act, 1877, and was therefore not barred by limitation. The alternative prayer for the value of the goods as compensation must be read as ancillary to the main relief asked for with reference to section 208 of the Code of Civil Procedure, and did not alter the character of the suit or bring it within any other category of the schedule.

Murugesa Mudali v. *Jotharam Davay* 478

5. ——————————, sched. II, arts. 106, 116—*Suit for an account of a dissolved partnership—Registered partnership deed:*

A suit for an account of a partnership dissolved more than three years before the filing of the plaint is barred by limitation even if the instrument of partnership was registered.

Vairavan Asari v. *Ponnayya* 14

6. ——————————, sched. II, art. 110—*Rent Recovery Act (Madras)—Act VIII of* 1865, *s.* 10—*Suit to recover arrears of rent—Suit to enforce acceptance of patta pending—Time from which period of limitation is computed:*

The cause of action, with reference to limitation, in a suit for rent, accrues on the date on which the rent is payable by custom or contract, irrespective of whether patta has been tendered or a suit to enforce acceptance of patta under the Rent Recovery Act (Madras), 1865, is pending.

Kumarasami Pillai v. *President, District Board of Tanjore* 248

7. ——————————, sched. II, arts. 120, 144—*Emoluments of hereditary office—Interest in immoveable property:*

A suit to recover a sum of money due by custom as an emolument of an hereditary office is not one for the possession of an interest in immoveable property. In 1888 a sum of money became payable, as marriage dues, to the holder of certain offices connected with a temple. Upon a suit being brought more than six years thereafter, namely in 1895, to recover the amount, it was objected that the claim was barred by limitation:—*Held*, that such a claim is governed by article 120 of schedule II to the Limitation Act, and must, in consequence, be enforced within six years of the accrual of the right.

Rathna Mudaliar v. *Tiruvenkata Chariar* 351

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8. ————————————————————, sched. II, art. 132—*On demand—Accrual of cause of action :*

In a suit brought in 1895 on a hypothecation bond, dated 9th October 1880, it appeared that the loan secured thereby was repayable on 9th October 1883, but it was stipulated that if interest was not paid at 10 per cent. per annum as therein provided, then that the loan should be repaid with interest at 15 per cent. when the obligee should require it. Default had been made in the payment of interest in 1881, but the obligee had not called for the money :—*Held*, that the suit was not barred by limitation.

Nettakaruppa Goundan v. *Kumarasami Goundan* 20

9. ————————————————————, sched. II, art. 173A—*Civil Procedure Code—Act XIV of 1882, ss. 244, 258—Execution of decrees—Money decree :*

Section 258, Civil Procedure Code, refers only to the execution of decrees under which money is payable, and is not applicable to decrees for possession of immoveable property.

Sankaran Nambiar v. *Kunara Kurup* 182

10. ————————————————————, sched. II, art. 179—*Execution of decree - Payment out of Court to plaintiffs of money collected by receiver, but not under decree—Step in aid of execution :*

The question whether an application to enforce execution of a decree was barred by limitation depended upon whether a payment out of Court to plaintiffs of money collected by a receiver constituted (with the application alleged to have preceded it) a step in aid of execution within the meaning of article 179 of schedule II to the Limitation Act. The receiver had been appointed during the pendency of the suit, which was by mortgagees for possession of the mortgaged land and for mesne profits accrued prior to the date of plaint. The receiver remained in possession of the land for a period of six months after decree, when he handed it over to the plaintiffs ; and the payment out of Court above referred to was of money which had apparently been collected by the receiver during the said six months, and formed no part of the mesne profits dealt with by the decree : —*Held*, that such money was not collected or paid in execution of the decree though the plaintiffs had become entitled to it as a consequence of the decree. It consisted of current profits of the estate, in demanding which plaintiffs had done nothing towards the execution of the decree, which did not deal with such profits, and which could be fully executed without reference to them. And *held*, therefore, that the payment referred to did not constitute a step in aid of execution, and that the present application was barred by article 179 of schedule II to the Limitation Act.

Appasami Naickan v. *Jotha Naickan* 448

LIQUIDATED DAMAGES—*Breach of a contract to pay various sums—Agreement to pay enhanced rent in event of breach—Penalty :*

By the terms of a deed a tenant was liable to pay rent to the plaintiff at an enhanced rate if he failed to pay, at a time specified, Government revenue, interest on a mortgage, and the rent agreed upon. The interest and the rent having fallen into arrears, and a suit having been brought to recover rent at the enhanced rate :—*Held*, that plaintiff was entitled to recover the additional amount as liquidated damages.

Balburaya v. *Sankamma* 451

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MADRAS HARBOUR TRUST ACT (MADRAS)—ACT II OF 1886, ss. 70, 87—*Immunity from action—Breach of contract—Contract Act—Act IX of 1872, ss. 151, 152—Liability of bailees for hire for loss of goods—Negligence—Onus of proof :*

When goods which have been entrusted to bailees for hire are lost, it lies on the bailees to show that they have taken as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. If they fail to satisfy the Court on that point, they are liable for the loss. *Per* SHEPHARD, J.—The provision in section 87 of the Madras Harbour Trust Act, 1886, to the effect that the Board, its officers and servants shall not be liable in damages for any act *bonâ fide* done or ordered to be done by them in pursuance of the Act, does not apply to all causes of action, and *inter alia*, to a suit in respect of a breach of contract against the Board. The immunity there given applies only to those cases in which there is an act done or purporting to be done in pursuance of the Act. The fact that the Board has worked under the provisions of a statute does not prevent it from entering into a contract ; and the section does not apply in a case where the party aggrieved complains of the breach of such a contract on the part of the Board. By section 70 of the Madras Harbour Trust Act, 1886, the Board is empowered to make bye-laws for the reception, removal and porterage of goods. A bye-law framed under this section provided that importers desiring to store cargo must apply to the Secretary of the Board for such space as they might require, and that such applications would be granted on such terms as the Board might approve, and concluded with the reservation that the Board, while taking all reasonable precautions, would accept no responsibility in respect of property stored upon its premises, which would remain at the risk of the consignees or owners :—*Held* (*per* COLLINS, C.J., and BODDAM, J.), that this provision was not a bye-law for the reception or removal of goods, within the meaning of section 70 of the Act, and was *ultra vires*.

Trustees of the Harbour, Madras, v. *Best & Co.* 524

MARUMAKKATAYAM LAW—*Self-acquired property—Power of disposition by will —Succession certificate—Probate :*

A member of a Marumakkatayam tarwad died leaving self-acquired property. The karnavan of the tarwad applied for a succession certificate, but the application was opposed by legatees under a will of the deceased which had not been admitted to probate, but was undisputed :—*Held*, that the will was valid and that the succession certificate should not be granted to the karnavan, but to one of the legatees.

Achutan Nayar v. *Cheriotti Nayar* 9

MERCHANDISE MARKS ACT—ACT IV OF 1889, s. 15—*Use of counterfeit trade-mark—Prosecution after one year from first discovery of offence—Limitation—Penal Code—Act XLV of 1860, ss. 482, 486 :*

A complainant having, in 1893, discovered that goods were being sold marked with what was alleged to be a counterfeit trade-mark, called upon the persons so selling to discontinue the use of the said alleged counterfeit trade-mark and to render an account of sales. The right to proceed further was reserved, but no action was then taken. In 1898, upon its being ascertained that the same trade-mark was being used, a prosecution was commenced :—*Held*, that, inasmuch as the complainant had not shown that he believed the use of the alleged counterfeit trade-mark had been discontinued after his first discovery and complaint in 1893, the prosecution was time-barred under section 15 of the Indian Merchandise Marks Act, 1889 ; and that the complainant must enforce his remedy by civil process.

Ruppell v. *Ponnusami Tevan* 488

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MUHAMMADAN LAW—*Suit for partition of property of deceased by his heirs—Law governing devolution where deceased's paternal ancestors had been subject to Muhammadan Law, but his mother was a member of a tarwad holding property subject to Marumakkatayam Law—Limitation Act—Act XV of* 1877, *ss.* 4, 14—*Exclusion of time of proceeding* bonâ fide *in Court without jurisdiction—Joinder of causes of action—Court Fees Act—Act VII of* 1870, *s.* 28—"*Plaint*"—*Suit filed before period of limitation expired, but stamp duty not paid till afterwards :*

Two suits were brought for partition of the property of a deceased by his heirs under the Muhammadan Law :—the first, by his widow and six children in the Court of the Subordinate Judge ; the second by two other children by his first wife, in the Court of the District Munsif, from which Court it was transferred to the Court of the said Subordinate Judge. The Subordinate Judge having ruled that the plaintiffs in each suit were not entitled to sue jointly, the plaints were permitted to be amended. The first plaint was accordingly re-presented in the Subordinate Court as that of the widow ; the second, also in the Subordinate Court, as that of the first child of the first wife : and seven further plaints were filed in the Subordinate Court on behalf of the remaining children, respectively. These seven further plaints were unstamped. Six of them, presented by the widow's children, stated explicitly that the duty payable thereon was included in that already paid on the widow's plaint, which sum correctly represented the duty payable on the footing that the share of each formed a distinct subject-matter. All the plaints were by order placed on the file of the District Munsif's Court. The plaints were at first treated at the Munsif's Court as being duly stamped : though payment of fresh Court-fees was subsequently ordered after the expiration of the period of limitation. The deceased had died in 1882 ; the two original suits had been filed in 1893 and 1894, respectively—within twelve years of his death ; and the two amended suits and the seven fresh plaints had been filed in December 1894, more than twelve years from his death :—*Held*, (on the question of joinder), that there was no misjoinder of causes of action. If the suits were viewed substantially as suits against trespassers, the plaintiffs, as tenants in common, were competent to sue together in respect of what was thus a common injury to them. If, on the other hand, the suits were suits for partition, the plaintiffs were *a fortiori* entitled to join. (On the question of limitation), that the suits by the two children of the first wife were not barred as they should be treated as a continuation of their original joint claim, which had been instituted in the same Court before the period of limitation had expired. That where there has been a misjoinder which has precluded a Court from entertaining a suit, the period during which such suit has been prosecuted diligently and in good faith may be deducted in computing the period of limitation : the inability of the Court to entertain a suit combining causes of action which could not be combined, being covered by the words "from other cause of a like nature,"—in section 14 of the Limitation Act. That with reference to the widow's amended suit, inasmuch as her original suit (on behalf of herself and her six children) had been filed before the period of limitation had expired and had been prosecuted diligently and in good faith, the time during which that original suit had been pending must be deducted and her amended suit held to be not barred. That for similar reasons, a like deduction should be made in favour of the six fresh suits of her children (unless a contrary decision were necessitated by the fact that their plaints had remained unstamped until after the expiration of the extended period of limitation). *Per* SUBRAMANIA AYYAR, J, that although an amount equal to the fees properly payable in respect of the widow's amended suit and of the six fresh suits filed by her children had in fact been paid on the joint suit originally filed, credit could not be claimed out of that original payment for the Court-fees due on the six fresh suits subsequently instituted. These plaints must, therefore, be considered to have been not duly stamped, if not entirely unstamped, at the time when the period of limitation expired. That, the said plaints having been filed in time, the fact that they were not duly stamped or were entirely unstamped when the period of limitation had expired, did not render them time-barred ; since the plaints must be regarded as having been presented on the day upon which they were filed. It cannot be inferred from the Limitation Act, 1877, that the word "plaint" as used in section 4, explanation, means "plaint duly stamped." A "plaint" in law means merely "a private memorial tendered to a Court, in which the person sets forth his cause of action : the exhibition of an action in writing." Whether any Court-fee is payable in an action commenced by the plaint, and if so when and how it should be paid, are matters that are foreign to the question whether the document is a plaint or not. The Court Fees Act and the Limitation Act are entirely different in their purpose and scope, and neither can be taken to control or qualify the other. *Per* DAVIES, J., that inasmuch as the order of the Subordinate Judge requiring separate plaints was erroneous it could not operate to enhance the Court-fees truly payable. The true plaints in the case, in so far as stamp duty was concerned, were the two joint plaints originally presented. These were filed in time, and were sufficiently stamped. The fees having been paid at the beginning, no question arose as to the insufficiency of stamp duty, and the objection on the ground of limitation was thereby disposed of. A deceased as well as his paternal ancestors had followed the Muhammadan Law ; but his mother had been a member of a tarwad which held property subject to Marumakkatayam Law. On its being contended that in such a case the property of the deceased, whether derived from his father or mother, passed according to the rule of Marumakkatayam Law to his mother's tarwad, and not to his heirs according to the Muhammadan Law :—*Held*, that the law governing the devolution of the property of the deceased, derived from either parent but not held by him as a member of a tarwad subject to Marumakkatayam Law, is the Muhammadan Law. *Venkatramayya* v. *Krishnayya* (I.L.R., 20 Mad., 319) referred to.

Assan v. *Pathumma* 494

OATHS ACT—ACT X OF 1873, ss. 9 to 11—*Offer by party to be bound—Conclusive proof of the matter stated :*

Defendant in a suit, before trial, filed a petition under section 9 of the Indian Oaths Act, 1873, to the effect that if the plaintiff should make an oath according to law regarding certain facts, "this defendant will forfeit his right of contesting this suit." He subsequently desired to withdraw the petition on insufficient grounds, but the plaintiff took the oath, and on the strength thereof all the issues were decided, and a decree passed, in plaintiff's favour. The suit was, however, remanded, on appeal, for disposal after recording evidence on both sides. On appeal by plaintiff against this order of remand :—*Held*, (1) that there is nothing in sections 9 to 11 of the Indian Oaths Act, 1873, which allows a party who has agreed to the administration of an oath under those sections to retract after the opponent has accepted the proposal ; (2) that the Act gives the Court a discretion to administer the oath or not, and though it should not administer it if good grounds be shown for retracting, it is justified in so doing, notwithstanding the retractation if the grounds are frivolous ; (3) that if "the matter stated," as referred to in section 11 of the Act, affords sufficient material for the decision of the suit, a decree may be passed on the facts so proved. But if the facts so proved are not sufficient for the decision of the case, such further facts as are necessary should be proved by evidence adduced on both sides. The Act provides, not for the adjustment of a suit in an arbitrary way, but merely for the conclusive proof of facts ; such facts, if not sufficient for the decision of the suit, should be supplemented by facts duly proved by evidence ; and (4) that the facts proved by the special oath are conclusively proved, and any further evidence that may be taken should be limited to matters not proved by the oath.

Thoyi Ammal v. *Subbaroya Mudali* 234

PAYMENT UNDER PROTEST—*Land Revenue, Madras Town—Act XII of* 1851, *ss.* 1, 17—*Act VI of* 1867, *ss.* 4, 31—*Penal assessment—Jurisdiction of Civil Court—Limitation :*

The plaintiff was in occupation of certain land in Madras, and in May 1895 he received a notice from the Collector stating that the land belonged to the Government, and that a penal assessment of Rs. 100 a

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month was imposed upon him for the current month, and calling upon him to pay that sum within three days, failing which his property would be distrained, and stating that if he did not vacate the land at once a further penal assessment would be imposed and levied every month. In June 1896 a like notice was served upon the plaintiff, calling upon him to pay Rs. 1,300, the amount chargeable up to date. The plaintiff having appealed to the Board of Revenue without success, paid under protest the penal assessment in various sums amounting together to Rs. 3,004-1-0. He now sued to recover that amount and prayed for a declaration of his title:—*Held*, by BODDAM, J., that the High Court had jurisdiction to entertain the suit in respect of the claim for money, but that the suit was barred as to so much of it as had been paid more than six months before the institution of the suit:—*Held*, by SHEPHARD, Offg. C.J., and MOORE, J. (affirming the judgment of BODDAM, J.), that the land belonged to Government and the plaintiff was in occupation without title; and that it was accordingly competent to Government to impose the assessment. In order to enable one having paid money under protest to recover money so paid, it is necessary for him to show that the payment was made under illegal coercion.

Muthayya Chetti v. *Secretary of State for India* 100

PENAL CODE—ACT XLV OF 1860, ss. 65, 67—*Imprisonment in default of fine—Towns Nuisances Act (Madras)—Act III of 1889, s. 3, cl. 10:*

An accused having been convicted of an offence under section 3, clause 10, of the Towns Nuisances Act (Madras), 1889, and sentenced to pay a fine of Rs. 8 and in default of payment to undergo simple imprisonment for a week:—*Held*, (1) that section 67 of the Indian Penal Code refers solely to cases in which the offence is punishable with fine only: and has no application to offences punishable either with imprisonment or with fine, but not with both; such sentences are governed by section 65 of the Indian Penal Code; and (2) that the sentence of imprisonment in default should not exceed one-fourth of the maximum term of imprisonment provided for the offence.

Queen-Empress v. *Yakoob Sahib* 238

2. ——————————, **ss. 147 and 324**—*Charges under Criminal Procedure Code—Act V of 1898, s. 260—Summary Procedure under Penal Code, s. 323:*

A first-class Magistrate took a case on his file and commenced a regular enquiry therein under sections 147 and 324 of the Indian Penal Code; but after hearing evidence and being of opinion that only an offence under section 323 of the Indian Penal Code had been made out, he proceeded to deal with the case summarily:—*Held*, that inasmuch as the evidence adduced was not sufficient to justify a committal, but clearly disclosed an offence over which he had summary jurisdiction, the Magistrate was right in acting as he did. Such a course is different to disregarding part of a charge for the purpose of dealing with a case summarily. The High Court will not interfere where a Magistrate has *bonâ fide* acted in the interests of justice. *Empress* v. *Abdool Karim* (I.L.R., 4 Calc., 18) distinguished.

Queen-Empress v. *Rangamani* 459

3. ——————————, **ss. 206, 397, 424**—*Harvesting crops under attachment:*

A judgment-debtor, whose standing crops were attached, harvested them while the attachment was in force and was convicted of theft:—*Held*, that the accused was not guilty of theft, but of the offence of dishonestly removing the property under Penal Code, section 424. *Per* BENSON, J.—The offence was also criminal misappropriation within the meaning of Indian Penal Code, section 403.

Queen-Empress v. *Obayya* 151

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4. ——————————, **s. 294A**—*Companies Act—Act VI of 1882, s. 4—Illegal contract—Bond to secure payments under a kuri:*

An agreement is not illegal whereby a number of persons subscribe, each a certain sum, by periodical instalments, with the object that each in his turn (to be decided by lot), shall take the whole subscription for each instalment, all such persons being returned the amount of their contributions, the common fund being lent to each subscriber in turn. Nor is such an agreement rendered illegal by section 294A of the Indian Penal Code.

Vasudevan Nambudri v. *Mammod* 212

5. ——————————, **ss. 395, 396, 412**—*Criminal Procedure Code—Act X of 1882, ss. 269, 307, 533—Verdict of jury and their opinion as assessors—Confessional statement:*

Ten persons were committed to a Sessions Court charged with offences under Indian Penal Code, sections 395 and 396, and some of them were also charged with offences under section 412. One of the accused had made a confessional statement before the Magistrate who recorded it, but did not make on it a memorandum to the effect stated in Criminal Procedure Code, section 164, and did not admit it in evidence for the reasons that the accused was produced from the custody of the police in which he had been detained for five days, and there was a proposal on the part of the police to treat him as an approver. It appeared that a perusal of the preliminary register would have shown that the accused were either guilty under section 396 or not guilty under section 395 at all. The accused were tried by the Sessions Judge with a jury. The confessional statement was not admitted in evidence. The jury found the accused not guilty of dacoity, but the Judge disagreeing with the verdict referred the case to the High Court under Criminal Procedure Code, section 307:—*Held*, (1) that the procedure adopted by the Judge was wrong and that he should have tried the accused with the aid of assessors under Indian Penal Code, section 396; (2) that the Judge should have enquired under Criminal Procedure Code, section 533, whether the confessional statement had been duly made; and (3) that, under the circumstances, the High Court should determine on the evidence on record, after giving due weight to the opinions of the Judge and the jury, whether the accused were guilty under section 395.

Queen-Empress v. *Anga Valayan* ... ...

6. ——————————, **ss. 482, 486**—*Merchandise Marks Act—Act IV of 1889, s. 15—Use of counterfeit trade-mark—Prosecution after one year from first discovery of offence—Limitation:*

A complainant having, in 1893, discovered that goods were being sold marked with what was alleged to be a counterfeit trade-mark, called upon the persons so selling to discontinue the use of the said alleged counterfeit trade-mark and to render an account of sales. The right to proceed further was reserved but no action was then taken. In 1898, upon its being ascertained that the same trade-mark was being used, a prosecution was commenced:—*Held*, that, inasmuch as the complainant had not shown that he believed the use of the alleged counterfeit trade-mark had been discontinued after his first discovery and complaint in 1893, the prosecution was time-barred under section 15 of the Indian Merchandise Marks Act, 1889; and that the complainant must enforce his remedy by civil process.

Ruppell v. *Ponnusamy Tevan* 488

PROBATE AND ADMINISTRATION ACT—ACT V OF 1881, ss. 35, 48, 62—*Executrix—Letters of administration with will annexed:*

A petitioner prayed for a grant of probate of her deceased son's will. No executrix had been appointed therein, but the petitioner was directed that out of certain property she should pay certain debts:—*Held*, that such a direction was insufficient to show an intention on the testator's part that for

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the general purposes of administration the petitioner should be executrix; and that the petition should have been for letters of administration with the will annexed; that the petition should state all assets likely to come to the petitioner's hands; and that proof of execution and of the consciousness of a testator is insufficient, and that it should be further shown that he knew of and understood the contents of the document which he signed.

Kuppayammal v. *Ammani Ammal* 345

2. ——————————————————————, s. 104—*Equal and ratesable distribution—Civil Procedure Code—Act XIV of* 1882, *s.* 234—*Execution of decree against deceased judgment-debtor:*

The right of a decree-holder, under section 234 of the Civil Procedure Code, to have his decree executed against the legal representative of a deceased judgment-debtor, is not affected by section 104 of the Probate and Administration Act, which directs debts to be paid equally and rateably out of the assets.

Venkatarangayan Chetti v. *Krishnasami Ayyangar* 194

PROVINCIAL SMALL CAUSE COURTS ACT—ACT IX OF 1887, s. 15, sched. II, art. 8—*Suits for rent*—"*Suits of the nature cognizable in Courts of Small Causes*"—*Second appeal—Civil Procedure Code—Act XIV of* 1882, *s.* 586:

A suit for the recovery of rent other than house-rent does not become a suit of the nature cognizable in Courts of Small Causes within the meaning of section 586 of the Code of Civil Procedure because a Judge of a Court of Small Causes has been invested by the Local Government with authority to exercise jurisdiction with respect thereto under section 15 and schedule II, article 8, of Provincial Small Cause Courts Act, 1887. A second appeal will lie in such a suit, though the amount or value of the subject matter of the original suit does not exceed Rs. 500.

Vedachala Mudali v. *Ramasami Raja* 229

2. ——————————————————————, s. 15, sched. II, art. 35 (j)—*Civil Procedure Code—Act XIV of* 1882, *s.* 646B—*Suit for the value of property illegally retained—Jurisdiction of Small Cause Courts:*

Certain moveable property having been distrained under section 15 of the Rent Recovery Act (Madras), 1865, such distraint was set aside and the property ordered to be restored to the owners. That order not having been carried out, the owners filed suits on the Small Cause side of the Courts of the Subordinate Judge and the District Munsif, for the value of the property so illegally retained:—*Held*, that the suits were not excepted from the jurisdiction of the Small Cause Courts by article 35 (*j*) of schedule II of the Provincial Small Cause Courts Act, 1887.

Chakradharudu v. *Venkataramayya* 457

3. ——————————————————————, sched. II, art. 7—*Suit for damages for use and occupation of land:*

A suit for damages for use and occupation of land is cognisable by a Court of Small Causes.

Vira Pillai v. *Rangasami Pillai* 149

4. ——————————————————————, sched. II, art. 31—*Jurisdiction—Suit for mesne profits under Rs.* 500—*Civil Procedure Code—Act XIV of* 1882, *s.* 586—*Second appeal:*

A suit for mesne profits is cognisable in Courts of Small Causes where the value of the subject-matter in dispute is less than Rs. 500, and article 31 of schedule II of the Provincial Small Cause Courts Act does not apply thereto. Such a suit falls within the provisions of section 586 of the Civil Procedure Code, and no second appeal lies from a decision in it.

Seshagiri Ayyar v. *Marakathammal* 196

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RAILWAYS ACT—ACT IX of 1890, ss. 77, 140—*Notice to Railway administration—Service on Traffic Manager:*

In a suit against the South Indian Railway Company to recover the value of a parcel delivered to the defendant company for carriage, it appeared that the plaintiff had within two months of the delivery given notice of the suit to the Traffic Manager of the defendant company at Trichinopoly:—*Held*, that the notice was a good notice if it, in fact, reached the agent of the defendant company within the period of six months.

Periannan Chetti v. *South Indian Railway Company* 187

REGISTRATION ACT—ACT III OF 1877—*Registration—Unregistered agreement incorporated into a judicial proceeding:*

A prior suit between the same parties, now contesting the right to part of an ancestral estate, claimed another part of the same estate, without comprising the lands now in suit, which, at the time when the first suit was brought, were outstanding under a mortgage. A decree had been made by consent, excluding the lands now sued for. The defendant's case was that the lands now claimed, together with those decreed by consent, had been made the subject of a compromise of which the terms had been stated in two written agreements not registered. Also, that according to the compromise each of the parties was to take a moiety of the whole estate. Each had obtained possession; but the decree was limited to the part of the estate for which the prior suit, then disposed of, was brought; and only one of the agreements—that one which related to the lands then in suit—was presented to and accepted by the Court which made the consent decree:—*Held*, that this agreement had a different effect from the other one, as it constituted a step in a judicial proceeding, and did not require registration. The order was pronounced in terms of it. But as regarded the lands now in suit, excluded as they had been from the decree in the former suit, the defendant's title to them had been left to stand or fall by the other unregistered document. The latter, by the Registration Act, 1877, conferred no title, and this defence failed.

Pranal Anni v. *Lakshmi Anni* 508

2. ——————————————————————, ss. 17, 18—*Rent Recovery Act (Madras)—Act VIII of* 1865, *s.* 11—*Reduction of rent:*

A document given by the owner of land to his tenant, varying the terms of tenancy with reference to the amount of rent to be paid, is not an instrument relating to an interest in immoveable property and does not require registration. Where a landholder has granted a reduction of rent otherwise properly payable in respect of land, the mere fact that the tenant has made some improvements subsequent to the grant does not bring the case within the exception to the proviso of section 11 of the Rent Recovery Act (Madras), 1865, so as to be binding on the landholder's successor.

Obai Goundan v. *Ramalinga Ayyar* 217

REGULATION VII OF 1817 (MADRAS)—*See* RELIGIOUS ENDOWMENTS ACT (2).

2. ——————— XXV OF 1802 (MADRAS), s. 9—*Regulation XXVI of* 1802 (*Madras*), *s.* 2—*Assessment of Land Revenue Act* (*Madras*)—*Act of* 1876:

An application to a Collector to grant separate registration of a portion of a permanently-settled estate which has been alienated by a court-sale, is one under the provisions of Regulations XXV and XXVI of 1802 and not under Act I of 1876.

Bommarazu v. *Seshamma* 438

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3. ——————XXIX OF 1862 (MADRAS), s. 7—*Jurisdiction—Suit for office of karnam—District Munsif's Court:*

A suit to establish plaintiff's right to, and to recover possession of, the office of karnam, and for the restoration of the inam lands, and for damages, was brought in the Court of the District Munsif:—*Held*, that it was properly so brought.

Jayamatha Pillai v. *Subbaraya Pillai* 340

RELIGIOUS ENDOWMENTS—*Devastanam Committee—Grounds for removal from office—Errors of judgment on part of committeeman:*

Mere error in judgment on the part of a member of a devastanam committee is not sufficient to disqualify him from continuing to hold such office. To justify the removal of such an office-holder, it must be shown that the further holding by him of the office is incompatible with the interests of the temple under the charge of the committee of which he is a member. The duty of a devastanam committee consists, primarily, in seeing that its endowments are appropriated to their legitimate purposes and are not wasted. It is not a part of the duty of such a committee to interfere with the trustees in matters relating to rituals.

Tiruvengadath Ayyangar v. *Srinivasa Thathachariar* 361

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863—*Trustees—Dismissal for breach of duty—Failure to submit accounts—Meetings of committee—Number of members present—Resolution appointing quorum—Resolution by three out of seven*

Though committees constituted under the Religious Endowments Act, 1863, are not strictly corporations, their procedure in matters relating to the management of properties and trustees under their control should be governed by the rules applicable to regular corporations. In 1879, when a committee consisted of seven members, a meeting was held at which five were present, and a resolution was unanimously passed that at future meetings three should form a *quorum*. This resolution had never been rescinded, and had always been acted upon. In 1895, when the committee also consisted of seven, a meeting was held after due notice to all its members, at which three were present, and a trustee of the temple was, on valid grounds, dismissed from office and called upon to hand over charge of the temple and its properties. The resolution of dismissal was unanimous and was confirmed at a subsequent meeting:—*Held*, that the meeting as constituted was competent to pass the resolution removing the trustee. Whether unanimity of the whole committee might not have been necessary in the event of business having been transacted otherwise than at a meeting, *Quære*. Failure on the part of a trustee to submit accounts to the committee is a breach of one of the most important duties cast upon him by law and is sufficient to justify his dismissal.

Anantanarayana Ayyar v. *Kuttalam Pillai* 481

2. ——————————————————, ss. 2, 13, 14, 16—*Regulation VII of* 1817 (*Madras*)—*Joinder of purchasers in a suit against trustee:*

A temple having been endowed with immoveable property after the passing of Regulation VII of 1817 (Madras), and before the Religious Endowments Act (XX of 1863), and the trustee having without authority sold the same, a suit was instituted under Act XX of 1863 against the trustee and the purchasers of the property, to annul the sales and to declare the right of the temple thereto:—*Held*, (1) that a transferee of trust property, under a transaction which amounts to a breach of trust on the part of the trustee of the institution cannot be proceeded against under the provisions of the

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Religious Endowments Act, 1863; and (2) that the trustee of a public religious institution can be sued under the provisions of the Religious Endowments Act, 1863, notwithstanding the fact that the institution came into existence after Regulation VII of 1817 was passed.

Sivayya v. *Rami Reddi* 223

RELIGIOUS INSTITUTION—*Suit for ejectment of a jeer as being illegally appointed—Prayer for appointment of a new jeer—Elective office:*

The jeer of a mutt died in 1888 and the defendant assumed office as his successor. The plaintiffs, who were disciples of the mutt, asserting in the plaint that the office of the jeer was elective, but without having held an election, brought a suit to eject the defendant and to have a new jeer elected or appointed by the Court and placed in possession of the properties of the institution. It was alleged both that the defendant had not been duly appointed to be jeer and also that he was disqualified for that office by immorality and otherwise:—*Held*, that the suit was not maintainable.

Srinivasa Swami v. *Ramanuja Chariar* 117

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865, s. 4—*Validity of patta—Omission to sign by landholder:*

A suit was brought to set aside a sale of lands on the ground, among others, that a patta which had been tendered was illegal. One of the clauses objected to in the patta contained an erroneous reference to punja lands which had inadvertently not been erased: another provided only in an indirect manner for the rent payable in respect of any other land that might be cultivated. The patta was not signed or sealed:—*Held*, that the clauses referred to were unobjectionable: and the fact that the patta tendered had not been signed by the landlord did not necessarily render it invalid.

Rajah Eswara Doss v. *Babu Rajan* 353

2. ——————————————————, ss. 9, 50, 51—*Tender of patta during fasli—Suit commenced after fasli:*

A suit to enforce acceptance of patta under section 9 of the Rent Recovery Act, 1865, may be instituted after the expiration of the fasli to which the patta relates, provided that the patta has been tendered during the continuation of the fasli. *Ramasami Mudaliar* v. *Rathna Mudaliar* (I.L.R., 21 Mad., 148) explained.

Papamma v. *Subbanna* 318

3. ——————————————————, s. 10—*Limitation Act—Act XV of* 1877, *sched. II, art.* 110—*Suit to recover arrears of rent—Suit to enforce acceptance of patta pending—Time from which period of limitation is computed:*

The cause of action, with reference to limitation, in a suit for rent, accrues on the date on which the rent is payable by custom or contract, irrespective of whether patta has been tendered or a suit to enforce acceptance of patta under the Rent Recovery Act (Madras), 1865, is pending.

Kumarasami Pillai v. *President, District Board of Tanjore* 248

4. ——————————————————, ss. 10, 69, 73—*Decision of Collector ejecting tenant—Appeal:*

An appeal lies from the decision of a Collector ejecting a tenant under section 10 of the Rent Recovery Act (Madras), 1865. Such a decision, notwithstanding the use of the word 'order' in the section referred to, is a judgment within the meaning of section 69. *Mahomed Yakub Sahib* v. *Mohamed Jaffer Ali Sahib* (I.L.R., 4 Mad., 167) not followed.

Narasimhaswami v. *Lakshmamma* 436

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5. ——————————————————————s. 11—*Reduction of rent—Registration Act—Act III of* 1877, *ss.* 17, 18:

A document given by the owner of land to his tenant varying the terms of tenancy with reference to the amount of rent to be paid, is not an instrument relating to an interest in immoveable property and does not require registration. Where a landholder has granted a reduction of rent otherwise properly payable in respect of land, the mere fact that the tenant has made some improvements subsequent to the grant does not bring the case within the exception to the proviso of section 11 of the Rent Recovery Act (Madras), 1865, so as to be binding on the landholder's successor.

Obai Goundan v. *Ramalinga Ayyar* 217

6. ——————————————————————, ss. 15, 18, 51—*Summary suit to set aside distraint—"Within thirty days"—Sunday—General Clauses Act—Act X of* 1897, *s.* 10 (1)—*General Clauses Act (Madras)—Act I of* 1891, *s.* 11:

Suits to set aside a distraint under section 15 of the Rent Recovery Act (Madras), 1865, were filed on the thirty-first day after the distraint complained of, the thirtieth day being a Sunday, and the Court closed. On objection being taken that the suits were barred under sections 18 and 51 of the Act:—*Held*, (1) that the suits were filed in time; (2) that the provisions of the Limitation Act do not extend the period of thirty days limited by sections 18 and 51 of the Rent Recovery Act (Madras), 1865, for bringing a summary suit to set aside a distraint; neither does section 10 of the General Clauses Act, nor section 11 of the General Clauses Act (Madras), inasmuch as the latter Acts are not retrospective; and (3) that there is a generally recognised principle of law under which parties who are prevented from doing a thing in Court on a particular day, not by any act of their own, but by the Court itself, are entitled to do it at the first subsequent opportunity.

Sambasiva Chari v. *Ramasami Reddi* 179

REVENUE RECOVERY ACT (MADRAS) ACT II OF 1864, s. 37—*Tender of full amount of arrears of Revenue—Sale for arrears accrued since attachment:*

When a defaulter, whose land has been attached and is being brought to sale for arrears of revenue, tenders the full amount of the arrears of revenue on account of which the land was attached, together with interest and charges under Revenue Recovery Act, 1864, section 37, the Collector is bound to stay the sale. When, therefore, a Collector, notwithstanding such tender, proceeded to sell on the ground that arrears had accrued between the date of attachment and the date of tendor:—*Held*, that the sale was invalid.

Secretary of State for India v. *Rajah Goundar* 5

2. ——————————————————————ss. 38, 59—*Sale for arrears of peishcush—Material irregularity, or mistake in conduct of sale—Grounds for setting sale aside—Posting notice of sale in Collector's office—Jurisdiction of Civil Courts:*

A person whose application that a sale of land may be set aside under section 38, of the Revenue Recovery Act II of 1864 (Madras) is refused by a Collector, is a person aggrieved within the meaning of section 59 of that Act, and is entitled to seek redress in a Civil Court; and a Civil Court has jurisdiction to entertain such a suit and may set aside such a sale. When a party seeks to set aside a sale in a Civil Court on the ground of material irregularity or mistake in the conduct of the sale, he must establish, as in proceedings under section 38, that substantial injury has been caused by such irregularity or mistake. A Civil Court cannot cancel the sale unless such substantial injury has been established. The words "except as otherwise is hereinafter provided," which occur in clause (1) of section 38, refer to the action which the Collector is empowered to take *suo motu*, under clause (3) of the same section, and have no relation to the remedy provided by section 59. Direct evidence is not necessary to connect inadequacy of price realised with a material irregularity, where the latter has been proved: and the relation of cause and effect between the two may be inferred where such inference is reasonable. But where the only irregularity shown was an omission to display the notice of sale in the Collector's office, and there was no evidence to show that this affected the attendance of buyers at a place many miles distant, where the sale actually took place, the inadequacy of price being susceptible of other explanations:—*Held*, that it was not shown that the irregularity referred to had caused substantial loss and that there was therefore no ground for setting the sale aside.

Bommayya Naidu v. *Chidambaram Chettiar* 440

SPECIFIC RELIEF ACT—ACT I OF 1877, ss. 10, 11—*Civil Procedure Code—Act XIV of* 1882, *s.* 208—*Limitation Act—Act XV of* 1877, *sched. II, art.* 49—*Claim to recover goods in hands of third parties—Alternative claim for value as compensation:*

In execution of a decree obtained by the defendants against one M in the Court of Small Causes, certain goods were attached, to which plaintiff preferred a claim. That claim being disallowed, plaintiff filed in the City Civil Court, Madras, a suit for and obtained a declaration of his title to the goods, but prior to the date of the decree, namely, in October 1895, the goods attached had been sold by the Court of Small Causes, and certain third parties had become purchasers thereof. On plaintiff, in December 1897, suing "for the recovery of the goods or their value as compensation":—*Held*, (1) that the goods not being in the possession or under control of the defendants, plaintiff was not entitled to a decree for their recovery in specie: and that plaintiff's only remedy was by way of damages for the wrongful taking of his goods at the instance of the defendants; and (2) that the suit being framed for the recovery of specific moveable property was governed by article 49 of schedule II of the Limitation Act, 1877, and was therefore not barred by limitation. The alternative prayer for the value of the goods as compensation must be read as ancillary to the main relief asked for with reference to section 208 of the Code of Civil Procedure and did not alter the character of the suit or bring it within any other category of the schedule.

Murugesa Mudali v. *Jotheram Davay* 478

2. ——————————————————————s. 42—*Separate registration and assessment of villages alienated from zamindari—Regulation XXV of* 1802 (*Madras*), *s.* 8—*Assessment of Land Revenue Act (Madras)—Act I of* 1876—*Invalid order of Government—Declaratory decree—Construction of agreement:*

By the effect of sections 5 and 6 of the Madras Act I of 1876 the decision of the Collector, in a case within his jurisdiction, whether for or against separate registration of a portion alienated from a zamindari, when once duly sanctioned as provided by that Act, can only be questioned in a Civil Court. Under sections 7 and 8, the apportionment of the assessment may be appealed from the Collector to the Board of Revenue, and power is reserved to the Governor in Council to order re-adjustment of the separate assessment if fraud or material error should appear. Separate registration, on the other hand, is a matter of private right. The grantee of the perpetual lease of a village, alienated thereby from a zamindari, sued for a declaration of the invalidity of an order of the Government, inasmuch as it directed the cancellation of the Collector's order, after sanction by the Board, for the separate registration of the village:—*Held*, that this declaration should be decreed. The objection that the suit was contrary to the law enacted in section 42 of the Specific Relief Act, 1877, was not sustainable. No further relief could have been required by the plaintiff. The effect of the declaration itself, for which he had sued, would be sufficient to maintain the Collector's original order, which was valid in law,

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while the order of the Government directing its cancellation was not legal and was void. Nor was the suit defective for want of parties. Another suit, heard on appeal with the above, having been brought by the lessees of the entire zamindari, against the same grantee, raised the question,—what was the obligation entered into by him in respect of payment of the revenue upon separate registration and separate assessment of the village. This involved the construction of terms in the documents entitling the grantee to the village, and these, according to the plaintiffs, obliged him to pay a fixed sum to the zamindari :—*Held*, that he was only liable, after the registration and assessment, for burdens lawfully incident to the separate holding, and that they were to be discharged by direct payment by him to the Collector.

Robert Fischer v. *The Secretary of State for India in Council* 270

3. ———————————————— **ss. 42, 54**—*Injunction—Property in word—Use of word to which special meaning has become attached—Dharmakarta :*

The vicharanakarta of a number of temples held a sanad from Government in which two of such temples were named and the others included in the word "vagaira,"—(meaning literally "et cetera," or "and others"). The dharmakarta of the said two temples and of three minor ones only, having limited rights and duties, and being in many respects subordinate to the vicharanakarta, had, in pursuance of immemorial custom, used a seal in connection with his office, which had never borne more than a single figure, without legend. He had now made and used in the conduct of temple affairs a new seal, bearing the same figure, but with the legend "Tirumalai, Tirupati vagaira devastanam dharmakarta" added to it. On the vicharanakarta suing for a declaration and for a perpetual injunction to restrain the use of a seal containing such words :—*Held*, that although the legend might in a sense be accurate in representing what the defendant actually was, and the vicharanakarta had no property in the word "vagaira," yet the defendant should be restrained from using it upon the seal, since from the manner in which that word had been used in the sanad of plaintiff's appointment to cover the thirty minor temples connected with the two main temples, a special meaning had become attached thereto when used in connection with the two principal temples; and since the object of the dharmakarta in using it was to assert an extension of his rights and to claim a position co-extensive with that of the vicharanakarta, which, in fact, he did not possess.

Sri Sadagopa Ramanuja Pedda Jiyangarlu v. *Sri Mahant Rama Kisore Dossjee* 189

4. ———————————————— **s. 54**—*Injunction—Remedy in damages :*

Under the Specific Relief Act, 1877, section 54, the Court may grant a perpetual injunction against a defendant who invades or threatens to invade a plaintiff's right, in cases there specified, and, *inter alia*, when the invasion is such that pecuniary compensation would not afford adequate relief : The rule so laid down differs from the rule upon which the decisions are based in English law. In the latter the right to an injunction is a *primâ facie* right to which a plaintiff is entitled on proof that material injury has been sustained, provided that no circumstances are disclosed to deprive him of that *primâ facie* right. Under the Specific Relief Act an injunction is not to be given when the remedy in damages is considered adequate.

Boyson v. *Deane* 25

STAMP ACT—ACT I OF 1879, ss. 5, 11, 18, 34—"*Chargeable with duty*"—*Promissory note executed out of British India—Insufficient stamp :*

A suit upon a promissory note which had been executed out of British India was dismissed on the ground that the note was insufficiently stamped, and that it could not be admitted in evidence on payment of the duty chargeable under section 34 of the Indian Stamp Act. On a petition

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being preferred for the revision of the order of dismissal :—*Held*, that section 34 of the Stamp Act did not render the document inadmissible in evidence, that section being applicable only to an instrument which is "chargeable with duty." There is no provision of law which requires a promissory note executed out of British India to be stamped before it is sued on or used in Court, where the holder of the note has not done any of the acts referred to in sections 5 and 18 of the Act, and, in consequence, the obligation to stamp has not arisen.

Mahomed Rowthan v. *Mahomed Husin Rowthan* 337

2. ———————————————— **Sched. I, art. 44** (*a*)—*Mortgage—Consideration :*

A kanom deed is liable to stamp duty as a mortgage only, and in calculating the consideration, the ascertained amount of compensation for improvements paid at the landlord's request by the incoming to the outgoing tenant must be included.

Reference under Stamp Act, s. 46 164

SUCCESSION CERTIFICATE ACT—ACT VII OF 1889, s. 4—*Hindu Law—Suit by person claiming property of undivided family by right of survivorship—Succession Certificate.*

Where a plaintiff claimed by right of survivorship to recover money due on a mortgage bond which had been executed by the defendants in favour of the former managing member of the plaintiff's undivided family :—*Held*, that the Succession Certificate Act did not apply and that plaintiff need not produce a succession certificate under that Act.

Pallamraju v. *Bapanna* 380

2. ———————————————— **s. 4** (1), (*a*)—*Debt—Suit for account of share of deceased partner :*

A Muhammadan, being the son of a deceased member of a firm, brought a suit as his legal representative against the surviving partners praying for an account of the partnership assets and for payment to him of the amount which might be found due to the share of the deceased. The plaintiff had neither letters of administration nor a succession certificate :—*Held*, that the plaintiff's claim, being unliquidated, was not a debt within the meaning of Succession Certificate Act, 1889, section 4 (1), (*a*).

Sabju Sahib v. *Noordin Sahib* 189

TOWNS NUISANCES ACT (MADRAS)—ACT III OF 1889, s. 3, cl. 10—*Penal Code—Act XLV of* 1860, *ss.* 65, 67—*Imprisonment in default of fine :*

An accused having been convicted of an offence under section 3, clause 10, of the Towns Nuisances Act (Madras), 1889, and sentenced to pay a fine of Rs. 8 and in default of payment to undergo simple imprisonment for a week :—*Held*, (1) that section 67 of the Indian Penal Code refers solely to cases in which the offence is punishable with fine only; and has no application to offences punishable either with imprisonment or with fine, but not with both; such sentences are governed by section 65 of the Indian Penal Code; and (2) that the sentence of imprisonment in default should not exceed one-fourth of the maximum term of imprisonment provided for the offence.

Queen-Empress v. *Yakoob Sahib* 288

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 35—*Guardians and Wards Act—Act VIII of* 1890, *ss.* 29, 30—*Mortgage by guardians on estate of minor—"Previous permission of the Court"—Contract Act—Act IX of* 1872, *s.* 64 :

Guardians duly appointed under the Guardians and Wards Act, 1890, having mortgaged property belonging to a minor to enable them to discharge debts binding on his estate, the mortgagee sued to recover the

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amount of principal and interest due. The necessity had been urgent, the terms of the deed fair, and the money had been duly applied; but the guardians had not obtained the sanction of the Court as directed by section 29 of the Guardians and Wards Act, 1890. On its being contended that the mortgage was invalid and incapable of being enforced:—*Held*, that a mortgage so executed was not void but only voidable; and that the defendant was entitled to avoid the mortgage but only on the condition of restoring any benefit received by him thereunder to the person from whom it had been received. The fact that the person who had received the benefit was the defendant, did not alter his position.

Sinaya Pillai v. *Munisami Ayyan* 289

2. ——————————————————————ss. 60, 68, 72, 74, 75, 95—*Advance by mortgagee to pay off prior lien on mortgaged property—Suit against purchaser of property to recover amount so advanced—Charge on the mortgaged property:*

Plaintiff's undivided brother had advanced money on a usufructuary mortgage bond to enable the owners of certain property to obtain possession of it from one in whose favour a lien had been decreed to subsist. The money not having been so applied, the holder of the lien attached the property and applied to the Court for its sale. To save the property from being sold, plaintiff's said brother further paid the amount of the lien into Court; and at about the same time the mortgagors sold the property to defendant. Plaintiff's brother had never obtained possession of the property, and had since died. Upon plaintiff suing to recover (in addition to the mortgage amount, liability for which was not disputed), the amount of the lien so paid into Court to save the property from sale:—*Held*, that inasmuch as plaintiff could only succeed by showing that by such payment a charge was created upon the land (the money not having been paid at the request or for the benefit of the defendant) the suit must fail. There is no provision in the Transfer of Property Act to support the proposition (involved by the plaintiff's suit) that a second mortgagee may, by a transaction between himself and the first mortgagee, without knowledge or concurrence on the part of the mortgagor, acquire a new right over the mortgaged property. *Per* SUBRAMANIA AYYAR, J.—That as against the mortgagors, plaintiff would have been entitled to add the sums paid by him to the prior incumbrancer to the mortgage amount. But as the mortgage was usufructuary and plaintiff had never obtained possession, he had acquired no charge on the mortgaged property for the money recoverable by him under section 68 of the Transfer of Property Act. The amount sought to be added thereto consequently stood on a similar footing, and the plaintiff's contention that a charge in respect of it existed in his favour was unsustainable.

Perianna Servaigaran v. *Maruda'nayagam Pillai* 332

3. ——————————————————————s. 60—*Suit to redeem entire mortgage by purchaser of equity of redemption of a portion—Indivisibility of mortgage:*

The mortgagors of four items of property originally mortgaged for an entire sum sold the equity of redemption of one item to the plaintiff who now sued the mortgagee to redeem the whole of the four items:—*Held*, that he was entitled so to do. A mortgage for an entire sum is from its very purpose indivisible; and that character of indivisibility exists with reference not only to the mortgagee, but also to the mortgagor; save by special arrangement between all the parties interested, neither mortgagor nor mortgagee, nor persons acquiring a partial interest through either, can obtain relief under the mortgage except in consonance with that principle of indivisibility.

Muthasanan Nambudri v. *Parameswaran Nambudri* 209

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——————————————————————ss. 66, 68—*Decree for sale on mortgage in suit against Hindu father—Suit by son for declaration that decree not binding on his share:*

A decree having been obtained against a Hindu father in a suit on a bond hypothecating family property, the sons sued for a declaration that the decree was not binding on their share on the grounds that they had not been made parties to the suit, and that the debt had been contracted by the father for immoral purposes:—*Held* (not following the decision of the majority of the full Bench in *Bhawani Prasad* v. *Kallu* (I.L.R., 17 All., 537)), that the true rule as to the effect of section 85 of the Transfer of Property Act, in cases in which a decree is obtained against a Hindu father without making his sons parties to such a suit, is laid down in *Ramasamayyan* v. *Viraswami Ayyar* (I.L.R., 21 Mad., 282).

Palani Goundan v. *Rangayya Goundan* 207

5. ——————————————————————s. 87—*Decree for foreclosure—Mortgagor's application for extension of time:*

In a suit on a mortgage a decree for foreclosure was passed, a period of three months being fixed for the discharge of the mortgage-debt. The mortgagor having made default, the decree-holder applied for and was placed in possession of the property. The mortgagor, to whom no notice had been given of the decree-holder's application, then applied for and obtained an extension of time for payment, and he made the payment and recovered possession:—*Held*, (1) that the mortgagee was entitled to appeal against the order; (2) that the order was right since no order absolute of foreclosure had been made after notice to the mortgagor.

Narayana Reddi v. *Papayya* 133

——————————————————————s. 88—*Civil Procedure Code—Act XIV of* 1882, *s.* 310*A—Extension of decrees—Application to set aside sale of mortgaged property:*

Section 310A of the Code of Civil Procedure applies where a sale of immoveable property has taken place under a mortgage decree, so as to enable the owner of such property who duly complies with its provisions to have such sale set aside. Where the owner of immoveable property applies under that section to have a sale of property set aside, he is under a liability to deposit a sum equal to five per cent. on the purchase money, for payment to the purchaser, even where the land has been purchased by the decree-holder.

Tirumal Rao v. *Syed Dastaghiri Miyah* 286

——————————————————————s. 90—*Civil Procedure Code—Act XIV of* 1882, *s.* 244—*Mortgage of annuity—Sale of attached property at instance of mortgagee—Right of son not party to suit to redeem his share—Hindu Law—Rights of Hindu debtor's son after attachment and sale:*

In 1848 an annuity had been settled on plaintiff's ancestor and his heirs in consideration of his withdrawal from a suit for partition then pending. In 1878 plaintiff's father and others then enjoying the annuity executed a bond for money due by them, mortgaging their rights under the said annuity. Instalments due under the bond having fallen into arrears, a suit was brought, in 1889, in respect of them, and a decree obtained, which contained a provision that the right to the annuity should be liable to be proceeded against for the amount so due. Plaintiff was born in 1891. In 1893 an application was made for the issue of a proclamation of sale, and a sale ensued and a certificate was given to the purchaser, who was the decree-holder. Plaintiff having instituted this suit to set aside the said sale or to have it declared that it did not affect his right under the said annuity:—*Held*, (1) that if there was in fact a decree for sale, plaintiff, as son of the judgment-debtor, born after the date of the decree, though

before the sale, could not question the sale; nor would any right of redemption be left to the *plaintiff*; (2) that inasmuch as the decree was, on its true construction, not a decree *for sale*, the case was one of attached property being sold at the instance of the mortgagee in execution of a money decree, and so within the prohibition of section 99 of the Transfer of Property Act. The conditions under which a sale of mortgaged property is permissible under that section are not satisfied unless there is a decree for sale; and in the absence of such decree the sale is prohibited; (3) that although a sale in contravention of the section is not absolutely void for all purposes, it is at least void against all persons who were not parties to the suit in which the decree for money was obtained; (4) that the rights of a Hindu debtor's son may be concluded by a proper mortgage decree and sale thereunder, or, if there is no *mortgage*, by a decree for money and sale of the attached property, but they are not affected by a sale brought about in defiance of section 99; (5) that the suit was not barred by section 244 of the Code of Civil Procedure; and that plaintiff was entitled to a decree for the redemption of his share.

Muthuraman Chetti v. *Ettappasami* 8

8. ——————————————————s. 99—*Civil Procedure Code—Act XIV of* 1882, *s.* 244—*Sale by mortgagee in execution of decree*:

Property subject to a mortgage having been sold by the mortgagee as holder of a decree against the mortgagors, a separate suit was brought by the mortgagors to set aside the sale as being in contravention of section 99 of the Transfer of Property Act. On objection being taken that the suit was not maintainable, the matter being one for determination in execution proceedings under section 244 of the Code of Civil Procedure:—*Held*, (1) that although the sale was contrary to the provisions of section 99 of the Transfer of Property Act, that section being for the benefit only of a particular class of persons, namely, those concerned with a right to redeem mortgaged property, such a sale was not void but voidable; (2) that the question being one arising between the parties to the suit wherein the sale was made, and relating to execution, could not be raised and decided in a suit, but should be raised and tried only in execution proceedings taken under section 244 of the Code of Civil Procedure, and the sale set aside if such relief were not, for any reason, barred; (3) that the sale having been confirmed, such confirmation was final, and precluded the mortgagors from seeking the relief to which they would otherwise have been entitled; and (4) that, notwithstanding such sale and confirmation, the mortgagors might not be precluded from suing to redeem the mortgaged property on payment of the amount given credit for by the mortgagee in respect of the sale.

Mayan Pathuti v. *Pakuran* ... ...

9. ——————————————————s. 135—*Sale of actionable claim—Mortgagee by assignment—Assignee of prior lien*:

The assignee of a mortgagee obtained a decree for the principal and interest due under the mortgage, subject to a prior lien of the appellant. The appellant's prior lien had also been acquired by assignment, the consideration for which was proved to have been Rs. 575, though it purported to have been a much larger sum. On the appellant contending that section 135 of the Transfer of Property Act did not apply so as to prevent his claiming a lien for the larger sum:—*Held*, that the appellant was only entitled to a lien for the price paid by him for the assignment.

[illegible]*ha Ayyar* 301