
12

THE INDIAN LAW REPORT

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.

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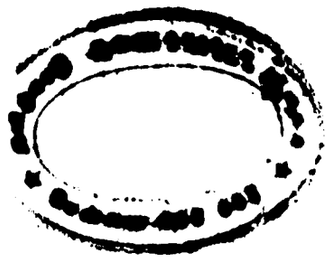
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JUDGES OF THE HIGH COURT.

1ST JANUARY—31ST DECEMBER 1900.

CHIEF JUSTICE.

Hon'ble Sir CHARLES ARNOLD WHITE, *Kt.*

PUISNE JUDGES.

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„ Mr. J. E. P. WALLIS (*from 22nd March* 1900).

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THE

INDIAN LAW REPORTS,

Madras Series.

PRIVY COUNCIL.

ANNAPURNI NACHIAR (DEFENDANT NO. 2), APPELLANT,

v.

FORBES AND MINAKSHI SUNDARA NACHIAR
(PLAINTIFF AND DEFENDANT NO. 1), RESPONDENTS.

P.C.*
1899.
June 23.
July 22.

[On appeal from the High Court at Madras.]

Hindu Law—Adoption—Preference of the adoptive mother, in the inheriting the family estate through the adopted son, over a senior co-wife.

A Hindu, having two wives, adopted a son in conjunction with the co-wife who was the junior in marriage of the two, having chosen her to be present at the adoption with himself. The husband next died; and after him the adopted child, having inherited the impartible family estate, also died. The two widows survived them both:

Held, affirming the decisions of the Courts below, that the junior co-wife, having taken part in the adoption by her husband at his selection, inherited the impartible family estate upon the death of the adopted son, in preference to the co-wife who was senior in marriage, but who had not been conjoined in the adoption.

Kasheeshuree Debia v. *Greesh Chunder Lahoree* ((1864) W.R., (Sup. Vol.), 71), referred to and approved.

APPEAL from a decree (10th April 1895) of the High Court, affirming a decree (25th November 1893) of the District Judge of Tinnevelly.

The plaintiff in the suit, now the first respondent, was the Collector of Tinnevelly, Agent of the Court of Wards, in possession of the impartible zamindari named Uthumalai. The first defendant, now the second respondent, was Minakshi Sundara Nachiar,

ANNAPURNI NACHIAR v. FORBES.

one of the two widows of the late Irudalaya Marudappa, Zamindar of Uthumalai; the other defendant, now the present appellant, having been Annapurni Nachiar, the other of the two widows of the zamindar.

This suit was instituted by the Collector against both the co-widows in order to their having to establish by interpleader, under section 470 of the Code of Civil Procedure, which of the two should be held to inherit the impartible estate from a son whom their late husband had adopted shortly before his death. The proceedings accordingly were carried on throughout between the two co-widows.

Irudalaya, the husband, died on the 12th August 1891, having on the preceding 12th July adopted as his son a child, Navanitha Krishna Marudappa, who died on the 16th November following, aged about two years. The Collector took charge of the estate on behalf of the child before he died.

In carrying out the adoption on the 12th July 1891 the zamindar acted in conjunction with Minakshi Sundara Nachiar, the junior in marriage of the two co-wives, having chosen her to be present at the adoption. Annapurni was not conjoined therein.

The question for decision on this appeal was whether the High Court had been right in maintaining the judgment of the first Court that the junior wife, because she had been chosen to take part in the adoption and had done so, was entitled to inherit from the adopted son in preference to her co-wife, the junior being for that reason regarded as the adoptive mother.

Both the Courts below, Original and Appellate, concurred in finding that Annapurni Nachiar was the first wife, or Pattabha Sri; and that Navanitha Krishna was lawfully adopted by the late zamindar in conjunction only with his junior wife whom he chose to be present. The admission was recorded by the first Court that in the event of its being decided that the adoption was valid succession was to be traced from the adopted son and not from Irudalaya. The judgments of the Judges of the High Court (SHEPHARD and BEST, JJ.) are reported at length in I.L.R., 18 Mad., 27.

Mr. *J. D. Mayne*, for the appellant, relied on the following principal points:—According to the theory of Hindu Law in such an adoption equal rights were conferred thereby on all co-wives to be regarded as adoptive mothers. The right therefore of the

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appellant, as senior wife, should have received due effect; and she, and not the junior wife, should have been held entitled to inherit from the adopted son. The Courts below had been wrong in holding that Minakshi, the junior wife, in virtue of her having alone as a wife shared in the act of adoption by the husband acquired a status in regard to the adopted son which annulled the superior right of inheritance attaching to the seniority in marriage of Annapurni. In adoption the husband alone adopted. The co-wife having been associated with him, without that association having added anything effective to the ceremony, and not being in the least degree necessary, the argument was that no advantage was obtained by her from her being conjoined with the husband on the occasion. There appeared no authority for the proposition that a junior co-wife derived a right to be preferred, in the inheritance from the adopted son, over a senior co-wife, from the fact of her having been chosen to be present at the adoption. The question resolved itself into whether the selection of the junior co-wife to be present, without her presence having any effective operation, altered the right of the senior co-widow to inherit from the adopted son in preference to the other. It was submitted that there was no sufficient authority for the decision now appealed from, and on this subject the following authorities were cited and examined:—

Vasishtha and Baudhayana in the 'Sacred Books of the East,' volume XIV, pages 75 and 334, respectively; 'Dattaka Mimamsa,' section I, verse 23; section VI, verse 46; 'Dattaka Chandrika,' section III, verse 17; Manu, chapter IX, sloka 183; Colebrooke's 'Digest of Hindu Law,' volume II, pages 250–253, and *ibid*, chapter IV, section 8, verse 273; 'Principles and Precedents of Hindu Law' by W. H. Macnaghten, volume I, Preliminary Remarks, pages 10 to 13; *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra*(1); *Mahashoya Shosinath Ghose* v. *Srimati Krishna Soondari Dasi*(2); *Pudma Coomari Debi* v. *The Court of Wards*(3); *Rungama* v. *Atchama*(4).

The contention was that when once the adoption had been made the adopted boy occupied the same position in regard to all

(1) (1883) L.R., 10 I.A., 138; I.L.R., 10 Calc., 232.
(2) (1880) L.R., 7 I.A., 250; I.L.R., 6 Calc., 381.
(3) (1881) L.R., 8 I.A., 229; I.L.R., 8 Calc., 302.
(4) (1846) 4 M.I.A., 1.

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the co-wives of the adopting father, and they to him. He cited W. H. Macnaghten's 'Hindu Law,' volume II, page 62; F. W. Macnaghten's 'Considerations on Hindu Law,' page 171, and *ibid*, Appendix, pages 10, 11; West and Bühler's 'Hindu Law,' 3rd edition, pages 1181 and 1182; and referred to the later edition of Jaganatha's 'Digest', volume II, Chapter IV, section 8, verse 273. And he reviewed *Kasheeshuree Debia* v. *Greesh Chunder Lahoree*(1) and *Teencowree Chatterjee* v. *Dinonath Banerjee*(2), cited in the judgments of the Courts below.

Mr. *J. Jardine*, Q.C., and Mr. *J. H. A. Branson*, for the respondent Minakshi Sundara Nachiar, argued that in the texts of Hindu law, and in the works of the authorities on the subject, there was nothing of weight contrary to the proposition that a husband, in adopting a son, might favour one of several co-wives more than another, and, if he chose, place her in the relation of adoptive mother to the adopted son. The theory of adoption by Hindu law did not require that if there should be several co-wives they should all be deemed to be adoptive mothers, although the father by adoption might have conjoined one of them with himself in carrying it out. Where all was fiction it was perhaps not cogent to distinguish the impossibility of there being several such parents in reality. But what was argued was that the High Court had rightly concluded it to be justified, in principle and by authority, to hold that where a husband has associated one of his co-wives with himself in adopting a son, that co-wife is to be considered to be alone the adoptive mother.

They referred to Manu, chapter IX, sloka 183, and to the passages in the works of Sir W. H., and of Sir F. W., Macnaghten, already mentioned, and pointed out that little was to be obtained from either the 'Dattaka Mimamsa' or the 'Dattaka Chandrika' on this point; the plurality of wives being hardly brought into connection with the subject at all. They referred to the Tagore lectures, 1888, of Golapchandra Sarkar on 'Adoption,' pages 215, 217, and relied on *Kasheeshuree Debia* v. *Greesh Chunder Lahoree*(1).

Mr. *J. D. Mayne* replied.

Afterwards, on the 29th July their Lordships' judgment was delivered by Lord HOBHOUSE.

(1) (1864) W.R., (Sup. Vol.), 71.

(2) (1865) 3 W.R., (C.R.), 40.

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JUDGMENT.—This suit is in form instituted by the Court of Wards; in substance it is one between the two widows of Irudalaya, late owner of the impartible estate of Uthumalai, who have interpleaded one another. They were both married on the same day; but it has been found that the appellant is the senior wife of the two. On the 12th July 1891 Irudalaya adopted a boy called Navanitha: on the 12th August 1891 he died; and on the 16th November 1891 the boy died, being then about two years old. The Court of Wards was then in possession of the estate as his guardian, and their only interest is to ascertain his heir.

The appellant's claim is rested on the fact that she was the senior wife; the respondent Minakshi's on the fact, which has been found by both Courts, that the boy was adopted by Irudalaya in conjunction with her and not in conjunction with the appellant. The District Judge held that the respondent was entitled to the estate as adoptive mother and nearest heir of the last holder Navanitha, and his judgment was affirmed by the High Court. That opinion is challenged in the present appeal. There has been a great deal of dispute in the Courts below upon matters of fact, but none are in dispute now. The disputed question of law is thus stated by the District Judge:—"Whether, when a man "having more than one wife, adopts a son in conjunction with one "of them only, the other wives acquire the same legal status with "respect to the adopted son as the wife who joins her husband in "making the adoption?"

There is only one reported decision directly involving the proposition in question. It is to be found in *Kasheeshuree Debia* v. *Greesh Chunder Lahoree*(1). The plaintiff Kasheeshuree was the first wife of Kali Kant. His second wife was called Mohini. Kali Kant adopted a boy in conjunction with Mohini and without the concurrence of the plaintiff. After the deaths of Kali Kant and of Mohini and of the boy, the question arose whether the heir of the boy was the plaintiff, or the defendant who was Kali Kant's nephew and nearest collateral. It was argued for the plaintiff that both wives were equally adoptive mothers, and both entitled to inherit in preference to a collateral. The Court (consisting of Bayley and Jackson, JJ.) stated their opinion that this position was not borne out by Hindu Law and Precedent; and after

(1) (1864) W.R., (Sup. Vol.), 71.

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subjecting the cited authorities to examination they decided in favour of the defendant. So that according to those experienced Judges, when a man has selected one of his wives to adopt a boy in conjunction with him, other wives who do not participate in the act are so completely excluded from inheritance to the boy, that a collateral member of the family shall be preferred to them. That the other wives should be postponed to the one who joined in making the adoption is a less sweeping conclusion, but clearly involved in the wider one reached by the Bengal High Court.

Mr. Mayne has contended for the appellant that this Bengal decision is not warranted by law. He referred to sacred texts of Rishis, Manu and Baudhayana, for some fundamental principles of adoption, and to show that the good effects produced by the son of one wife enure to the benefit of other wives of the same man. But these texts are very far from showing that a wife who receives in adoption, and another who does not, stand on an equal footing as regards inheritance to the adopted boy. If applied to inheritance in the way contended for by the appellant, such texts would prove too much; they would be equally good to prove that a natural mother and her co-wife stand on an equal footing, which is clearly not the case. There is no advantage to be got from more minute criticism of these texts, nor indeed of the texts cited from the later books, 'Dattaka Chandrika' and 'Dattaka Mimamsa,' which are addressed to the question whether a wife's assent is necessary to an adoption, and not to this question of inheritance.

A passage is quoted from Colebrooke's 'Translation of Jagannadha' (Digest, 4th edition, volume II, pages 252-53) in which the author considers the difficulty (seeming difficulty he calls it) occurring in oblations of funeral cakes to a maternal grandfather, either when the offerer has none from having been adopted by an unmarried man, or when he has more than one from having been adopted by a man with more than one wife. Both the difficulty and the plan suggested for meeting it are very abstruse, and so far as their Lordships can see, of a very formal nature; but the whole discussion clearly has reference to the religious aspect of the situation.

The authority most relied on for the appellant is a passage in the Preliminary Remarks of Sir W. H. Macnaghten in his work on Hindu law. It is rather curious that he approaches the question by way of illustrating his opinion that the Hindu law is generally

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simple and free from difficulty. He supposes a case. A man dies childless leaving three widows. He gives permission to one to adopt a son. The adopted son dies without issue leaving the three widows surviving. To whom will the property go, to the widow adopting, or equally to the three? The law, he says, is silent. He then supposes an advocate of the adopting widow to admit that, if the husband had adopted, he could not have selected one of his wives as adopting mother and excluded the others from all maternal relation, but to contend that in the case stated the non-adopting widows were only stepmothers. He continues:—"The "reason is plausible but such is not the law. The three widows "are one and the same individual. The adopter has the privilege "of selecting the boy; but adoption once made, he necessarily "holds the same relation to all of them." This passage certainly gives the appellant a right to argue not only that the admission which Sir William puts into the mouth of the adopting widow's supposed advocate was deemed by him to be good law, but that he goes further and applies to the subject of inheritance the doctrine of Manu that all wives have male issue when one has it. This passage in Sir W. H. Macnaghten's preface is apparently the only authority in favour of the appellant. It must be taken with the respect due to his great reputation, but also with the drawback that he was avowedly giving his opinion on a hypothetical case of the first impression. He has no precise authority; the law, he says, is silent: he does not show by what process he arrived at his conclusion: and that which seemed to him so clear that it illustrated the perspicuity of the Hindu law has met with doubt and denial from others.

In fact Sir W. H. Macnaghten himself goes on (pages 12, 13 of his Preliminary Remarks) to make statements very difficult to reconcile with those which have just been quoted. He is speaking of a case in which a man leaving three widows has appointed one to make adoption:—"I here merely allude to the rights and "privileges accruing to the single widow from the simple fact of "her having made the adoption, independently of any intention "expressed or implied by the deceased, that such widow alone "should be considered as the mother of the adopted child. If he "declared this explicitly, the case would be different; or if such "may be reasonably gathered to have been his intention, from "some unequivocal indication of his will that his other wives shou

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"have no concern with the adoption. But the simple fact of his "having commissioned any one of the three to select the boy, "cannot be considered as sufficient to deprive the two others of "their maternal rights, or to debar them from taking the shares "to which they would have succeeded had no adoption taken "place." If both these passages are sound law we have as the result that a man may by a posthumous act give a preference to one wife which he cannot do when living.

Sir F. W. Macnaghten in page 171 of his treatise speaks of the adoption of a boy to a man who left three widows, with directions for joint adoption about which they could not agree. The Court selected a boy and then the question was which widow had the right to receive him? "The law is clear and was undisputed. "The boy could not be received by the three widows jointly. "He must be received by one of them—and would then be "considered as the son of the father and of the widow by whom "he had been received—about this there was not, because there "could not be, any dispute."

In the appendix of the same work, page 11, occur the answers of a pandit examined by the Court in the same case. Among those answers occur the following:—"Only one (widow) can adopt; "the three (widows) may agree upon the child to be adopted, but "only one of the widows can adopt." "The child becomes the "child of all three. The widow adopting him, if he should die "under age, she will be called the mother and the others the "stepmothers."

The actual decision, which was in favour of the senior wife, throws no further light on the question now before the Board. But here are opinions given on an actual case under judicial decision, and they are to the effect that the adopting widow would become the mother of the boy in a sense in which her co-wives would not be mothers, in effect that she would be in the place of a natural mother, which would lead to the conclusion that she was the boy's heir. Those opinions related to a case in which, so far as any action of their husband was concerned, the widows stood on an equality, and became unequal only by the ceremony of adoption after his death.

More recent text-books referring to the Bengal decision of 1864 have been cited to their Lordships, such as West and Bühler's 'Hindu Law,' 3rd edition, pages 1181, 1182, and Golapchandra

Sarkar on 'Adoption' (Tagore Law Lectures for 1888), page 153, and they were referred to by the learned Judges in the Courts below. They do not show that any dissatisfaction with that decision has been felt by Indian lawyers, but on the contrary state the law in accordance with it.

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It seems to their Lordships that the decisions in the Bengal case and in this case accord with principles well recognised as applicable to other points of Hindu law. Reference has been made to the text of Manu (chapter IX, sloka 183), in which he declares that if of several wives one brings forth a male child, all shall by means of that child be mothers of male issue. In the preceding sloka he declares that if among several brothers of the whole blood one have a son born they are all made fathers of a male child by means of that son. We must suppose that all take the spiritual benefits of male issue; but the law is clear that for the purposes of inheritance the natural mothers and fathers respectively are preferred. Again it seems not to be doubted that a man may authorise a single one of several wives to adopt after his death, or that she would on adoption stand in the place of the natural mother. If he can do that, it would be very capricious to deny him the power of selecting a single wife to join with him in his lifetime in adopting a boy, with the same effect on her relations with that boy. It is true that some rules of Hindu law, resting perhaps on religious tenets or ancient customs, appear to be quite arbitrary; but when this Board is asked to affirm a rule of that nature they require some cogent authority for it. It certainly is a reasonable law that the head of a family should be able to take action likely to prevent disputes between his widows relative to adoption and the consequences of it. To unite one wife with himself in adopting is one way; and it is satisfactory to find that besides the one direct judicial decision there is so much reason and opinion in its favour and so little against it. They hold that the High Court of Bengal in 1864 and the Madras Courts in this case have decided rightly, and they will humbly advise Her Majesty to dismiss this appeal. The appellant must pay the costs.

Appeal dismissed.

Solicitor for the appellant: Mr. *R. T. Tasker.*

Solicitors for the second respondent: Messrs. *Lawford, Waterhouse & Lawford.*

PRIVY COUNCIL.

P.C.*
1899.
June 29.
July 20.

INNASIMUTTU UDAYAN (DEFENDANT),

v.

UPAKARATH UDAYAN AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Madras.]

Limitation Act—Act XV of 1877, *sched. II, art.* 142.

A suit for the proprietary possession of land was defended on the ground of limitation, resting on the defendant's possession, displacing the plaintiff's case that her predecessor in title had possessed the land within twelve years before the suit.

The defendant had a possession which was admitted to have extended back for seven years before the suit. The documentary evidence showing that he had been in possession for more than five years immediately preceding those seven years was exactly similar to the evidence which accompanied his possession during that period. This evidence consisted of a series of documents such as were usually given to and received by the possessor of lands, and they extended throughout the period in dispute, going back far behind the twelve years which would bar.

It was not necessary to consider whether the burthen of proof was shifted merely by the seven years' admitted possession, as the additional evidence raised the inference that the same possession had continued for more than twelve years:

Held, that the burthen of rebutting this inference had not been discharged by evidence given by the plaintiff, while the evidence for the defendant had amply sustained the burthen originally laid upon him to show his twelve years' possession.

APPEAL from a decree (4th October 1895) of the High Court reversing a decree (7th March 1894) of the Subordinate Judge of Madura.

The plaintiff in this suit, filed on the 2nd November 1892, Savuri Ammal, who died while it was pending, and who was now represented by the eight respondents, sued for the proprietary right of lands in Madura. She claimed to be heiress on the death of her mother Avammal in 1884, since whose death the property had been, as was admitted, in the possession of the defendant. The relationship of the parties appears in the judgment of their Lordships, where the facts of the case are stated.

* *Present:* Lords WATSON, HOBHOUSE, Sir RICHARD COUCH and Sir EDWARD FRY.

The only question was whether the period of the defendant's possession, anterior to the death of Avammal in 1884, had been proved to have been long enough to make up the period required, viz., twelve years, to establish the bar of limitation.

The Subordinate Judge, on issues raising the question, found that Avammal had not had possession at any time, and that the defendant had been in possession for more than the twelve years; and decided that thus the plaintiff's suit was barred by limitation.

On an appeal by the plaintiff the High Court reversed this decision. They found that there was evidence that Avammal had been in possession till she died in 1884.

The defendant, Innasimuttu II, appealed.

Mr. *J. D. Mayne*, for the appellant, submitted that the High Court's decision was against the weight of the evidence as to the possession of Avammal; and that the decree should be set aside because the suit was barred by limitation.

The respondents did not appear.

Their Lordships' judgment was delivered by Sir EDWARD FRY.

JUDGMENT.—This is an action brought to recover an estate which was formerly in the possession of one Innasimuttu Udayan (a man of the same name as the appellant), who died many years ago. He had two sons; of these, one was Jacob, distinguished as Jacob I. This Jacob had a son, Jacob II, who appears to have died in the sixties, and is said by the appellant to have adopted him and to have left a will in his favour. The other son of the original Innasimuttu was Rayar, who, about 1820, was transported for some crime. He appears to have died sometime in the sixties, but whether before or after Jacob II is not shown. He left a widow, Avammal, who died in the year 1885. Savuri Ammal, the late plaintiff, in this action now represented by the respondents, was the daughter of Avammal, and claimed in some way (though in what way is not clear) through her mother. In the course of these proceedings it seems to have been admitted that the plaintiff had a title to maintain the action if she could get over the case made under the Statute of Limitations by the defendant who is the present appellant.

The question for decision is a question of fact, viz., has the appellant shown possession of the estate in question during twelve years before the 2nd November 1892, the date when this action

was commenced. The plaintiff herself in her plaint states that the appellant, after the death of Avammal in 1885, took possession of the property in question, and the appellant is sued as being in possession. The appellant's own statement is that he has been in possession from 1865 or 1870. It is not necessary to consider whether the mere fact of possession for seven years before suit throws on the plaintiff the burthen of showing when that possession began; for in the present case the admitted fact of possession is accompanied by a series of documents of the kind usually given to and received by the possessor of an estate, and bearing the appellant's name as the possessor of the estate, and that series of documents does not commence with the year 1885, but from dates covering the period in controversy; and it appears to their Lordships that this case might be decided on the short ground that the documentary evidence of possession, exactly similar in character to that which accompanies the admitted possession, goes back far behind the twelve years in question, that this throws on the plaintiff the burthen of rebutting the inference arising from the fact of possession accompanied by these documents, and that this burthen has not, in their Lordships' estimate of the conflicting evidence, been sustained by the plaintiff.

Their Lordships, however, are unwilling to decide the matter without a more detailed discussion of the evidence, especially as this case has been heard *ex parte*.

The estate in question included holdings in the following six villages:—(1) Aniki, (2) Yeranikottai, (3) Panjamari, (4) Nettendal, otherwise Sadir Nettendal, (5) Manakkudi or Chabram Manukudi, (6) Thiruppakottai, otherwise Tiruppakottai.

According to the plaintiff her mother Avammal was in possession of the estate on her death in 1885; the appellant's case is that the estate descended from the original Innasimuttu Udayan to Jacob I, then to Jacob II, and that on his death it fell into the possession of his adopted or quasi-adopted child the appellant, that it was managed by the appellant's father during his minority, and that then somewhere from 1865 to 1870 he entered into possession, and has so remained ever since.

The first class of documents which are produced by the vakil of the plaintiff consist of number chits showing the cultivation and collection of money in the four villages of Aniki, Yeranikottai, Panjamari and Nettendal; they all bear the name of Innasimuttu

Udayan as the possessor and they extend in a broken series from the year 1845 to the year 1870, and then they cease; these documents confirm the statement made by some witnesses that no mutation of names had taken place on the death of the original proprietor; but what is more noteworthy is the date at which the series of documents ceases, viz., 1870. If the appellant be correct that he got into possession at or about that date, the cesser of this stream of documents is perfectly natural; if, on the other hand, the story of the plaintiff were true that the appellant only got into possession on the death of Avammal in 1885, the absence of any document later than the year 1870 in the possession of the plaintiff is inexplicable.

The following sets of documents relating to the estate are produced by the appellant:—

First there are muchalkas or undertakings to pay a share of produce and a money rent in respect of Aniki, Yeranikottai and Panjamari given to the collectors, and extending in a broken series from 1877 to 1889; these are given in many cases to English civilian officers acting as assistant collectors in the Madura district; they purport to be signed in most cases by the appellant, in some cases by an elder brother, in one case by a younger brother, in two cases by his wife and in two cases by Michael Udayan his father, all on behalf of Innasimuttu Udayan. Now it may well be that the name of Innasimuttu Udayan appearing in the heading of these papers may have been continued without change from the original proprietor: but their Lordships hesitate to believe that the signatures to which they have referred would have been accepted by the civilian officers unless a living Innasimuttu Udayan had been in possession of the land in respect of which the obligation was accepted and the persons whom the appellant has described as his relatives had been known to the officials to be such relatives. The practice in such cases is described by Attavanai Pillai, the karnam of Aniki, which shows that muchalkas are accepted only from the pattadar or some person supposed to be able to act for him. These documents come from the right custody as they were filed in the District Court by a representative of the Ramnad zamindari under which the villages are held, and they appear to their Lordships to be evidence of much weight.

The next series of documents consists of pattas granted by the deputy collector or other person from time to time representing

the Ramnadz amindari in respect of the five villages of Aniki, Yeranikottai, Panjamari, Nettendal and Manakkudi. These are all, with one exception to be hereafter mentioned, granted to Innasimuttu Udayan as the proprietor; they extend, though in a broken series as regards Aniki, from 1877 to 1891; as regards Yeranikottai from 1877 to 1891; as regards Panjamari from 1877 to 1889; as regards Nettendal from 1878 to 1891, and as regards Manakkudi from 1879 to 1888. In the Nettendal series, however, there is a patta granted to Rayar Udayan, and this seems to correspond with the fact that one of the holdings in this village which the plaintiff sought to recover from the appellant is described as in the name of Rayar Udayan as pattadar. But the circumstances relative to this holding are not before us.

In 1877 some difficulties arose between the collector and the appellant in respect of the grant of pattas in the villages of Panjamari and Aniki, and from the documents before their Lordships it appears that in March 1877 the appellant succeeded, as pattadar of Panjamari, in obtaining a judgment for a new patta against the assistant collector; and in the following June a patta in respect of Aniki was offered to the appellant as being the person entitled to receive it and was refused by him on an objection as to its form.

Another class of documents consists of formal receipts given to the appellant on behalf of the Ramnad estate for rents in respect of the villages. These documents are, like all the others, not continuous, but they extend over the following periods: in relation to Aniki from 1886 to 1890; in respect of Yeranikottai from 1880 to 1890; in respect of Panjamari from 1878 to 1892; and in respect of Nettendal for 1879 to 1892. In all cases, therefore, except with regard to Aniki, they cover the disputed period, viz., from 1880 to 1885.

None of the documents hitherto referred to relate to the sixth village, Tiruppakottai. This village belongs to a mutt institution in which it is not usual to exchange pattas and muchalkas. But the accountant under the hakdar has produced accounts from the mutt of the hakdar which refer to various plots as in the name of Innasimuttu. This may be the name of the original proprietor, but the entries are at least consistent with the appellant's case.

The evidence of the native village officers standing alone may probably be of little weight, but as concurring with the series

of documents to which their Lordships have referred they do not regard it as negligible. They therefore take notice of the fact that the karnams of Aniki and Nettendal and the accountant for Tiruppakottai support the appellant's contention as to his possession of lands.

One other document is produced by the appellant, viz., a usufructuary mortgage of lands in Nettendal executed by him on the 13th April 1880.

Against this body of documentary evidence the plaintiff produced only evidence to which their Lordships attach little weight.

On this review of the evidence on both sides their Lordships are of opinion that the burthen of proving possession for twelve years before 2nd November 1892 which originally rested on the appellant has been amply sustained by him and they concur in the view of the Subordinate Judge that the muchalkas especially are very cogent evidence of the possession by the appellant for a stretch of time covering the period in dispute; and although they do not relate to all the six villages, yet as according to both sides the six villages were held together, they support the appellant's title to all the lands. Their Lordships are not able to accept as of much weight the evidence that the appellant came sometimes and assisted Avammal in the cultivation of the land, but even if this were the case their Lordships think that it does not explain or account for the existing body of documentary evidence.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the judgment under appeal, to dismiss the respondents' appeal to the High Court with costs and thereby to restore the judgment of the Subordinate Judge of Madura with a direction that all sums of money including costs which may have been paid under the judgment of the High Court at Madras be repaid, and with a further direction that, if possession of the lands in controversy has been delivered to the respondents, possession be restored to the appellant and mesne profits be paid by the respondents to the appellant. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellant: Mr. *R. T. Tasker.*

APPELLATE CIVIL.

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

1899. April 26.

KARUPPANNAN CHETTI AND ANOTHER (PLAINTIFFS), APPELLANTS,

BULOKAM CHETTI AND OTHERS (DEFENDANTS NOS. 1 TO 5 AND 8 TO 13), RESPONDENTS.*

Hindu Law—Sudras—Sons born of a kept woman entitled to equal shares with legitimate sons in partition, the father so desiring.

Sons born of a woman continuously kept by their father as a concubine (and whose connection with their father is neither adulterous nor incestuous), are, in the case of a Sudra's estate, entitled to equal shares with legitimate sons in a suit for partition, if it is the wish of the father that they should so participate. Clause 2 of section XII, chapter I, part II, of the Mitakshara, does not refer alone to the self-acquired property of the father.

SECOND APPEAL against the decree of S. Russell, District Judge of Madura, in Appeal Suit No. 407 of 1897, modifying the decree of T. Sadasiva Ayyar, District Munsif of Dindigul, in Original Suit No. 376 of 1896.

Suit for partition by first plaintiff and his son against first plaintiff's father (first defendant) and younger brothers and their sons. Defendants Nos. 8 to 13 were illegitimate sons of first defendant by a concubine who had lived permanently with him. The question was whether defendants Nos. 8 to 13 were entitled to any and what share in the partition. First defendant, the father, wished the illegitimate sons to share equally with the legitimate. The District Munsif referred to *Kirpal Narain Tewari* v. *Sukurmoni*(1), *Krishnayyan* v. *Muttusami*(2), *Parvathi* v. *Thirumalai*(3), *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing*(4), and *Chinnammal* v. *Varadarajulu*(5); Manu, chapter III, slokas 23 to 25, and chapter IX, sloka 179; and held that the son of a Sudra, born of a permanent concubine, is, strictly speaking, not an illegitimate son, but a legitimate aurasa son born of a

* Second Appeal No. 1437 of 1898.

(2) I.L.R., 7 Mad., 407.
(4) I.L.R., 18 Calc., 151.
(1) I.L.R., 13 Calc., 91.
(3) I.L.R., 10 Mad., 334.
(5) I.L.R., 15 Mad., 307.

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gandharva marriage. He found that defendants Nos. 8 to 13 were each entitled to half the share of a legitimate son at the partition of ancestral property. Plaintiff appealed, contending that the illegitimate sons were not entitled to any share at all, or at most to a smaller share. The illegitimate sons filed a memorandum of objections claiming full shares with the legitimate sons. The District Judge said:—"There is no direct ruling as to the share to be allotted to an illegitimate son when partition is sought to be enforced through the Court in the life time of the father. There is ample authority that the illegitimate sons are entitled to a half share on a division after the death of the father. I agree with a great deal of the relevant matter which the District Munsif has written as to the fact that the illegitimate sons are entitled to a share. In my opinion this case should be decided on the following text:—'The son begotten by a Sudra on a female slave obtains a share by the father's choice, or at his pleasure. But after the demise of the father if there be sons of a wedded wife, let these brothers allow the son of a female slave to participate for half a share, that is, let them give him half (as much as is the amount of one brother's) allotment'—Mitakshara, part II, chapter I, section XII, clause 2. This text is relied upon by the Bombay High Court—*vide Sadu* v. *Baisa*(1); also by the Privy Council in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing*(2). Both these cases refer to the rights of an illegitimate son after the death of his father. The text quoted settles the point. It equally settles what the right is during the father's life time. It is a full share at the father's pleasure. In the present case it is not denied—it is admitted, that the father's pleasure is that the illegitimate sons should share equally with the legitimate sons, and this is my decree in appeal." He modified the decree of the District Munsif and gave the illegitimate sons equal shares with the legitimate.

Plaintiffs preferred this second appeal.

Sivasami Ayyar for appellants.

Sundara Ayyar for respondents.

JUDGMENT.—It is found that the defendants Nos. 8 to 13 are the illegitimate sons of the first defendant by a woman kept by him continuously, and his connection with whom was neither adulterous

(1) I.L.R., 4 Bom., 37.
(2) I.L.R., 18 Calc., 151.

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nor incestuous. It is also found that the first defendant wishes that his illegitimate sons should take equal shares with his legitimate sons, the plaintiffs, in the partition.

Upon these findings the District Judge was perfectly right in holding that the illegitimate sons are entitled to full shares. There is no foundation whatever, for the suggestion that the Mitakshara, part II, chapter I, section XII, clause 2, refers only to the self-acquired property of the father. The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

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

1898. October 10, 18.

BEST AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

HAJI MUHAMMAD SAIT AND OTHERS (DEFENDANTS), RESPONDENTS.*

Negotiable Instruments Act—Act XXVI of 1881, ss. 79, 80—Interest on promissory note—No mention of interest or rate of interest in instrument—Indent of goods—Failure to take delivery and re-sale in consequence—Liability for loss.

Certain promissory notes, on which a suit was brought, were in the following terms :—"On demand we promise to pay——or order the sum of Rupees——"for value received." Plaintiffs claimed interest. On its being contended that where an instrument is completely silent about interest section 80 of the Negotiable Instruments Act, 1881, has no application, and no interest can be allowed :

Held, that the mercantile usage which would have enabled the Court to award interest on such an instrument prior to the passing of the Negotiable Instruments Act, 1881, has not been abrogated by that Act, though the interest that can now be awarded is limited by section 80 to six per cent. Section 80 governs, alike, the case in which interest, but no rate of interest, is mentioned in the instrument, and that in which interest is not mentioned. In the case of a note payable on demand, the date of the demand, and not that of making the note, is the date from which interest must be taken to run.

Plaintiffs had procured certain goods in pursuance of indents signed by defendants which provided that, in the event of defendants failing to take due delivery of the goods, plaintiffs should be at liberty to re-sell them on defendants'

* Original Side Appeal No. 24 of 1898.

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account and that defendants should pay to plaintiffs any deficiency arising from such re-sale. Goods were re-sold at a loss, and in a suit to recover such loss it was contended, in defence, that the property in the goods had not passed to the defendants and that plaintiffs' only remedy was by way of damages :

Held, that a clause such as that contained in the indent came into operation notwithstanding that the property had not passed to the buyers; and that plaintiffs were entitled to recover the deficiency arising from the re-sale.

APPEAL against the decree of Mr. Justice Boddam, sitting on the Original Side of the High Court, in Civil Suit No. 305 of 1897.

Suit for two sums of Rs. 11,958-6-9 and Rs. 6,521-4-0, respectively; the former in respect of nine promissory notes and interest, and the latter for losses sustained on the re-sale of goods indented by defendants through plaintiffs, and of which defendants had taken only partial delivery. By the indents in pursuance of which plaintiffs had ordered the goods for defendants, the latter undertook to take deliveries at specified intervals, and agreed to pay plaintiffs certain specified charges, together with interest at nine per cent. per annum on goods not duly taken. The indents also provided as follows :—"Should the dealers fail to take delivery as aforesaid the merchants shall be at liberty at such time or times after such failure as they shall in their uncontrolled discretion think desirable to re-sell on the dealers' account by public auction or private contract either the whole or any portion of the goods as shall not have been taken delivery of and the dealers shall forthwith pay to the merchants any deficiency arising from such re-sale with interest thereon at the rate of nine per cent. per annum until payment, together with all charges for godown rent and fire insurances up to and expenses connected with such sale and interest at the rate of nine per cent. per annum until such re-sale and shall forfeit any advantage which may arise from such re-sale and also any deposit made by them." Plaintiffs ordered and received the goods in packages branded with the shipper's mark, and placed them with other goods in their godowns for delivery to defendants as required, promissory notes being given by the latter as each delivery was taken. Twenty-seven packages which had not been taken were ultimately sold by plaintiffs under the provision in the indent, the said sum of Rs. 6,521-4-0 being made up of losses on such sale and charges. Interest was claimed at nine per cent. on the promissory notes. Defendants denied their liability in respect of such interest inasmuch as it was not provided for in the promissory notes, and

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they contended that it was not otherwise recoverable. With regard to the loss sustained by the re-sale of goods, defendants denied that the property in such goods had passed to them and claimed that the goods should not have been sold on their account, and that plaintiffs were not entitled to recover the loss sustained by such sale, or the charges connected therewith. The sixth issue dealt with the question of liability for interest on the promissory notes. The promissory notes were in the following terms:—"On demand we promise to pay Messrs. Best & Co. "or order the sum of Rs. ——— for value received." The judgment of the Court was that plaintiffs were not entitled to interest, and it proceeded as follows:—"As regards their claim on the promissory notes, the plaintiffs claim that they are entitled to the amount of these promissory notes and interest upon them at nine per cent. per annum. The notes themselves are on-demand notes and bear no interest. The plaintiffs, however, say that they are entitled to claim interest under section 80 of the Negotiable Instruments Act. This section says that where no rate of interest is mentioned, interest may be claimed. Here no interest at all is mentioned. The rate of interest is not omitted. So that the section does not apply at all. Had the Legislature intended that where interest is omitted it should be allowed, it could have said so, but it has not. It says where the 'rate' of interest is omitted. That applies in my judgment only to those cases where the note is drawn payable with interest without saying at what rate. In my opinion, therefore, the plaintiffs are not entitled to any interest upon these promissory notes." The third issue was:—"Did the property in any of the said goods pass to the defendants?" On this, his Lordship said:—"These twenty-seven packages of goods were re-sold by the plaintiffs in October 1897. As I have already said, the plaintiffs do not suggest that anything was done with the goods on their arrival to specially appropriate them to the defendants, but it was contended, though not with much force, that the fact of their bearing the shipper's mark when they were received and placed in the plaintiffs' godown was an appropriation sufficient to pass the property in them, though it was admitted by the plaintiffs' Counsel that had they been destroyed by fire in the plaintiffs' godowns the day before the plaintiffs re-sold them, the loss would have been the plaintiffs', and not the defendants'. I find as a fact that

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no property passed to the defendants in any of the twenty-seven packages of goods re-sold by plaintiffs. The plaintiffs nevertheless contend that they are entitled under the above set out clause to recover in this action from the defendants the difference between the indent price and the re-sale price and the interest and charges mentioned in that clause. At the time that I settled the issues I called the attention of the plaintiffs' Counsel to the decisions in the Calcutta Courts upon this clause and suggested that he should amend his plaint and claim damages for breach of contract, but he declined and, indeed, had any amendment been made, no evidence was tendered before me at the hearing to show the market price at any time of these goods so that I could not in any case have ascertained the damages. Until the property in the goods passed to the defendants the goods remained with the plaintiffs, and their only remedy against the defendants was to sue for damages for breach of contract and the proper measure of damages for breach of contract is the difference between the contract price and the market price at the time of breach. It was argued that there was no breach of contract until shortly before the re-sale in October 1897, but even if that were so, there is no evidence of what was then the market price. It is idle to suggest that the price obtained at a private sale is evidence of the market price. So far, therefore, as the plaintiffs' claim for the loss by re-sale is concerned, their action must be dismissed." Judgment was given for the amount due on the promissory notes (less a sum paid and a deficiency on one of the indents).

The plaintiffs preferred this appeal on the grounds, among others, that interest on the promissory notes, and the loss sustained by the re-sale should have been allowed. First and third defendants each lodged a memorandum of objections.

Mr. *K. Brown* for appellants.

The Advocate-General (Hon. *C. Arnold White*) for respondent No. 2.

Mr. *E. Norton* for respondent No. 1.

Sankaran Nayar for respondent No. 3.

JUDGMENT.—On the part of the appellants, two questions are raised in this appeal. The learned Judge has refused to allow interest on the promissory notes given by the defendants from

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time to time on taking delivery of the cases of piece-goods. In the promissory notes there is no mention of interest and accordingly the learned Judge, having regard to the language of section 80 of the Negotiable Instruments Act, has held that no interest is chargeable. Section 79 provides for the case in which by the terms of the instrument interest is made payable at a specified rate. Section 80 provides for the case "when no rate of interest is specified in the instrument." This section, it is said, does not cover the case in which, as in the present case, the instrument is completely silent about interest, and hence it is inferred that in the case of such an instrument the Legislature did not intend that any interest should be allowed. Inasmuch as it is clear that before the Act was passed, the Court would have followed the law laid down in the English books and in accordance with mercantile usage would have allowed interest from the date of the maturity of the note, the construction which it is sought to put upon section 80 is tantamount to saying that the usage of trade has been abrogated by the Act. We cannot think that was intended, nor do we think the language of the section compels us to adopt this view. On the other hand, we do not think we can treat the case as a *casus omissus* in which the Court is free to award interest as it would have done before the Act was passed. The language used is perhaps not the most felicitous, but we think it may be taken to denote alike the case in which interest, but no rate of interest, is mentioned and the case in which interest is not mentioned.

This construction avoids on the one hand the difficulty already mentioned of supposing that the Legislature meant to alter the old law and, on the other, the difficulty of supposing that it was intended to leave the Courts discretion to award interest at a higher rate than six per cent. in the case not covered by the section. Applying section 80 to the present case, we think we must allow interest to the plaintiff at six per cent. from the dates at which the several notes ought to have been paid. The notes being payable on demand, it is not the date of the making, but the date of demand, that must be taken as the point from which to calculate interest.

The other point taken by the appellants' Counsel turns on the clause in the indents giving the plaintiffs liberty to sell the goods on the defendants failing to take due delivery and to charge

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against the defendants the difference between the amount so realized and the contract price of the goods. The learned Judge, following a Calcutta decision (*Yule & Co.* v. *Mahomed Hossain*(1)), held that, as the property in the goods had not passed to the defendants, the only remedy of the plaintiff was in damages calculated in the ordinary way according to the market rate at the time of breach. Since judgment was given the law has been reviewed in the Calcutta High Court (*Moll Schutte & Co.* v. *Luchmi Chand*(2)), and the Full Bench has decided that a clause such as that contained in the indent before us comes into operation notwithstanding that the property has not passed to the buyers, and the same view has been adopted in this Court in a case referred by the Chief Judge of the Presidency Small Cause Court (*Ronaldson* v. *Chella Pillai Chetti*(3)). Following this authority, we hold that the appellants are entitled to charge the deficiency resulting from the re-sale of the several lots of goods. It is admitted that the figure showing the deficiency can be taken from the plaint. Interest on that amount must be added. Except as regards these two points, we see no reason to differ from the learned Judge.

The decree must be modified by adding to the amount decreed the amount of the deficiency arising on the several re-sales and also interest at six per cent. on the notes from the respective dates of demand. If there is no evidence as to dates of demand, we must ask the learned Judge to find on that question.

As to costs, the appellants having in the main succeeded must have their full costs in both Courts.

The memorandum of objections must be dismissed with costs.

Messrs. *Wilson & King*—attorneys for appellants.

Messrs. *Barclay, Orr & David*—attorneys for respondent No. 1.

Mr. *A. E. Rencontre*—attorney for respondent No. 2.

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(1) I.L.R., 24 Calc., 124. (2) I.L.R., 25 Calc., 505.
(3) Referred Case No. 29 of 1897 (unreported).

APPELLATE CIVIL.

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

1899. March 3.

NARAYYA (PLAINTIFF), APPELLANT,

v.

SESHAYYA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Limitation Act—Act XV of 1877, sched. II, art. 23—Malicious prosecution—Termination of prosecution—Presentation of revision petition against acquittal—Commencement of period of limitation.

A suit for damages for malicious prosecution was brought more than one year from the date of the plaintiff's acquittal, but within a year from the dismissal of a revision petition which had been filed against the acquittal. On its being contended that the period of limitation should be calculated from the date of the dismissal of the revision petition, as the prosecution was only then terminated within the meaning of article 23 of schedule II of the Limitation Act:

Held, that time began to run from the date of the acquittal.

Whether it would be so in a case in which an appeal is preferred by Government against an acquittal, *Quære*.

SECOND APPEAL against the decree of P. S. Gurumurti Ayyar, Acting Subordinate Judge of Cocanada, in Appeal Suit No. 159 of 1897, reversing the decree of D. Raghavendra Rao, District Munsif of Peddapur, in Original Suit No. 241 of 1896.

Suit to recover damages for malicious prosecution. The defendants, while traversing all the allegations in the plaint, pleaded that the suit was barred by limitation. After the charge in question had been dismissed by the Magistrate, one of the defendants had filed a revision petition before the District Magistrate, which was also dismissed. This suit had been filed more than a year from the dismissal of the charge by the Magistrate, but within a year from the date of the dismissal of the revision petition. The District Munsif held that the criminal proceedings were brought to a termination with the dismissal of the said revision petition, and that the suit was, in consequence, not barred by limitation. He further found that there was an absence of reasonable and probable cause; and that the prosecution had been malicious. He awarded damages. The defendants appealed to the Acting Subordinate Judge, who allowed the appeal in the

* Second Appeal No. 979 of 1898.

following judgment:—"The main point pressed here is limitation. The prosecution of plaintiff terminated in his favour on 2nd July 1895, and the suit for damages was filed by him on 20th July 1896, *i.e.*, later than the time (one year) allowed by article 23 of schedule II of the Limitation Act. This article requires the period to be calculated from the time 'when the plaintiff is acquitted or the prosecution is otherwise terminated.' Plaintiff's vakil contends that the clause 'prosecution is otherwise terminated' includes petitions for re-trial of the accused and argues that as the defendants' revision petition to the District Magistrate for the re-trial of the case was dismissed in September 1895, limitation should be computed from the date of the dismissal of this petition; but the argument does not seem to me to be acceptable, as there is no time fixed for filing revision petitions and a man may move for re-trial even after the period of one year allowed under the article for suits for compensation. I think it covers only cases of appeal by an accused to get his conviction quashed. . . . I accordingly find that the suit by the plaintiff for damages for malicious prosecution was filed a little too late, and therefore allow this appeal with costs in both the Courts."

Sivasami Ayyar for appellant.

Hon. *Ananda Charlu* for respondents.

JUDGMENT.—The Subordinate Judge's view that limitation began to run when the appellant was acquitted is, in our opinion, right. No appeal against that acquittal was preferred by the Government, and it is therefore unnecessary to consider when limitation would have begun to run if an appeal against the acquittal had been preferred. We cannot agree with the contention on behalf of the appellant that on the respondents' moving the District Magistrate to make a reference to the High Court with reference to the acquittal, the order acquitting the appellant had ceased to be final and the prosecution should be treated as one which had not terminated within the meaning of article 23 of the Limitation Act.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar (Officiating Chief Justice) and Mr. Justice O'Farrell.

1899. July 24. August 15.

RAMANNA NAIDU (DEPONENT OF AN AFFIDAVIT), APPELLANT,

v.

BRAHMAYYA CHETTI AND OTHERS (PURCHASERS AND COUNTER-PETITIONERS, AND PETITIONER TO SET ASIDE SALE), RESPONDENTS.*

Insolvent Act—11 *&* 12 *Vic., cap. XXI, s.* 30—*Bankruptcy Rules of* 1848, *Rule XXV* —"*Person interested*"—*Liability for costs of unsuccessful motion—Deponent of an affidavit.*

A sale of property forming portion of the estate of certain insolvent debtors having been authorised by the Court, the Official Assignee moved to set it aside, relying in support of his application on affidavits which had been filed in Court nd in which the deponents alleged that the property was worth a great deal more than the price at which the sale had been authorised. The Court having dismissed the motion, and ordered the deponents to pay the costs of the Official Assignee and the purchasers:

Held, that the deponents could not be made liable for costs, and that Rule XXV of the Bankruptcy Rules of December 1848 did not apply to such a case. The deponents were not "persons interested in the insolvent's estate," nor could they be said to have "applied" or appeared on an application. The Official Assignee should be made liable for the costs of such an unsuccessful application, he being left to take such steps as might be necessary to indemnify himself.

APPEAL against an order passed in Insolvent Case No. 18 of 1894.

Certain immoveable property belonging to Sunka Ragavalu Chetti and others, insolvents, having vested in the Official Assignee of Madras, an affidavit, dated 21st March 1898, was filed in which the deponent valued the said property at Rs. 2,000, at which price certain persons were stated to be willing to purchase it. On 28th March 1898, the Court made an order for the sale of the said property. Affidavits, dated 13th May 1898, by D. Ranga Charlu and Y. Ramanna Naidu, were then filed, in which the deponents valued the property at Rs. 6,000; and an order was made on 5th September 1898 directing the purchasers above referred to not to proceed with its purchase at the first-mentioned price of Rs. 2,000. On 25th October 1898 the Official Assignee moved to set aside

* Original Side Appeal No. 44 of 1898.

the sale with reference to the said affidavits of D. Ranga Charlu and Y. Ramanna Naidu, and the Court, after hearing Counsel for the purchasers, dismissed the motion, and withdrew the order of 5th September 1898 directing the purchasers not to proceed with the purchase, and ordered all costs, both of the Official Assignee and of the purchasers, to be paid by the said D. Ranga Charlu and Y. Ramanna Naidu.

Y. Ramanna Naidu preferred this appeal.

Kumarasami Sastri for appellant:—There was no jurisdiction for the order directing appellant to pay the costs, as he was not a party to the proceedings. The motion to set aside the sale was moved by the Official Assignee, and appellant only filed an affidavit as to the value of the property, and merely occupied the position of a witness. Section 73 of the Insolvent Act confers the right to appeal on any person "aggrieved" and does not confine itself to parties. Even if appellant was no party to the proceedings before the Insolvent Court, yet the order in so far as it directed him to pay costs made him a party thereto. The order appealed against is a "judgment" within the meaning of section 15 of the Letters Patent. Costs can only be allowed as between parties.

Mr. *R. F. Grant* for respondents Nos. 1 to 3:—Rule XXV of the rules framed under section 3 of the Insolvent Act gives the Commissioner power to grant costs in such cases. Though appellant was not a party to the proceedings, yet his undivided brother was a creditor. He was, therefore, interested in the insolvent's estate. It has been held that the Official Assignee is an agent of the creditors. The order is, therefore, right.

Kumarasami Sastri in reply:—Rule XXV requires (1) that the person should be interested, and (2) that he must appear, apply or oppose in proceedings before the Commissioner. Here, appellant did absolutely nothing beyond swearing the affidavit.

JUDGMENT.—The application to set aside the sale was made by the Official Assignee, and the appellant who has been made to pay the costs of the respondents (purchasers and the Official Assignee), so far as appears, did nothing except make an affidavit in support of the motion. We are unable to see how he could be held liable for costs. Reference is made to Rule XXV of the Bankruptcy Rules of 22nd December 1848, but we are unable to hold that that rule applies. The appellant is not a person "interested in the insolvent's estate," nor can he be said to have "applied" or appeared

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on an application. The proper course in such case is, we think, to make the Official Assignee liable for the costs of the unsuccessful application made by him, leaving him to take such steps as are necessary to indemnify himself. We set aside the order of the learned Judge so far as it directs that the costs of the respondents (purchasers and Official Assignee) be paid by the appellant. There will be no costs of this appeal.

Messrs. *Branson & Branson* — attorneys for respondents Nos. 1 to 3.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

1897. September 13.

SRINIVASA CHARIAR AND OTHERS (PLAINTIFFS),

v.

RAGHAVA CHARIAR AND OTHERS (DEFENDANTS).*

Religious endowment, suit relating to—Civil Procedure Code—Act XIV of 1882, s. 30—Suit by worshippers—No leave to sue—Non-joinder of Advocate-General—Maintainability of suit.

Four worshippers at a temple, who were also entitled to vote at the election of dharmakartas, filed a suit for a declaration that the election of certain persons to that office was void. Notice had not been given to the other worshippers, nor had leave of the Court been obtained prior to the institution of the suit:

Held, that the suit was maintainable notwithstanding that the Advocate-General had not been joined as a party;

that section 30 of the Code of Civil Procedure being permissive and not prohibitive and dealing with procedure only, and not affecting substantive rights the omission to state in the plaint that the suit was instituted on behalf of other worshippers having similar rights to sue as the plaintiffs was not fatal to the maintainability of the suit;

that the Court was competent, with a view of adjudicating completely and definitively on the matter in dispute, to require an amendment of the plaint, and that the suit need not necessarily be dismissed;

that the omission to apply for leave under section 30 of the Code of Civil Procedure is not in itself ground for dismissing a suit, but, on objection being taken, the suit should not be allowed to proceed except on the terms of the plaint being amended and the requisite leave being obtained; and

that the granting of leave under section 30 is not a condition precedent, and may take place after the institution of the suit.

Jan Ali v. *Ram Nath Mundul* (I.L.R., 8 Calc., 32) and *Thackersey Dewaraj* v. *Hurbhum Nursey* (I.L.R., 8 Bom., 432) considered.

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* Civil Suit No. 122 of 1897.

SRINIVASA CHARIAR v. RAGHAVA CHARIAR.

SUIT by four worshippers of the tengalai sect at the temple of Sri Parthasaradhi Swami in Triplicane for a declaration that second and third defendants were not duly elected as "dharmakartas" of the said temple. First defendant was the surviving dharmakarta, by whom the said election had been conducted. In Civil Suit No. 161 of 1891, it was decreed that all future appointments of dharmakartas in the said temple should be made by election, and that a list of persons entitled to vote at such election should be entered in a register and that none others should vote. The number of persons whose names appeared on that register was 2,068. The election at which second and third defendants had been elected had taken place in 1897; and the plaintiffs alleged that it was void and of no effect by reason of various informalities charged. They prayed as above. First defendant took objection to the maintainability of the suit as brought by only four worshippers and electors, and contended that it was not in conformity with section 30 of the Code of Civil Procedure. He also claimed that the sanction of the Advocate-General should have been obtained, and that the suit should be dismissed for want of such leave. This defendant, as well as the second and third, also put in other defences. An issue having been framed as to whether the suit was not maintainable for any of the reasons assigned in the written statement, the Court first considered the point so raised.

Mr. *E. Norton* for plaintiffs.

Seshagiri Ayyar for defendant No. 1.

Mr. *R. F. Grant* for defendant No. 2.

Hon. *Ananda Charlu* for defendant No. 3.

JUDGMENT.—The issue which I have to try refers me to the written statements of the defendants and the objections therein stated to the maintenance of this suit. The written statement of the first defendant states two grounds of objection. It says that "the suit is bad, as it was not brought in conformity with section 30 of the Civil Procedure Code," and the objection is taken that the sanction of the Advocate-General was not obtained. This latter objection was abandoned by the defendant's Vakil in deference to the ruling of this Court in *Rangasami Naickan* v. *Varadappa Naickan*(1). In lieu of it, however, he took a point which is not raised in the pleadings, namely, whether the Advocate-General ought not to be

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(1) I.L.R., 17 Mad., 462.

SRINIVASA CHARIAR v. RAGHAVA CHARIAR.

made a party to the suit. It will be convenient to dispose of that point at the outset. In England there can be little doubt that a suit framed as this is, alleging no proprietary right in the plaintiffs and no particular injury suffered by them but complaining of a grievance common to an indefinite number of persons, could not be maintained. A suit of such a character could only be instituted by the Attorney-General (*London Association of Ship-owners and Brokers* v. *London and India Docks Joint Committee*(1) and cases cited). I think it is rather to be regretted that there has been in the Courts of this country a departure from the English practice, but that certainly appears to be the case, and the authorities cited by the defendants' Vakil do not go beyond showing that the Advocate-General may be a party to suits relating to charitable endowments in the same manner as the Attorney-General in England. In *Attorney-General* v. *Brodie*(2), the question arose on a petition presented by a private individual entitled in a cause instituted by the Advocate-General for the administration of certain charitable trusts created under a will. On this petition coming before the Court the Advocate-General claimed the right to appear and be heard. The Supreme Court held that he had no right to appear and accordingly refused to hear him. All that was decided by the Judicial Committee was that this singular decision, as they call it, was wrong.

In the Bombay case (*Advocate-General* v. *Vishvanath Atmaram*(3)) the question was seriously argued before the Supreme Court whether the Advocate-General could institute a suit for the administration of a Hindu religious trust.

While it was held that the suit was maintainable in the name of the Advocate-General, it was not decided that he was an indispensable party. In more recent times it has been distinctly held both in Calcutta and in Bombay that a suit which in England would be instituted only in the name of the Attorney-General may be maintained by persons interested in a religious endowment in their own name and without joining the Advocate-General (*Panchcowrie Mull* v. *Chumroolall*(4), and *Thackersey Dewaraj* v. *Hurbhum Nursey*(5)). In the Calcutta case decided in 1878 the

(1) [1892] 3 Ch., 242 at pp. 257, 270.
(2) 4 M.I.A., 190.
(3) 1 Bom. H.C.R., Appx., 9.
(4) I.L.R., 3 Calc., 563.
(5) I.L.R., 8 Bom., 432 at p. 452.

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plaintiffs were merely representatives of the sect interested in the temples benefited by the will for the construction of which the suit was instituted. In the Bombay case the plaintiffs were subscribers to the temple fund and devotees of the idol. They were held to have a sufficient interest to entitle them to sue in their own name for the proper administration of the temple fund.

In the present case the plaintiffs describe themselves as worshippers at the temple known as Sri Parthasaradhi Swami and entitled to vote on the election of dharmakartas. I am of opinion that the suit is maintainable notwithstanding that the Advocate-General has not been joined.

I now come to deal with the objection founded on section 30 of the Civil Procedure Code. It is objected that the suit cannot be allowed to proceed in its present form and without notice being given to the other members of the class to which the plaintiffs belong. It is further objected that the permission of the Court indicated by the section must be obtained before the institution of the suit and cannot be given afterwards.

Now in the first place it is to be observed that the section is permissive and in no way prohibitive in its terms; and furthermore that it is a section dealing with procedure only and not affecting substantive rights.

The rule of the Court of Chancery, to which the section owes its origin, appears to have been made applicable in two classes of cases. There are the cases in which the number of persons, claiming concurrent interests in the subject-matter, and, therefore, according to strict rule, necessary parties to the suit, is so large that they cannot all be conveniently joined with any chance of bringing the suit to a conclusion. And there are the cases in which numerous persons have distinct but similar rights which might be prosecuted in separate suits. For instance, there is the case of numerous creditors of the same person, or that of many persons claiming a right of common or right of fishing in respect of the same property (*Smith* v. *Earl Brownlow*(1) and Daniell's 'Chancery Practice,' page 207). In the latter class of cases, for the sake of convenience and to prevent multiplicity of suits, the Court allowed one person or a few persons to prosecute or defend suits on behalf of all the persons similarly interested. The judgment obtained in a

(1) L.R., 9 Eq., 241.

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suit so framed is binding on all the parties so represented in it. The present case appears to me to belong rather to the latter than the former class of cases. If I am right in considering that the plaintiffs, as worshippers at the temple and entitled to vote on the election of dharmakartas, possess an interest entitling them to sue, I think it is clear that they can sue without joining the other persons similarly entitled. That being so and there being no words either imperative or prohibitory in the section, I think it cannot be a fatal objection to the suit that it is not expressed to be instituted on behalf of those other persons. If the course prescribed by section 30 is not followed in a case like the present, the only consequence, in my opinion, is that the judgment does not bind the persons whose names are not on the record; see *Thanakoti* v. *Muniappa*(1); *Ragava* v. *Rajaratnam*(2); and *May* v. *Newton*(3). To obviate this inconvenient consequence I think it is competent to the Court with the view of adjudicating completely and definitively on the matter in dispute to require an amendment of the plaint.

The language of the judgment chiefly relied on by the defendants' Counsel (*Jan Ali* v. *Ram Nath Mundul*(4)) indicates a different view of the section, for it is said that inasmuch as the plaintiffs claiming an interest in common with others had not obtained leave under section 30 their suit must necessarily be dismissed. It seems to have been considered that the granting of leave under the section would have made up for the insufficiency of interest disclosed in the plaint. With great deference that view appears to me incorrect. Nor do I fully understand the judgment in the Bombay case relied upon by the plaintiffs' Counsel (*Thackersey Dewaraj* v. *Hurbhum Nursey*(5)). As far as I can ascertain the facts of the case, I should have thought it was a case for the application of section 30.

The conclusion at which I arrive is that the omission to apply under section 30 is not by itself ground for dismissing the suit, but that nevertheless now that the objection has been taken it ought not to be allowed to proceed except on the terms of the plaint being amended, and the requisite leave under section 30 being obtained.

(1) I.L.R., 8 Mad., 496.
(2) I.L.R., 14 Mad., 57.
(3) L.R., 34 Ch. D., 347.
(4) I.L.R., 8 Calc., 32 at p. 41.
(5) I.L.R., 8 Bom., 432 at p. 450.

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The granting of leave under the section is not made a condition precedent and, may, therefore, I think, take place after the institution of the suit (*Ramayyangar* v. *Kishnayyangar*(1)).

I understand there is no objection on the plaintiffs' part to the course which I indicate. If, as the defendants' Counsel suggests, there are worshippers who differ from the plaintiffs as to the propriety of the election, the Court will know how to deal with them. See *Watson* v. *Cave*(2). Costs reserved.

Messrs. *Wilson & King*—attorneys for plaintiffs.

Mr. *James Short*—attorney for defendant No. 2.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

ROSE AMMAL AND ANOTHER (PLAINTIFFS), 1898. November 22.

v.

RAJARATHNAM AMMAL (DEFENDANT).*

Transfer of Property Act—Act IV of 1882, *ss.* 60, 62— *Mortgage containing covenant to repay "within" a given time—Right to redeem before the expiration of that time—Mortgagee's right to foreclose.*

Certain premises were mortgaged with possession in 1896, the mortgagor, in the instrument of mortgage, covenanting to repay the mortgage money "within 20th of April 1904." In 1898 the mortgagor sold the mortgaged premises and called upon the mortgagee to receive the principal and interest due and to deliver up possession. On the mortgagee refusing on the ground that the mortgage was not redeemable till 1904:

Held, that the mortgagor was entitled to redeem. A stipulation for the postponement of payment of mortgage money is *primâ facie* intended for the benefit of the mortgagor; the parties to an instrument of mortgage may, however, by the language of their contract, show their intention that redemption may take place only at the end of a given term. The covenant, as worded, so far from showing an intention to preclude the mortgagor from redeeming, reserved the liberty to redeem at pleasure.

Vadju v. *Vadju* (I.L.R., 5 Bom., 22) and *Tirugnana Sambandha Pandara Sannadhi* v. *Nallatambi* (I.L.R., 16 Mad., 486) considered.

ASHA BI, by an instrument of mortgage dated 18th April 1896, mortgaged certain premises to defendant with possession, and

(1) I.L.R., 10 Mad., 185.
(2) L.R., 17 Ch. D., 19

* Civil Suit No. 177 of 1898.

ROSE AMMAL v. RAJA-RATHNAM AMMAL.

covenanted to repay the mortgage money "within the 20th of April 1904." On 14th May 1898, the said Asha Bi sold a portion of the mortgaged premises to the first plaintiff, and the remainder to second plaintiff; and in July 1898 called on the defendant to receive the principal sum and interest due under the mortgage and to deliver up the premises. Defendant declined on the ground that the mortgage was not redeemable till 20th April 1904. Plaintiffs filed this suit for a declaration of their right to redeem and other relief. The first issue framed was "whether the mortgage is redeemable before 20th April 1904?" Upon this preliminary issue the Court delivered the following

JUDGMENT.—Objection is taken to the further maintenance of this action on the ground that the time for payment of the mortgage money has not yet arrived. According to the mortgage instrument, dated the 18th April 1896, the plaintiff having said that she has mortgaged with possession the properties therein mentioned to the defendant, covenants to pay the mortgage money "within the 20th of April 1904." On the strength of these words in the mortgage,—and there are no others which assist the defendant's case,—it is argued that the plaintiff is not entitled to redeem until after the 20th of April 1904. In support of this contention two cases are cited. The first case, decided by the Bombay High Court in 1880, is similar to the present so far as regards the words of the instrument. The mortgage deed stipulated that the mortgagor would pay the debt within ten years and redeem the property. The suit for redemption was brought before the lapse of ten years, and it was dismissed on the ground that, in the absence of any stipulation to the contrary, the right to redeem and the right to foreclose should be regarded as co-extensive. Inasmuch as the defendant in that case could not have brought an action against the plaintiff it was held that the plaintiff was not in a more favourable position, and was not entitled to redeem. It is necessary to consider this case inasmuch as it appears to have been approved in a later Madras case although it cannot be reconciled with the earlier Madras cases. Westropp, C.J., in his judgment in *Vadju* v *Vadju*(1) refers to *Brown* v. *Cole*(2) and to a general observation of Lord Kingsdown in *Prannath Roy Chowdry* v. *Rookea Begum*(3) In an English mortgage drawn in the ordinary way, there can

(1) I.L.R., 5 Bom., 22 at p. 24. (2) 14 Sim., 427. (3) 7 M.I.A, 323 at p. 355

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be no doubt that the mortgagor's right to redeem can only arise after the date fixed for payment has passed. In *Brown* v. *Cole*(1), the mortgage appears to have been in the ordinary form except that the date fixed for payment was a year instead of six months from the date of the execution of the mortgage. It is difficult to see how in such a case the mortgagor could possibly be entitled to redeem before the day mentioned in the proviso. When it is intended that the money should remain outstanding and the property should remain unredeemed for a considerable time, which, however, may not exceed seven years, the English practice appears to be to insert two covenants—one binding the mortgagee not to call in the money until the day mentioned, the other binding the mortgagor not to redeem until the same day. As to the term during which redemption may be postponed, see *Teevan* v. *Smith*(2). It is possible that exception might be taken to a mortgage instrument in which the latter covenant was inserted and the former omitted, but it would be difficult to suggest a reason why, if the parties so chose, the mortgagor should not stipulate for postponement of the payment and yet reserve to himself the right of paying the money at his option. There is, moreover, authority to the effect that the rule of mutuality is not an inflexible and universal one. It is possible for the parties to agree that the mortgagor may be at liberty to redeem at a time when the mortgagee is not at liberty to foreclose (*Talbot* v. *Braddil*(3)); and in the case of the Welch mortgage redemption is always possible while the mortgagee is altogether precluded from foreclosing, *Longuet* v. *Scawen*(4). In the Madras case (*Tirugnana Sambandha Pandara Sannadhi* v. *Nallatambi*(5)) the Court, after referring to the Bombay case and the authorities there cited, observes with reference to sections 60 and 62 of the Transfer of Property Act that "the Legislature appears to have adopted the "principle that in the absence of a stipulation to the contrary, the "presumption is that the right to redeem and the right to foreclose "arise at the same time, and that when a date is fixed for payment "of the mortgage debt before which the mortgagee cannot fore-"close, the mortgagor also cannot redeem before the appointed "time." Section 60 provides that at any time after the principal

(1) 14 Sim., 427. (2) L.R., 20 Ch.D., 724. (3) 1 Vern., 394.
(4) 1 Ves. Sen., 402 at p. 406. (5) I.L.R., 16 Mad., 486 at p. 489.

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money has become payable the mortgagor has the right of redemption. I fail to see how the language of that section or section 62 can be read as altering the law laid down before the Act was passed. If before the Act was passed the mortgagor was at liberty to redeem before the day on which his mortgagee could have sued him, I cannot see what there is in section 60 to prevent a mortgagor adopting the same course now. Before the Act the mortgagor could not redeem before the money became payable, neither can he do so now. That is no reason why, when the money is payable, he should not be allowed to redeem before it has become due. Inasmuch as the observations on the Act and on the Bombay case are not strictly necessary for the decision of this case, I do not think that I am bound to follow it in disregard of earlier cases in which the law is clearly laid down in favour of the mortgagor's right to redeem. I think the principle to be deduced from the cases of which *Sri Raja Setrucherla Ramabhadra Raju Bahadur* v. *Sri Raja Vairicherla Surianarayanaraju Bahadur*(1) is the chief is that while the stipulation for the postponement of payment is *primâ facie* intended for the benefit of the mortgagor, the parties may, by the language of their contract, show their intention that redemption should take place only at the end of a given term. In the present case the only indication of such an intention is contained in the words which I have mentioned. So far from showing that the mortgagor intended to preclude herself from redeeming before the 20th of April 1904, the language, I think, shows that she meant to reserve the liberty of redeeming at her pleasure. That being so, I must rule in favour of the plaintiff, and the case must proceed to trial. The defendant must pay the cost of the day.

Messrs. *Branson & Branson*—attorneys for plaintiffs.

Ethiraja Mudaliar—vakil for defendant.

(1) I.L.R., 2 Mad., 314.

APPELLATE CIVIL.

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

NALLAMUTTU PILLAI (DEFENDANT), APPELLANT,

v.

BETHA NAICKAN (PLAINTIFF), RESPONDENT.*

1899. March 14. April 11.

Registration Act—Act III of 1877, s. 50—Unregistered sale of land valued under Rs. 100—Subsequent registered hypothecation—Possession of first purchaser for over twelve years—Registered hypothecation defeated by such possession.

The owner of land having, in 1876, sold and given possession of it for Rs. 95 to the plaintiff under an instrument which was not registered, hypothecated it in 1878 to a third party, under a bond that was registered. The land was wrongly represented in the hypothecation bond as being in the original owner's possession. The third party in 1882 sued the original owner on the hypothecation bond without making plaintiff a party, and obtained a decree, which, in 1893, he assigned to defendant, who purchased the land in the course of execution. On plaintiff suing for a declaration of his right to the land:

Held, that the hypothecation had been defeated by plaintiff's possession for a period exceeding twelve years prior to the institution of the suit. A hypothecation right so created is liable to be affected not only by lapse of time as between creditor and debtor, but also by possession of the hypothecated property for the requisite period by a third person on a claim inconsistent with the rights of both the creditor and the debtor. Nor does section 50 of the Registration Act interfere with the operation and effect of limitation and prescription governing such a case as this.

SECOND APPEAL against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Appeal Suit No. 155 of 1896, affirming the decree of T. R. Kuppusami Ayyangar, District Munsif of Kulitalai, in Original Suit No. 878 of 1894.

Vadamalainatha Pillai, having assigned certain land to plaintiff in 1876 for Rs. 95, by an absolute deed of sale, which was not registered, executed in 1878 a hypothecation debt bond over the same (with other) land in favour of Virappa Chetti, which was registered. Plaintiff had been in possession of the land since his purchase in 1876: though the hypothecation bond of 1878 described it as being in the enjoyment of Vadamalainatha Pillai. In 1882, Virappa Chetti sued Vadamalainatha Pillai on the hypothecation bond and obtained a decree which he assigned, in 1893, to defendant, who purchased the land in the course of

* Second Appeals Nos. 1310 and 1311 of 1898.

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execution. Plaintiff sued for a declaration of his right to the land, which defendant disputed on the ground that his decree had been obtained on a registered instrument, which had priority over the unregistered sale-deed under which plaintiff claimed; and that neither defendant nor his assignor had any knowledge of plaintiff's right to or alleged possession of the land. The District Munsif found the sale to plaintiff and the subsequent hypothecation to Virappa Chetti to be genuine; that plaintiff was in possession of the land: and that Virappa Chetti had taken the hypothecation of 1878 with notice of plaintiff's rights. He referred to *Krishnamma* v. *Suranna*(1); Specific Relief Act, 1877 section 27, illustration(3); *Dinonath Ghose* v. *Auluck Moni Dabee*(2) *Nani Bibee* v. *Hafizullah*(3); and *Lakshmandas Sarupchand* v *Dasrat*(4); as showing that possession is cogent evidence of notice, if not notice in itself. He considered that in any case Virappa Chetti had notice of plaintiff's claim to the land in 1882 when he obtained the decree against Vadamalainatha Pillai on the hypothecation bond. Plaintiff had not, however, been made a party to that suit. He held that defendant's title could not prevail against that of plaintiff, and declared plaintiff's right to the land. The District Judge, on appeal, though finding no evidence to show that Virappa Chetti had notice of plaintiff's possession when he took the hypothecation bond in 1878, held him to have been negligent in not enquiring, as it was not shown that he had been deceived by the mortgagor. He ruled that Virappa Chetti must be held to have had notice of plaintiff's title, and dismissed the appeal.

The defendant preferred this second appeal.

V. Krishnasami Ayyar for appellant.

Kothandarama Ayyar and Mr. *A. D. Zaccheus* for respondent.

SUBRAMANIA AYYAR, J.—This is a suit for a declaration of the plaintiff's right to the land in dispute which was purchased by him for Rs. 95 from the admitted original owner, one Vadamalainatha Pillai, under an unregistered instrument, dated the 2nd October 1876, but which having been included among the properties hypothecated to one Virappa Chetti by the said Vadamalainatha Pillai under a registered instrument of June 1878, was

(1) I.L.R., 16 Mad., 148.
(2) I.L.R., 7 Calc., 753.
(3) I.L.R., 10 Calc., 1073.
(4) I.L.R., 6 Bom., 168.

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sold in execution of the decree obtained on the hypothecation by Virappa Chetti and assigned to the defendant, and at such sale was purchased by the defendant himself. The plaintiff, who has been in possession of the land ever since his purchase, was not however made a party to the said litigation.

The lower Courts granted the declaration prayed for; the decision of the lower Appellate Court being based on the ground that though Virappa Chetti was, at the time he took the hypothecation, aware neither of the sale of the disputed land to the plaintiff nor of the latter's possession thereof, yet he, Virappa Chetti, had omitted to make due enquiry from his mortgagor about the matter of the possession of the land, that consequently he should be held to be in the position of one who had taken the hypothecation with notice of the sale to the plaintiff and that the defendant, the Chetti's assignee, cannot therefore set up the hypothecation as against the plaintiff.

It was contended before us on behalf of the defendant that even if Virappa Chetti had omitted to make due enquiry, as supposed by the lower Appellate Court, that does not preclude the defendant from relying on the hypothecation as against the plaintiff since nothing short of actual, clear and distinct notice of a prior unregistered transfer should be held to affect the right, given by section 50 of the Registration Act, to a person claiming under a registered instrument as against a prior transferee under an unregistered instrument. It is not, however, necessary to enter into a consideration of this contention inasmuch as it appears from the hypothecation instrument itself, the provisions whereof as to the matter under discussion the District Judge apparently overlooked, that Virappa Chetti did not omit to make the enquiry which the Judge thought it was his duty to make and that the Chetti was misled by Vadamalainatha's untrue representation that the possession of the land was with himself.

Though, therefore, the decision in favour of the plaintiff cannot be supported on the ground suggested by the District Judge, yet it is clearly sustainable on the ground that by virtue of the plaintiff's possession of the land for over twelve years prior to the institution of the present suit, the hypothecation in question has, in so far as the disputed land is concerned, been defeated. The contention of the learned vakil for the defendant, if he was rightly understood, that a hypothecation right is not a species of right

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liable to be affected by prescription such as that established in this case, is unsupported by authority and opposed to principle. There can be no doubt that such a right is liable to be affected not only by lapse of time as between the creditor and the debtor, but also by possession of the hypothecated property held for the required period by a third person on a claim inconsistent with the rights of both the creditor and the debtor. In support of this proposition reference may, in the absence of decided cases on the point, be made to the Roman Law, which fully recognized that prescription like that established in the present instance had the effect of extinguishing even a hypothecation right, as appears from, among other authorities, the following passage of the Code:—"Long standing silence, supported by regular limitation, renders "nugatory the action for creditors taking proceedings for their "pledge, unless the debtors, or those who have entered into their "rights, command possession of the security." (Salkowski's 'Roman Law' by Whitfield, 503; see also Mackeldey's 'Roman Law' by Dropsie, 287, Hunter's 'Roman Law,' 2nd edition, 447.)

The learned vakil for the defendant next contended that taking the rule, applicable to cases where the mortgagor has under the general law a right to hypothecate the property given as security, to be as stated above, still such rule should not be extended to a case like this where a person, not having, under the ordinary law, any right to the property of which he makes a transfer, is nevertheless enabled by the special provisions of section 50 of the Registration Act to make a valid transfer of such property by means of a registered instrument.

That section, however, so far as we are now concerned, confines itself to the single case of competition between a right created by an instrument that is registered and a right created by an instrument that is not registered. And neither the registration law nor any other enactment in force in this country contains a provision analogous to section 21 of the English Land Transfer Act of 1875, which lays down that "a title to any land adverse to or in "derogation of the title of the registered proprietor, shall not be "acquired by any length of possession." The import of the words just quoted does not appear to have been judicially explained. But in "Lightwood on Possession," it is suggested that that provision does nothing more than prohibit the entry of an adverse title on the register (see pages 303 and 304).

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Be this as it may, in the absence of any enactment to support the argument put forward on behalf of the defendant, there is absolutely no warrant for holding that section 50 of the Registration Act interferes in any way with the operation and effect of the established principle of limitation and prescription governing such cases.

For these reasons the decree of the Lower Courts must be sustained and the second appeal dismissed with costs.

MOORE, J.—I concur.

ORIGINAL CIVIL.

Before Mr. Justice Michell.

KUPPUSAMI PILLAI (PLAINTIFF),

1899. July 17.

v.

MADRAS ELECTRIC TRAMWAY COMPANY, LIMITED (DEFENDANTS).*

Interest Act—Act XXXII of 1839, s. 1—Notice of intention to claim interest—Demand of interest already due.

A letter demanding interest on an outstanding debt, from which the intention of the creditor to claim interest up to date of payment is made clear, is a sufficient notice, within the meaning of the Interest Act, 1839, to entitle the creditor to claim interest prospectively from the date of the letter, though the demand be made retrospectively in respect of interest alleged to be then already due.

SUIT for Rs. 2,802-9-7 due by defendants to plaintiff for materials supplied and labour performed in pursuance of a contract entered into between the parties in 1894. The sum claimed included interest in respect of the overdue account. Defendants admitted the claim on the contract, but denied liability to pay interest. The contract made no provision for the payment of interest. The work was finished in February 1895. On 24th July 1895, plaintiff's attorney made a written demand for the immediate payment of Rs. 3,440-4-3, "being the amount of principal and interest due by the company to my client." In January 1896 a payment on account was made. On 25th April 1897 plaintiff applied to defendants for a further payment by a

* Civil Suit No. 54 of 1899.

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letter in which he said:—"I humbly beg to request that you will be so good as to arrange for the adjustment of Rs. 2,351-10-3, being the amount due on my bills with interest." To this, the defendants replied on 29th April that no funds were then available for the purpose and asked that the account might be allowed to stand over for a while. On 28th March 1898, plaintiff made further application for the balance of account then amounting to Rs. 2,597-15-5, which sum also included interest, and to his letter was appended a statement setting out particulars of principal and interest, and threatening proceedings if his claim for such interest should be disputed. On 4th April 1898 plaintiff wrote again in similar terms; and on 17th November 1898 Rs. 2,761-1-6 was claimed, that sum also including interest then accrued due. Defendants tendered the amount admittedly due on the contract. Plaintiff refused to accept it and filed this suit for that sum together with interest thereon since completion of the contract.

Krishnamachariar for plaintiff.—The plaintiff is entitled under the Interest Act, 1839, to claim interest on his overdue accounts. He is also entitled to rest his claim on section 73, illustration (*n*) of the Contract Act, 1872, the money not having been paid him when the work was completed.

Mr. *D. Chamier* for defendants.—The letters relied on do not constitute notices of claim for interest within the meaning of the Interest Act. The notice there contemplated is prospective only, whereas the letters produced are retrospective, being mere demands for interest alleged to have already accrued due. The amount rightly due is that specified in the contract, which has been tendered.

JUDGMENT.—This is a suit for recovery of Rs. 2,802-9-7 claimed to be due to plaintiff from the defendant company for materials supplied and work done by the plaintiff for the defendants. The sum claimed includes interest as well as principal, and the only question in dispute between the parties is, whether the plaintiff is entitled to interest . . . .

There was no contract, nor is it the plaintiff's case that there was any, between the parties for payment of interest, but he relies for his claim to interest upon the Interest Act, XXXII of 1839, and certain letters written by and on his behalf, respectively, to the defendants' assistant secretary and the defendants, and also upon section 73 of the Contract Act . . . . Though

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no specific time was fixed by contract between the parties for payment of the bills, it is clear that the unpaid ones were left unpaid and without tender of payment for long after the reasonable time for payment had elapsed. When plaintiff wrote to defendants' assistant secretary on 25th April 1897 requesting payment (exhibit D), he was informed in reply that there were no funds available (exhibit E). In his letter (exhibit F) he stated that he had been obliged to borrow money at an exorbitant rate of interest; in his evidence in Court he said at 12 per cent. per annum, in order to execute his contract with defendants. I am inclined to think that in a case such as this, when a contractor is for no fault of his own kept out of his money—the principal sum—for a long time after it is due, it would be reasonable that the law should admit of interest being recoverable, by way of damages, for the period for which he is kept waiting for the principal sum due, after demand made, whether that demand is coupled with a claim to interest or not. I should, however, perhaps hardly venture to express this opinion, were it not that it is consonant, it appears to me, with that expressed by the House of Lords in *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.*(1), wherein their Lordships appear to have considered the doctrine laid down in the older cases that interest was recoverable by way of damages on any debt or sum certain due, payment of which was wrongfully withheld after demand made, from date of demand, a just and reasonable doctrine, but held that they were bound by the provisions of the Statute 3 and 4 Willm. IV, cap. 42, section 28, and by the decision of the Exchequer Chamber in *Merchant Shipping Co.* v. *Armitage*(2). It is contended, however, for the plaintiff, that he has complied with the provisions of the Interest Act, XXXII of 1839, (which are *verbatim* the same as those of section 28 of Statute 3 and 4 Willm. IV, cap. 42) except that the discretionary power to allow interest is vested in the jury under the latter Act and in the Court under the former. In plaintiff's attorney's letter to the defendant company of 24th July 1895 (exhibit A), he calls upon defendants "for the immediate payment of Rs. 3,440-4-3, being the amount of principal and interest due by the company to my client for gravel, sand, stones, &c., supplied and brickwork done between November 1894 and

(1) [1893] A.C., 429. (2) L.R., 9 Q.B., 99 at p. 114.

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"February 1895," and states that if this sum be not paid within a week from receipt of the letter, legal proceedings will be instituted without further notice. In his letter to defendants' assistant secretary of 25th April 1897 (exhibit D), plaintiff says :—"I humbly "beg to request you will be so good as to arrange for the adjust- "ment of Rs. 2,351-10-3, being the amount due on my bills with "interest." In his letter to defendants' assistant secretary of 19th March 1898 (exhibit F), plaintiff reminds the assistant secretary "of the balance of account for Rs. 2,597-15-5 between myself "and the company, which has been of long standing, in my favour, "and request you will be good enough to arrange for its early "adjustment;" then follows a statement of particulars of principal and interest, making up that sum after deducting part payment; and he adds that if the company disputes his claim for interest, he has no other means of redress than to go to law. In his letter to defendants' assistant secretary of 4th April 1898 (exhibit G) plaintiff reminds the assistant secretary of his (plaintiff's) letter of March 1898 and adds that he will be compelled to place his case in his solicitor's hands if he is not favoured with the assistant secretary's reply within three days. In plaintiff's attorney's letter to defendants' assistant secretary of 17th November 1898 (exhibit B), the former demands payment of Rs. 2,761-1-6, "being the "amount of principal and interest due to my client for work done "and materials supplied between November 1894 and February "1895 and for payment of which my client has repeatedly made "demands," and states that, if payment is not made within three days, a suit will be filed. In none of these letters is there an express notice that interest will be claimed from the date of the demand, but interest is claimed, retrospectively, up to date of demand, and it is contended on defendant's behalf that none of these letters therefore comply with the provisions of the Interest Act, so as to entitle the plaintiff to claim interest under that Act. On the other hand, it is contended on the plaintiff's behalf that by claiming interest for the past, the plaintiff impliedly claimed interest for the future also. No reported cases, Indian or English, were cited on either side. In *Earl of Londesborough* v. *Mowatt*(1) the plaintiff by letter to the defendant claimed a certain sum, and added that he should expect to be paid five per cent. interest

(1) 4 E. & B., 1.

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from a time specified, which was prior to the date of the letter, and it was held that there was a sufficient demand of payment within the English enactment to entitle the jury to give interest from the date of the demand until the date of payment. But in that case the demand, in its wording, though retrospective, was also prospective. The nearest case in resemblance to the present case which I have found, is, I think, the case of *Geake* v. *Ross*(1), in which the plaintiff, who had for some years supplied coal to an unregistered mining company, wrote a letter to the defendant, who was a shareholder, containing the following passages :—"I feel it my duty to write to you about my claim "on this company. They owe me, for balance of account and inter- "est, over £1,100 . . . . Now, I must ask the plain question, "why is not my account paid ? . . . . I must give you notice "that if my account with this mine be not settled on or before "the 1st day of November next, I shall instruct my solicitor to "take the necessary proceedings to recover the money this com- "pany owes me." It was held that there was a sufficient demand within Statute 3 and 4 Willm. IV, cap. 42, section 28, to justify a jury in giving interest from the date of the letter. Although the letters of the plaintiff and his attorney do not expressly claim interest prospectively from their respective dates, yet from their claiming interest up to those dates, I think they, by implication, made it sufficiently clearly appear that it was the plaintiff's intention to claim interest up to the date of payment, and having regard to the terms of the Interest Act of 1839 in question (identical with those of the English enactment) and to the decision in *Geake* v. *Ross*(1) above referred to, I am of opinion that all the letters of the plaintiff and his attorney sufficiently complied with the requirements of the Act, so as to entitle him to claim interest under the Act prospectively from their respective dates . . . .

If he is not entitled to claim interest under the Interest Act, there is no other law, I think, under which he can claim it. His Vakil referred to illustration (*n*) of section 73 of the Contract Act, but the case there put is that of a contract to pay a sum on a specified day, and therefore not a case in point. No local custom

(1) 44 L.J., C.P., 315.

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has been proved or set up. In *Kisara Rukkumma Rau* v. *Cripati Viyanna Dikshatulu*(1), which, however, was a mufassal case, the High Court considered the effect of the proviso in Act XXXII of 1839, "that interest shall be payable in all cases in which it is "now payable by law," and found that "the practice which has "unquestionably prevailed in the mufassal Courts for a long series "of years of awarding interest upon all demands of which the "payment has been illegally delayed was not shown to be based "upon any existing Regulation or positive rule of law by which "interest would, at the time the Act passed, have been payable "in respect of the debt in question," and as the requirements of the Interest Act as to a demand in writing had not been complied with, disallowed the claim for interest.

The only question remaining is as to the rate of interest to be allowed. The rate which the Court may allow under the Act is a rate not exceeding the current rate. The plaintiff has sworn that the current rate is 12 per cent. per annum, and there is no evidence *contra*. I award the plaintiff interest at that rate upon the sum of Rs. 3,215-13-4, the aggregate principal of his then unpaid bills from 24th July 1895, the date of the letter (exhibit A), down to 7th January 1896, the date of his bills (exhibits I, II and III), and upon Rs. 1,230-8-2, the balance of principal then remaining due, from 7th January 1896 down to date of institution of suit, and plaintiff will have a decree for the principal sum of Rs. 1,280-8-2, admitted to be due to him, together with the interest awarded; and the suit is dismissed as to the remainder of the sum claimed. [The judgment concluded with directions as to costs.]

Mr. *Rowlandson*—attorney for defendants.

(1) 1 M.H.C.R., 369.

APPELLATE CIVIL.

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

1899. February 27.

SUBBARAYA MUDALI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

KAMU CHETTI (DEFENDANT No. 1), RESPONDENT.*

Service inams—Enfranchisement in favour of widow—Right of widow.

Lands which had been held by a deceased as moniem service inam were enfranchised after his death and sold by his widow. On a claim being preferred by the reversioners for a declaration that the sale was inoperative as against them after the expiration of the widow's life estate:

Held, that the right of the widow under the grant was not limited to that of a widow's estate.

SECOND APPEAL against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in Appeal Suit No. 17 of 1897, affirming the decree of W. Gopala Chariar, District Munsif of Arni, in Original Suit No. 506 of 1895.

Suit for a declaration that a sale of land to first defendant by second defendant, the widow of one Kandasami, was inoperative after the expiration of her life estate, as against plaintiffs, who were reversioners. The lands in question were formerly moniem service inam which had been enfranchised after the death of the second defendant's husband; and it was contended that because these were service inams, the holders had not full ownership until enfranchisement, and that the patta after enfranchisement amounted to a grant to the widow, the second defendant, personally. The District Munsif held that though the inam deed raised no doubt that the enfranchisement was in favour of second defendant, this alone was not sufficient to vest it in her personally. Her husband and his forefathers had been in enjoyment without power of alienation, and the enfranchisement, in his view, meant no more than that the restriction was removed and that the holder was allowed to enjoy it thenceforth with all the rights of a pattadar. The benefit derived by second defendant by the enfranchisement had accrued by virtue of her position as the heir of her late husband, Kandasami, and he held that any advantage due to that position

* Second Appeal No. 819 of 1898.

SUBBARAYA MUDALI v. KAMU CHETTI.

must be considered to have been gained for the benefit of the family to which she belonged; and that, in consequence, the property must still be held to be family property and not the second defendant's personal property. He declared that plaintiffs, as next heirs to Kandasami (second defendant's late husband), had a reversionary interest in the property and that the sale complained of would not be valid or binding on plaintiffs after the death of second defendant. The District Judge, on appeal, regarded this as directly opposed to the principle laid down in *Venkatarayadu* v. *Venkataramayya*(1). He reversed the decree of the District Munsif.

The plaintiffs preferred this second appeal.

Kothandarama Ayyar for appellants.

Sundara Ayyar for respondent.

JUDGMENT.—The case of *Narayana* v. *Chengalamma*(2) is not in point, as the inam there was not attached to a village office as in this case. There is no reason to suppose that the Government in granting the inam to the widow of Kandasami (second defendant) intended to limit her rights to a widow's estate. We do not find anything in the judgment in *Sitapati* v. *Narasimham*(3) to warrant the raising of such a presumption in this case. Our present conclusion is in accordance with the decisions in *Venkatarayadu* v. *Venkataramayya*(1), *Dharanipragada Durgamma* v. *Kadambari Virrazu*(4) and *Salemma* v. *Lutchmana Reddi*(5).

The second appeal fails and is dismissed with costs.

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

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

(3) Second Appeal No. 222 of 1896 (unreported). The judgment of their Lordships (COLLINS, C.J., and SHEPHARD, J.), dated 7th September 1897, was (so far as it is material to the reported case) as follows:—"According to the plaintiff's contention the office of karnam belonged to the family of which plaintiff and first defendant are members, and it is found that the enfranchisement took place when the first defendant was the actual holder of the office. If these are the real facts, we do not think the case of *Venkatarayadu* v. *Venkataramayya* (I.L.R., 15 Mad., 284) applies, for the judgment shows that there was no intention to go beyond the decision in *Venkata* v. *Rama* (I.L.R., 8 Mad., 249), and the facts in the latter case are clearly distinguishable from those in the present."

(4) I.L.R., 21 Mad., 47.

(5) I.L.R., 21 Mad., 100.

PRIVY COUNCIL.

SRI VENKATA SVETA CHALAPATI RANGA RAO, RAJA OF BOBBILI (PLAINTIFF), APPELLANT,

v.

INUGANTI CHINA SITARAMASAMI GARU (DEFENDANT), RESPONDENT.

P.C.* 1899. June 22, 29, July 13.

[On appeal from the High Court at Madras.]

Stamp Act—Act I of 1879, s. 34—Penalty chargeable only on the original, unstamped, or insufficiently stamped, instrument—Document tendered as secondary evidence not within the section and not admissible.

By the terms of the Indian Stamp Act, 1879, the provisions of section 34, which apply to documents either unstamped or insufficiently stamped, have no application when the original instrument, which ought to have been properly stamped but was not, has not been produced. The clauses of that section deal with, and exclusively refer to, the admission in evidence of original documents which have been either not stamped at all, or have been insufficiently stamped.

APPEAL from a decree (4th April 1894) of the High Court affirming a decree (18th November 1892) of the District Judge of Vizagapatam.

The suit, in the course of which a question of the stamp law arose, was brought by the present Raja of Bobbili to obtain the proprietary possession of an estate once belonging to the family. The defendant was Bhavayyammi, who died pending this appeal and was succeeded on the record by the reversionary heir, the respondent abovenamed. He was a minor, and the Collector of Vizagapatam who, as agent of the Court of Wards, was manager on behalf of the original defendant, and was a co-defendant with her, now appeared for the minor. The original defendant was the widow of Sitaramasami, the son of the sister of the plaintiff's paternal grandfather, a former Raja of Bobbili, by whom the estate now the subject of dispute was granted by deed of the 5th of April 1848 to a cousin who had married the then Raja's sister. That donee died in 1872, and his widow thereupon restored the estate to the Raja of Bobbili on the footing that the grant had been only for her husband's life. The Raja then granted the

* *Present*: Lords WATSON, HOBHOUSE, and DAVEY, Sir RICHARD COUCH, and Sir EDWARD FRY.

estate to another cousin who died in the same year. This was the above-mentioned Sitaramasami, who left the widow Bhavayyammi from whom as the original defendant the present Raja of Bobbili sought to recover the estate. It was necessary for the Raja to show that the grant of 1848 was absolute and unconditional. The deed of grant was, however, not forthcoming, having been lost. The question was raised whether the draft, or a copy, of the instrument, which the document tendered as secondary evidence of its contents showed to have been insufficiently stamped, could be subjected to the penalty prescribed by section 34 of the Indian Stamp Act, 1879, as a preliminary to its being admissible in evidence.

The facts are stated in their Lordships' judgment.

The District Judge having fixed the first issue to be whether the grant of 1848 by the then zamindar of Bobbili in favour of Gopal Rao, his cousin, was an unconditional grant, decided that, as evidence of the nature of that grant, the draft or copy of the instrument of grant could not be received as secondary evidence.

The High Court concurred in the opinion of the first Court that the secondary evidence tendered of the first transfer could not be received. They held that the onus of proving that it was unconditional was upon the plaintiff. There was a concurrence of opinion by both Courts that the suit must be dismissed.

On this appeal, Mr. *J. D. Mayne*, for the appellant, argued that the draft of the actual deed of transfer executed in 1848, had been wrongly rejected as inadmissible in evidence. On the question whether the document tendered could be understood to come within the meaning of section 34 of Act I of 1879, the Indian Stamp Act, he referred to decisions in the English Courts, not as supporting the appellant's case, but as showing how analogous questions had been there dealt with, and as clearing the subject. *Rippiner* v. *Wright*(1) a case adverse to the view in favour of the appellant; as also was *Smith* v. *Henley*(2). He referred to the discussion in two cases in the House of Lords, *Marine Investment Company* v. *Haviside*(3), *London and County Bank* v. *Ratcliffe*(4).

The Indian Stamp Act followed generally the scheme of the English statute, in force at that period, the 33 & 34 Vic., cap. 97. Stamp laws were intended only to affect the rights of litigants with

(1) (1819) 2 B. & Ald., 478.
(2) (1844) 1 Ph., 391.
(3) (1872) L.R., 5 H.L., 624, 630.
(4) (1881) L.R., 6 App. Cas., 722, 730.

a view to the protection of the stamp revenue. It could not be argued that anything gathered from several writings could be stamped. But it was a different case where the transaction was contained in a specified document, the terms of which transaction had been accurately written in it, a state of things which could be established by evidence. In such a case, where the original had been lost, the copy might be considered to be the legal document representing the lost one, becoming an instrument within the meaning of section 34 of Act I of 1879, as denoting the rights of the parties.

Mr. *A. Cohen*, *Q.C.*, Mr. *J. H. A. Branson*, and Mr. *Kenworthy Brown*, for the respondent, were not heard.

Their Lordships' judgment was afterwards, on the 13th July, delivered by LORD WATSON.

JUDGMENT.—In the year 1848, the then Raja of Bobbili, Sri Raja Sveta Chalapati Ranga Rao Bahadur Garu, who was owner of the estate of Chidikada Jagannadhapuram, situated within the zamindari of Magdole, made a grant of it to his cousin, Sri Inuganti Rajagopala Rayanin Garu, the husband of his sister Sri Gopayyammi Garu. The estate was registered in the name of the donee, who died upon the 4th April 1856, survived by his widow Gopayyammi, and by their daughter, Lakshmi Chellayyammi Garu, who was at that time a minor, eight years of age.

Upon the death of Sri Inuganti Rajagopala Rayanin Garu, the estate was, with the consent of his widow, Gopayyammi, retransferred into the name of the original donor, upon the footing that the interest conferred upon Inuganti by the grant of 1848 was for his lifetime. The original donor, Sri Raja Sveta Chalapati Ranga Rao Bahadur Garu, on the 19th February 1862, made a second grant of the estate, in terms absolute and unqualified, to Sri Inuganti Sitaramasami Garu, the son of one of his sisters, who was registered as owner and continued to possess the estate, until his death, without leaving issue, in September 1873. His widow, the original respondent, Sri Inuganti Bhavayyammi Garu, thereupon entered into, and continued to enjoy possession of the estate, under the management of the Court of Wards. She died during the dependence of this appeal, and her representative, Inuganti China Sitaramasami Garu has been substituted as respondent.

The donor died, after making his second grant of the estate of Chidikada, in the year 1862, and was succeeded in the Raj of

Bobbili, by his son, Sri Raja Sitaramakrishna Rayandappa Ranga Rao Bahadur Garu, who was married to Lakshmi Chellayyammi Garu, the daughter of Rajagopala, the first donee. Her husband, the Raja, died without issue on the 18th May 1868, but authorised his widow Lakshmi to adopt a son. In virtue of that authority, his widow adopted the appellant in February 1871. In 1881, the appellant attained majority, and he has since been in full possession of the estate and Raj of Bobbili.

The present suit was brought by the appellant, in order to recover possession from the original respondent of the estate of Chidika Jagannadhapuram, in December 1890, his main ground of action being that by the terms of the first grant of 1848, Sri Inuganti Rajagopala Rayanin Garu became absolute owner of the estate, and that his interest was not restricted to his lifetime. The appellant maintained that, by Hindu law, on the death of Rajagopala, his widow Gopayyammi became entitled to a life estate, that on her decease, their daughter Lakshmi became entitled to enjoy the estate in question during her life, and that her right of succession had now devolved upon the appellant, under an arrangement with Lakshmi.

In the course of the proof taken in the present suit, the appellant proposed to establish by means of secondary evidence the terms of the grant of 1848, which he alleged to have been executed in the shape of a formal deed of gift. The respondent denied that such a deed ever was executed, and averred that the gift consisted in transferring the estate to the donee's name in the register, upon the footing that the estate was to revert to the donor, in the event of the donee leaving no heir male of his body.

What took place at the trial appears from an order passed by the District Judge of Vizagapatam, which is thus quoted in the final judgment delivered by him :—" The plaintiff offered in " evidence what purported to be an unauthenticated copy, said to " be the original draft, of a deed of gift of the plaint land, dated " 5th April 1848, and executed by the plaintiff's paternal grand " father in favour of the plaintiff's maternal grandfather. The " defendants object to the admission of this document on the " ground that it is the copy of a document which was insufficiently " stamped. The copy bears on its face an entry to the effect " that the document of which it is a copy bore a stamp of Rs. 8

" The defendants' exhibits I and II (admitted by the plaintiff) " show that in 1835 the plaint land was sold for Rs. 40,000. " The document produced, and which the defendants say is a copy " of a document insufficiently stamped, does not contain any " mention of the value of the property. It contains an entry to " the effect that the peshcush, or revenue payable to Government, " was Rs. 4,800. If this could be shown to be the value of the " property, the stamp of Rs. 8 would, under Regulation XIII of " 1816, be sufficient. But there is no connection, of which I am " aware, between the revenue payable to Government and the " value of the property, except that the former may, to some " extent, be an indication of the latter. The lower the revenue, " the higher is the market value of a given piece of property."

The learned Judge, accordingly, refused to receive the document tendered as secondary evidence or to allow it to be proved. He referred to two decisions of the High Court of Madras (*Arunachellum Chetty* v. *Olagappah Chetty*(1) and *Kopasan* v. *Shamu*(2) as establishing the rule that secondary evidence could not be admitted (even on payment of a penalty) of the contents of the original deed of gift of the 5th of April 1848. The appellant having thus failed to support his claim by competent evidence, the District Judge, on the 18th November 1892, dismissed his suit with costs.

The present appellant appealed from that decision to the High Court of Madras, on the ground that the District Judge had erred in refusing to receive the draft tendered as secondary evidence of the contents of the original deed of 1848. On the 4th April 1894, Mr. Justice Sir T. Muttusami Ayyar and Mr. Justice Best affirmed the decree of the Court below and dismissed the appeal with costs. The learned Judges of the High Court agreed in holding " that the copy should not be admitted on payment of a " penalty, for the provision of the Stamp Act regarding penalty " (section 39 of Act I of 1879) prescribes that such payment " shall be endorsed on the document, and pre-supposes that the " document is forthcoming."

Upon the hearing of this appeal, Counsel for the appellant admitted that he was not in a position to dispute that the original deed of gift, dated in 1848, had not been sufficiently stamped,

(1) (1869) 4 M.H.C.R., 312. (2) (1884) I.L.R., 7 Mad., 440.

in terms of the Madras Regulation No. XIII of 1816; and that he would be unable to maintain his claim for the estate of Chidikada unless he were permitted to prove the copy of the deed which he had tendered, and to use it as secondary evidence either on due payment of a penalty into Court, or upon its endorsement by the Collector. His right to have that remedy allowed him was rested upon the provisions of the Stamp Act, No. 1 of 1879.

Accordingly, the only question arising for decision in this appeal is,—Whether the Courts below were right in holding that the provisions made by the Act of 1879, for the case of deeds either unstamped, or insufficiently stamped, have no application when the original deed, which ought to have been stamped or was insufficiently stamped, has not been produced? That is a question which must depend upon the terms of the Statute itself.

Their Lordships are satisfied, by an examination of its clauses, that the construction of the Act of 1879, adopted by the Court below, is correct. These clauses throughout deal with, and exclusively refer to, the admission as evidence of original documents which, at the time of their execution, were not stamped at all, or were insufficiently stamped. It is only upon production of the original writ, that the Collector has the power given him, or the duty imposed upon him, of assessing and charging the penalty, a duty which he must, in that case, perform by writing an indorsement upon the writ submitted to him, which then, and not till then, becomes probative in law. By section 33, it is made the duty of "every person having, by law, or consent of parties, authority to recover evidence," to impound any document coming before him in the course of his functions, which appears to him to be chargeable with duty, and not to have been duly stamped. Section 34 provides that no instrument which has not been duly stamped shall be received in evidence or acted upon by the persons described in the preceding section except (1) on payment of the duty chargeable, or of the amount required to make up such duty, together with a penalty, and (2) in any proceeding in a criminal Court, other than a proceeding under chapter XL or chapter XLI of the Code of Criminal Procedure, or chapter XVIII of the Presidency Magistrates Act. When the original has been admitted in evidence by a person having authority under the preceding section, upon payment of duty and penalty, it is made the duty of such person to send to the Collector an authenticated copy of the instrument, together with a certificate in writing stating the amount of the duty and penalty levied in respect thereof, and also to send such amount to the Collector. In every other case, the person impounding the instrument is required "to send it in original to the Collector."

In the opinion of their Lordships, the effect of granting the remedy which the appellant maintains he is entitled to, would be to add to the Act of 1879, a provision which it does not contain, and which the Legislature of India, if the matter had been brought under their notice, might possibly have declined to enact.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Surr, Gribble & Oliver.*
Solicitor for the respondent—The Solicitor, India Office.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Michell.

APPA RAO (PETITIONER), APPELLANT,

1899. August 2, 4.

v.

VENKATARAMANAYAMMA (COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *s.* 244—*Retention by the Court of property not the subject-matter of a decree in the course of its execution—Dismissal of petition for delivery of possession—Appeal from order of dismissal.*

A decree having been passed awarding to a plaintiff in a suit a moiety of certain jewels which were stored in family boxes in the possession of the defendant, the boxes containing the jewels were taken possession of by an officer of the District Court and a division was effected by a commissioner appointed for that purpose by that Court. After the division certain jewels remained which had been set aside by the commissioner as not forming part of the subject-matter of the decree, and these continued in the custody of the District Court. The defendant thereupon presented a petition to the District Court praying that the jewels so remaining undivided might be returned to him. Plaintiff resisted the application but both parties were agreed that the said remaining jewels were not part

* Appeal against Order No. 123 of 1898.

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of the subject-matter of the suit and were not dealt with by the decree. The petition was dismissed; whereupon the petitioner appealed. On objection being taken that no appeal lay against the order of dismissal on the ground that, since the jewels in question were not part of the subject-matter of the suit and were not dealt with in the decree, the question was not one relating to the execution of a decree and was not governed by section 244 of the Code of Civil Procedure:

Held, that the question as to what should be done with the boxes and their contents arose between the parties to the suit and related to the execution of the decree; that the order was passed under section 244 of the Code of Civil Procedure and that consequently an appeal lay.

Per MICHELL, J.:—The property having been interfered with in the course of the execution of a decree the question involved was one "relating to the execution of the decree." The general words in the section should be construed liberally

Muttuvelu Pillai v. *Vythilinga Pillai*, (5 M.H.C.R., 185), and *Madhan Mohan Singh* v. *Kangu Doss Chuckerbutty*, (12 B.L.R., 201), referred to.

APPEAL against the order of M. D. Bell, District Judge of Gódávari, in Civil Miscellaneous Petition No. 367 of 1898 (Execution Petition No. 32 of 1897 in the matter of Original Suit No. 8 of 1893).

Petitioner was defendant in a suit in the District Court in which counter-petitioner, who was plaintiff, had obtained a decree for partition. During the pendency of that suit the Court had, on counter-petitioner's application, issued a commission for the preparation of an inventory of certain jewels which were contained in boxes of the family in the possession of the petitioner. The inventory having been duly prepared, counter-petitioner had obtained a decree for, *inter alia*, a moiety of the jewels specified in it. In pursuance of that decree, the boxes containing the jewels had been brought by an officer of the Court from the custody of the petitioner to Court for division, and the jewellery specified in the inventory divided accordingly and handed to the parties by the commissioner. After the division had been effected certain jewels still remained in the boxes, having been rejected by the commissioner as not answering exactly to the description of them given in the inventory. These continued in the custody of the District Court. Petitioner thereupon presented a petition to the District Court under section 244 of the Code of Civil Procedure, praying that the said remaining jewels might be handed over to him. Against this counter-petitioner presented a counter-petition asking for delivery of the said remaining jewels to him. Both parties agreed that they did not form part of the subject-matter of

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the suit and were not dealt with in the decree. Counter-petitioner contended that if petitioner had any right to the jewels he could establish it only by a suit brought for the purpose. The District Court dismissed the petition, making no order on the counter-petition.

The petitioner preferred this appeal under sections 244 and 540 of the Code of Civil Procedure.

Hon. *Bhashyam Ayyangar*, *Seshachariar*, and *Ayya Ayyar* for respondent.—There is a preliminary objection to this appeal being heard. It is submitted that no appeal lies against the order of the District Judge. Admittedly the jewellery in question is not part of the subject-matter of the suit, and is not dealt with by the decree. This petition, therefore, relates to property not the subject-matter of the decree. In *Venkata Ramanayamma* v. *Appa Rao*(1) it was held that no appeal lay in such a case.

Sundara Ayyar for appellant:—It is sufficient to establish petitioner's right of appeal that the Court deprived him of the possession of the jewellery in the course of execution. The possession now complained of was taken in the course of execution and the petitioner's remedy against the wrongful retention is under section 244. *Muttuvelu Pillai* v. *Vythilinga Pillai*(2) was decided under the corresponding section of the former Act. It is immaterial that in the case cited the property in question was alleged to be included in the decree. See also *Rani Kattama Nachiar* v. *Bothagurusami Tevar*(3) and *Jogendro Narain Koonwar* v. *Ranee Surno Moyee*(4). In *Venkata Ramanayamma* v. *Appa Rao*(1) the Court was not executing the decree when handing over the property to defendant. Here, the Court has wrongly taken possession of the property in the course of execution. The broadest construction should be placed on section 244, *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(5).

Hon. *Bhashyam Ayyangar* in reply.—In cases under section 244 there must be a question, (1) that must relate to the execution of the decree and (2) that arises between the parties to the suit. In all the cases cited the property in dispute was alleged to be included in the decree, which allegation was denied.

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(1) Appeal against Order No. 162 of 1895 (unreported).
(2) 5 M.H.C.R., 185. (3) 6 M.H.C.R., 293. (4) 14 W.R., (C.R.) 39.
(5) L.R., 19 I.A., 166; I.L.R., 19 Calc., 683 at p. 689.

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MOORE, J.—A preliminary objection is raised that there is no appeal against the order of the District Judge. I am of opinion that that order was passed under section 244, Civil Procedure Code, and that consequently there is an appeal. In execution of a decree the Sheristadar of the District Court, acting under orders of the Judge took possession of a box containing certain jewels and had it removed to the District Court. It was there opened and some of the jewels in it were disposed of in accordance with the directions contained in the decree. It is admitted that the jewels remaining in the box were not included in the property dealt with in the decree. As regards this box and what is left in it the first defendant put in a petition requesting the Court to deal with the property in one manner while the plaintiff presented a counter-petition pleading that it should be dealt with in another manner. On these petitions the District Judge has passed an order.

In my opinion it must be held that this order is one under section 244, Civil Procedure Code. The question arising as to what should be done with the box and its contents is one between parties to the suit, *i.e.*, the plaintiff and the first defendant. No one unconnected with the suit has put forward any claim. It must also, I consider, be held that that question is one relating to the execution of the decree. It was in execution of the decree that the box was taken possession of by the sheristadar and brought to the Court and that subsequently certain of its contents were handed over to certain parties to the decree. It is in consequence of these execution proceedings that the District Judge has been called on to decide what should be done with the remainder of the property and the question that has thus arisen must therefore I consider be held to be one relating to the execution of the decree.

The Judge has rejected the application made to him but has given no reasons for his order. The result is that it is impossible for us in appeal to say if that petition has been rightly dismissed or not. We accordingly set aside the order of the District Judge and remand the matter to him for disposal on the merits. Costs of this appeal will be provided for in the final order.

MICHELL, J.—I agree. I think the case *Muttuveli Pillai* v. *Vythilinga Pillai*(1) is not distinguishable from the present case

(1) 5 M.H.C.R., 185.

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and that the decision in that case is therefore authority for holding the order in question in the present case to be appealable. That was a decision on section 11 of Act XXIII of 1861, but the words in that section "any other questions arising between the parties "to the suit in which the decree was passed and relating to the "execution of the decree" on which the decision in that case turned are reproduced in section 244(*c*) of the Code now in force (with an addition of some words not affecting the question in the present case). In that case the plaintiff sued for recovery of certain land of which, along with other lands, the defendant had been put in possession in execution of a decree in a suit for recovery of lands brought by him against the plaintiff and others, although it did not form part of the lands sued for and for which the decree was obtained in such former suit. If, as was held in that case, the question was one "relating to the execution of the decree," although the land sued for and which had been wrongly put in possession of the defendant by the Nazir in course of execution of the decree in the former suit was not part of the subject-matter of that former suit nor included in the decree therein, then the question in the present case appears to be similarly one "relating to the execution of the decree" notwithstanding the fact that the particular jewels in question did not form part of the jewels which were the subject-matter of the suit between the parties nor of the decree therein.

As in the case of *Muttuvelu Pillai* v. *Vythilinga Pillai*(1) so in the present case it was in course of execution of the decree by the Court officer that the property in question, which did not form part of the property included in the decree, was interfered with. The only difference is that in that case the property in question was put by the Nazir in the possession of the judgment-creditor whereas in this case it has been brought into the Court-house. But that difference is, I think, on an immaterial point. The material point is, I think, that the property in question was interfered with in course of execution of the decree and therefore the question involved is one "relating to the execution of the decree." These general words have always been construed liberally and such construction has been approved by their Lordships of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(2). The case of

(1) 5 M.H.C.R., 185. (2) L.R., 19 I.A., 166; I.L.R., 19 Calc., 683.

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Madhan Mohan Singh v. *Kangu Doss Chuckerbutty*(1) is, I think, clearly distinguishable from the present case; because in that case the property in question was taken possession of not by the officer of the Court but by the decree-holder.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice O'Farrell.

1899. July 10. August 15.

VIRARAGHAVA AYYANGAR (DEFENDANT No. 1), APPELLANT,

v.

PONNAMMAL (PLAINTIFF), RESPONDENT.*

Limitation Act—Act XV of 1877, sched. II, art. 179, cl. (2)—Final decree of Appellate Court—Decree against joint defendants—Appeal by one of two defendants against part of the decree—Decree against non-appealing defendant "imperilled."

Plaintiff having, on 31st March 1891, obtained in a District Munsif's Court a decree rendering liable the property of two defendants, the second defendant appealed, making the plaintiff alone respondent, with the result that the District Court set aside the decree against the second defendant, and remanded the suit for trial as to his liability. Plaintiff appealed unsuccessfully to the High Court against this order of remand, the first defendant again not being made a party. On 23rd July 1894 the District Munsif delivered a revised judgment, in which he again held the second defendant's share liable, but gave both defendants two months' time for payment, which provision was not contained in the original decree. This revised judgment was upheld by the District Court on appeal, on 25th March 1895: and by the High Court on second appeal on 22nd February 1897, with the modification that the decree as against second defendant should be treated as a money decree. First defendant was again not a party to either appeal. On 7th August 1897, plaintiff applied for execution, whereupon first defendant pleaded limitation:

Held, that the decree as against the first defendant was not barred by limitation inasmuch as it had been imperilled by the appeal of the second defendant.

Per MOORE, J.—Under article 179, clause (2), of schedule II of the Limitation Act, it is immaterial whether some only or all of several judgment-debtors prefer an appeal. There is only one decree that can be executed and that is the final decree of the Appellate Court.

Per O'FARRELL, J.—On the general question as to the construction of article 179, schedule II, of the Limitation Act, the plain words of the Act have been unduly narrowed by the decision in *Muthu* v. *Chellappa*, (I.L.R., 12 Mad., 479); the consideration of such subtle points as whether a decree was or was not "imperilled" by an appeal was foreign to the intention of the Legislature.

(1) 12 B.L.R., 201.

* Letters Patent Appeals Nos. 66 and 67 of 1898.

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APPEALS, under Letters Patent, section 15, against the orders of Davies, J., on Civil Miscellaneous Second Appeals Nos. 21 and 22 of 1898, presented against the orders of F. H. Hamnett, Acting District Judge of Tanjore, in Appeals against Orders Nos. 899 and 909 of 1897.

Application by decree-holder in Original Suit No. 358 of 1889 to execute the decree by the sale of the first defendant's share of the hypothecated property made liable by the decree. The petitioner had instituted Original Suit No. 358 of 1889 against first defendant and his undivided son, the second defendant, to recover a sum due on a hypothecation bond executed by first defendant in favour of plaintiff's husband. On 31st March 1891 the Court of the District Munsif decreed that the plaintiff should recover Rs. 1,523-2-0 from first defendant and by sale of the mortgaged property with interest and costs, and that second defendant's share in the mortgaged property should also be liable to the plaintiff's claim. Against this decree second defendant appealed, making petitioner (as plaintiff) alone respondent in that appeal, with the result that, on 26th October 1891, the District Court set aside the decree against second defendant and remanded the case for trial as to the second defendant's liability. Petitioner then appealed to the High Court against this order of remand, but the order was upheld. First defendant was not made a party to this appeal either. On 23rd July 1894 the District Munsif delivered a revised judgment in which he observed that "the first defendant did not appeal and the decree of the Court so far as he is concerned is in force"; he again held second defendant's share of the mortgaged property to be liable to petitioner's claim and added a provision, not contained in the original decree, that first and second defendants should be allowed two months' time for payment. This revised judgment was confirmed by the District Court, on appeal, on 25th March 1895; and on 22nd February 1897 the High Court passed a decree on second appeal containing the following modification:—"The first defendant do pay to the plaintiff Rs. 1,523-2-0 with interest thereon at 6 per cent. per annum from 17th December 1889, the date of plaint, up to date of payment, and that in default of payment of the sum aforesaid on or before the date specified (viz., three months from the date of the decree), the first defendant's share of the hypothecated properties or a sufficient portion thereof be sold . . . . and that the plaintiff be at liberty to proceed

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against the second defendant's share of the said properties in execution of this decree treating it as a money decree." First defendant was not a party in either of the last-mentioned appeals. On 7th August 1897 petitioner applied for execution of the decree: whereupon first defendant pleaded that it was barred by limitation so far as it affected him. The District Munsif held that the execution of the decree as against first defendant was not barred under article 179 of schedule II of the Limitation Act and ordered the execution to proceed. The District Judge, on appeal, upheld the order. The first defendant preferred a second appeal, which, on 27th September 1898, was dismissed by Mr. Justice Davies in the following judgment:—"I think the orders of the Courts below are right. In this case it appears that the decree against the first defendant, the father, was imperilled by the appeal of his son, the second defendant, which distinguishes it from the case of *Muthu* v. *Chellappa*(1). I therefore dismiss this appeal with costs."

Against the last-mentioned order, first defendant preferred this appeal under section 15 of the Letters Patent.

Sundara Ayyar and *Gopalasami Ayyangar* for appellant.—The question is whether the decree against first defendant was imperilled by the appeal preferred by second defendant. Under article 179 of schedule II of the Limitation Act, 1877, the period of limitation is three years from the date of the decree or order, or, where there has been an appeal, the date of the final decree or order of the Appellate Court. Under the Act of 1859, time ran only from the date of the original decree. It is contended that the decree became barred as against first defendant on 1st April 1894, namely, three years from the date of the Munsif's judgment of 31st March 1891. He was not a party to any proceedings subsequent to that decree, and should not be affected by them. The true principle is that where portion of a decree is appealed against, whether there be one or more defendants, the Court will decide whether the portion not appealed against has been imperilled. If not, the decree-holder must execute his decree within three years or lose his remedy. The Court is not bound to reverse a decree against a person who does not appear, and the District Judge did not do so as against first defendant in the

(1) I.L.R., 12 Mad., 479.

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decree of 26th October 1891. It is submitted that the decree against first defendant was not imperilled by that appeal to the District Court, but even if it was, it became final on 26th October 1891. In the case of an appeal by a defendant, a decree against a co-defendant may be reversed; but on a plaintiff's appeal, the District Court could not have exercised such a discretion under section 544 of the Code of Civil Procedure. Under that section the Court may benefit a person not a party, but cannot alter a decree to his prejudice. This application for execution was made more than three years after both original and appellate decree; and when the case was remanded on 26th October 1891, the District Munsif treated the decree as still in force as against first defendant. If the decree against first defendant was ever imperilled, it was only until the decree of the District Court was passed on appeal on 26th October 1891. A decree dealing with the liability of one of two co-defendants cannot be said to affect the position of the other co-defendant. Here, the first defendant could not have appealed, and he did not do so; and he did not appear in the second defendant's appeal; nor was there any reason for the petitioner to appeal so far as first defendant was concerned, the original decree being in petitioner's favour. That was a final decree as against first defendant in every sense. The decree that must be imperilled is that against the non-appealing defendant. The period of limitation will not be extended if it is the decree of the appealing defendant alone that is imperilled. He referred to *Raghunath Pershad* v. *Abdul Hye*(1). [O'FARRELL, J.—The test applied in that case seems to have been whether there were in effect two separate decrees: see the judgment of Couch, C.J., cited on page 31.] No doubt it was so, but the principle was whether the portion not appealed against had been imperilled. [O'FARRELL, J.—These decisions modify the words of the statute; where is the line to be drawn?] In a case in which several reliefs are claimed and a plaintiff appeals only with respect to one of them, and carries his appeal to the Privy Council, it could not be contended that limitation would be extended in regard to the reliefs in respect of which no appeal was brought. *Sreenath Mojoomdar* v. *Brojonath Mojoomdar*(2) was a decree for lands and for moveables. [O'FARRELL, J.—That decision seems never to have been referred

(1) I.L.R., 14 Calc., 26. (2) 18 W.R. (C.R.), 309.

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to or followed.] In *Muthu* v. *Chellappa*(1) an application for execution was held to be barred as against two defendants, the plaintiff having appealed against that portion of the decree which exonerated two other defendants. The same view was taken in *Ponnambala Tambiran* v. *Sami Chetti*(2), though it was there held that the portion of the decree not appealed against was imperilled. [MOORE, J.—What is your definition of "imperilled"?] It means liable to alteration; and the portion not appealed against must be liable to alteration if the period of limitation is to be extended as against it. In *Sriram Ghatak* v. *Brajamohan Ghosal*(3), which was decided on section 544, it was held that the suit must be common to all, non-divisible, and it shows that the District Court could not have altered the decree against first defendant when hearing second defendant's appeal; so that the original decree of 31st March 1891 would be the final one. [MOORE, J.—The modification of second defendant's liability under that decree renders the position of the first defendant worse than it was.] First defendant was, from the first, liable for the whole amount of the decree. If article 179 is construed in its literal sense the Court will be departing from the ruling in *Muthu* v. *Chellappa*(1), which has hitherto been regarded as the opinion of this Court on the point. (He also referred to *Gopal Chunder Manna* v. *Gosain Das Kalay*(4) and *Harkant Sen* v. *Biraj Mohan Roy*(5).)

J. L. Rosario for respondent.—The litigation continued after the judgment in 1891. The case came back to the District Court on 25th March 1895 on appeal from the District Munsif's revised judgment; and the second defendant again appealed to the High Court, and the decree was altered on 27th February 1897 to the prejudice of the petitioner. Limitation should run only from the date of the modification by the High Court. The decision of the Full Bench in *Gopal Chunder Manna* v. *Gosain Das Kalay*(4) is conclusive.

Sundara Ayyar, in reply.

MOORE, J.—In the decree passed in Original Suit No. 358 of 1889 on the 31st March 1891, the District Munsif of Valangiman directed that the plaintiff should recover Rs. 1,523-2-0 from the first defendant and by sale of certain mortgaged property with interest and costs and that the second defendant (the undivided son

(1) I.L.R., 12 Mad., 479.
(2) Letters Patent Appeal No. 95 of 1896 (unreported).
(3) 3 B.L.R., Appx., 41.
(4) I.L.R., 25 Calc., 594.
(5) I.L.R., 23 Calc., 876.

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of the plaintiff) should be held personally liable for the plaintiff's costs. The second defendant appealed to the District Judge (Appeal Suit No. 319 of 1891), his main contention being that his share of the property should not have been held to be liable. The first defendant was not joined as a party to this appeal. The District Judge of Tanjore on the 26th October 1891 set aside the decree of the District Munsif in so far as the second defendant was concerned and remanded the suit for re-trial with respect to his liability. An appeal was preferred against this order, but the High Court declined to interfere with it. In accordance with the directions contained in the remand order, the District Munsif delivered a revised judgment on the 23rd July 1894. In the heading of this judgment the defendants are set forth as Viraraghava Ayyangar (first defendant) and two others. It is, however, admitted that the first defendant did not appear either in person or by pleader before the District Munsif in connection with the second trial, and there appears also to be no doubt that notice was not served on him. In the decree his name is given, but while it is mentioned that the second defendant appeared by Vakil, nothing is said as to whether the first defendant appeared or not. In the decree it was directed that the plaintiff should recover the amount sued for with costs on the security of the mortgaged property including the second defendant's share and a provision, not to be found in the original decree, was added to the effect that the first and second defendants were allowed two months' time for payment. The second defendant appealed to the District Judge against this decree, but his appeal was dismissed (Appeal Suit No. 504 of 1894). To this appeal also the first defendant was no party. A second appeal to the High Court was filed by the second defendant, the first defendant not being joined, and the final appellate decree was passed on the 22nd February 1897 (*Sami Ayyangar* v. *Ponnammal*(1)). In this decree it was directed that the first defendant should pay to the plaintiff Rs. 1,523-2-0 with interest, and it was further ordered that on the first defendant paying the amount due within three months, the plaintiff should deliver up all documents in his possession relating to the mortgaged property and that in default of payment the first defendant's share of the mortgaged property should be sold, and it was finally directed that the plaintiff should be permitted to proceed

(1) I.L.R., 21 Mad., 28.

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against the second defendant's share of the properties in execution of the decree treating it "as a mere money decree." When, on the 7th August 1897, the plaintiff applied to the District Munsif for execution of the decree, the first defendant pleaded that it was barred by limitation in so far as he was concerned. The District Munsif held that there was no bar, and on appeal this order was confirmed by the District Judge. Mr. Justice Davies in Appeal against Appellate Order No. 21 of 1898 refused to interfere with the order of the District Judge, and against his decision the present two Letters Patent Appeals have been preferred.

The main contention urged on behalf of the first defendant is that as he was no party to any of the proceedings in this case subsequent to the decree of the 31st March 1891, that decree is the only one that can be held to be binding on him, and that such being the case the plaintiff's claim as against him is barred by limitation. On behalf of the plaintiff it is contended that this question is to be decided in accordance with article 179 of the second schedule attached to the Limitation Act, which provides that when an appeal has been preferred against a decree, time begins to run in so far as execution proceedings are concerned from the final decree of the Appellate Court, *i.e.*, in the present case from the 22nd February 1897. Mr. Justice Davies dismissed the appeal presented to him on the ground that as the decree against the first defendant, the father, was imperilled by the appeal of his son, the second defendant, the case was distinguished from that disposed of by the decision in *Muthu* v. *Chellappa*(1). It appears to me that this finding to the effect that the decree against the first defendant was imperilled, by which I suppose nothing more is meant than rendered liable to alteration or reversal, by the appeal preferred by the second defendant, must be upheld. The decree of March 1891 made the shares of both the first and second defendants liable. Against it the second defendant appealed, and if his contentions had prevailed and he had been relieved from liability, the result would have been to increase the liability of the first defendant. A similar remark applies to the revised decree of July 1894 and the appeal preferred by the second defendant from it to the District Judge. In this revised decree it may be noted that a slight modification of the original decree was made in so far as the first defendant was

(1) I.L.R., 12 Mad., 479.

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concerned, as it gave him two months' time in which to pay. The result of the second appeal preferred to the High Court from the decision of the District Judge was that a most important alteration was made in the decree of the District Munsif, and that it was directed that the share of the first defendant alone should be liable to be sold in satisfaction of the mortgage amount, the plaintiff, however, being permitted to proceed against the second defendant's share "in execution of the decree treating it as a mere money decree." The effect of this the final appellate decree is certainly, as the District Judge points out, to throw an extra burden on the first defendant's share and, such being the case, it must be held that the decree as against the first defendant was imperilled by the subsequent proceedings taken in appeal. This finding is sufficient for the disposal of the present appeals. I may however add that, with all due deference to the learned Judges who decided the case in *Muthu* v. *Chellappa*(1), I am of opinion that in all cases such as the present where all the judgment-debtors do not appeal no question arises, in so far as the bar by limitation with respect to execution proceedings is concerned, as to whether the decree as against the remaining judgment-debtors is imperilled by the appeal or not. The words of the second clause of article 179 of the second schedule attached to the Limitation Act are, in my opinion, clear and should be followed by the Courts. What is there laid down is that where an appeal is preferred from a decree, the period of limitation with respect to execution is three years from the date of the final decree of the Appellate Court. Whether all the judgment-debtors or some only of them have appealed makes, in my opinion, no difference. There is only one decree that can be executed and that is the final decree of the Appellate Court. There has in the past been a considerable conflict of authorities as to this, but of late the decisions are strongly in support of this view. Reference may be made, *inter alia*, to the decisions in *Sakhalchand Rikhawdas* v. *Velchand Gujar*(2), *Abdul Rahiman* v. *Maidin Saiba*(3), *Harkant Sen* v. *Biraj Mohan Roy*(4), and *Gopal Chunder Manna* v. *Gosain Das Kalay*(5). This last is a decision of a Full Bench, and in the order of reference from a

(1) I.L.R., 12 Mad., 479.
(2) I.L.R., 18 Bom., 203.
(3) I.L.R., 22 Bom., 500.
(4) I.L.R., 23 Calc., 876.
(5) I.L.R., 25 Calc., 594.

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Divisional Bench the greater number of the conflicting decisions above referred to are noted. I may also draw attention to *Chinnayya Rao* v. *Krishnama Charyalu*(1) in which the law, as laid down in *Gopal Chunder Manna* v. *Gosain Das Kalay*(2), is approved and followed. These appeals should, in my opinion, be dismissed with costs.

O'FARRELL, J.—I concur in the judgment just pronounced by Mr. Justice Moore. On the general question as to the construction of article 179, schedule II of the Limitation Act, I think that the plain words of the Act have been unduly narrowed by the decision in *Muthu* v. *Chellappa*(3), and that the consideration of such subtle points as whether a decree was or was not "imperilled" by an appeal was foreign to the intention of the Legislature. There has always been a considerable body of judicial opinion adverse to the earlier Calcutta decisions which the Madras decision followed, and these Calcutta decisions have now been overruled by an unanimous decision of a Full Bench of five Judges of the Calcutta Court itself. I have little doubt that when the question comes to be considered by a Full Bench of this Court the latest Calcutta decision will be followed. Limitation in respect of execution proceedings rests, I think, on somewhat different grounds from limitation in regard to suits. In the latter case it is contrary to public policy that a matter in dispute resting upon testimony should be agitated after a period when that testimony may have grown dim or opposing testimony be difficult or impossible to be procured. In the case of execution proceedings, there is ordinarily no matter in dispute at all. The only ground for refusing execution of a decree after a certain lapse of time is that it is not considered fair that a judgment-creditor should lull his debtor into a false sense of security and then suddenly execute a decree which the debtor may have thought he intended to forego. In a case where the law provides that the period for execution of a decree is prolonged by an appeal being preferred, the debtor cannot be misled. A suspension of execution, so far from being an injury to him, is in such cases a positive advantage, as it gives him further time for satisfaction of the decree. Moreover, by the making of merely formal applications for execution, a decree-holder can, in any case,

(1) Appeal against Appellate Order No. 7 of 1898 (unreported).
(2) I.L.R., 25 Calc., 594.
(3) I.L.R., 12 Mad., 479.

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keep a decree alive for twelve years—a longer period than is likely to elapse during the pendency of an appeal. The mischief of the view which I am now contending against is that it needlessly introduces an element of uncertainty into the execution of decrees, of which the present protracted litigation is an apt example.

In the present case, however, I do not think it necessary to go beyond the four corners of the decision in *Muthu* v. *Chellappa*(1). On any view, the decree as against the first defendant was "imperilled" when the second defendant appealed on grounds which went to the root of the whole transaction. It is, however, ingeniously contended that if this was the case at first, it ceased to be so when the Appellate Court in its order of remand declined to disturb the decree as against the first defendant and remanded the suit for re-trial as regards the liability of the second defendant only. It is urged that, on 26th October 1891, when this order of remand was passed by the District Court, the decree against the first defendant ceased to be imperilled. The fallacy, however, seems to me to consist in looking upon an order in remand, refusing to disturb a decree as regards one defendant and directing a re-trial as regards another, as equivalent to a final decree in favour of the former defendant. This is, I think, not so. Until the original Court has re-tried the question remanded there is no final decree in the suit, and if, against the decree finally passed in remand a fresh appeal is preferred by one defendant, the Appellate Court is again seized of the whole subject-matter of the appeal, and may in a proper case alter the decree in favour of the defendant who has not appealed, and this despite its former refusal to interfere on his behalf. In this view the whole decree has throughout been imperilled by the appeals preferred by the second defendant, and the period from which limitation has to be reckoned is the date of the final decree of the High Court in second appeal. I concur in the order proposed by Mr. Justice Moore that both these appeals should be dismissed with costs.

(1) I.L.R., 12 Mad., 479.

APPELLATE CIVIL.

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

1899. March 17, 21. April 13.

MUHAMMAD ESUPH RAVUTAN (DEFENDANT), APPELLANT,

v.

PATTAMSA AMMAL (PLAINTIFF), RESPONDENT.*

Muhammadan Law— 'Hiba-bil-Iwus' —Settlement in lieu of dower—Possession not transferred—Validity on passing of consideration.

A Muhammadan executed a deed of settlement of certain land in lieu of dower on his wife, who left him shortly thereafter without ever acquiring possession. On his contending that the settlement was invalid:

Held, that a *bonâ fide* transaction by way of 'Hiba-bil-Iwuz' (as this was found to be) is supported by proof of the actual passing of the consideration agreed to be given; that the consideration in this case was the release by the wife of her right to dower from her husband, and that such release was completed by her acceptance of the transfer under the settlement.

SECOND APPEAL against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakónam, in Appeal Suit No. 646 of 1897, modifying the decree of V. T. Subramania Pillai, District Munsif of Tiruturaipundi, in Original Suit No. 374 of 1896.

By a deed of settlement, dated 29th December 1894 (filed as exhibit A), defendant settled certain land on plaintiff, his wife, in lieu of dowry (mahar), the deed reciting that possession had been given to plaintiff on that date. Plaintiff alleged that she had obtained possession of the said land under the deed, but that defendant, her husband, forced her to relinquish the same and held it for himself. She sued for possession and mesne profits. Defendant denied that possession had been given and contended that the deed was invalid for that reason and others. It appeared that plaintiff had left her husband soon after the execution of the deed. The District Munsif found that no physical possession had been given to plaintiff, but held, following *Amina Bibi* v. *Khatija Bibi*(1) and *Azim UnNissa Begum* v. *Clement Dale*(2), that in the case of a gift by a husband to his wife, actual transmutation of possession was not necessary, and that possession by her husband was tantamount to possession by plaintiff, the husband being

* Second Appeal No. 1316 of 1898.

(1) 1 Bom. H.C.R., 157 at p. 161. (2) 6 M.H.C.R., 455.

considered to hold it as agent for his wife. He awarded plaintiff possession of the land. On appeal by defendant, the Subordinate Judge said:—

"If the consideration for the document is partly, as recited in it, the dower debt owed to the respondent by the appellant, it is not a pure and simple gift, and it may be difficult to say that even if the respondent never had possession under it, it can be avoided upon that ground. As remarked by Mr. W. H. Macnaghten in his work on the Muhammadan Law, it is what is termed by Muhammadan Law a 'Hiba-bil-Iwuz' which resembles a sale 'in all its properties; the same conditions attach to it, and the mutual seizin of the donees is not, in all cases, necessary' (chapter V, sections 14 and 15). In *Doe dem. Ramtonoo Mookerjee* v. *Bibee Jeenut*(1), I find it was remarked that 'such a deed will be construed according to the rules affecting the laws of sale; and the validity of a sale is derived, not from the seizin but from the contract,' (see also Appendix under title Gifts Nos. 2, 9, 10 and 11). That the deed in question was executed in satisfaction also of the respondent's claim for dower is proved by the appellant's own evidence, who stated distinctly that 'the arrangement was that the 15 mahs of land to be given to my wife was to cover her dower debt as well as her share' in his estate." He upheld the decree.

Plaintiff preferred this second appeal.

V. Krishnasami Ayyangar, for appellant, referred to W. H. Macnaghten's 'Muhammadan Law,' chapter IV, section 14, and *Muhammad Mumtaz Ahmad* v. *Zubaida Jan*(2). The deed of gift, exhibit A, was not in lieu of dower alone and possession was not transferred by it, for the wife, having left her husband, could not enjoy possession jointly with him. He argued that the deed was not 'Hiba-bil-Iwuz' as held by the Subordinate Judge and that the land could be resumed by the husband; and even if it was of that description it was invalid as portion of the consideration had failed. Deeds of gift and sale are governed by the same rules; *Rahim Bakhsh* v. *Muhammad Hasan*(3), and W. H. Macnaghten's 'Muhammadan Law,' chapter III, page 43. Moreover, under the Muhammadan Law every gift must be followed by possession.

(1) 1 Fult. Rep., 152. (2) I.L.R., 11 All., 460. (3) I.L.R., 11 All., 1.

He referred to *Amina Bibi* v. *Khatija Bibi*(1) and *Azim UnNissa Begum* v. *Clement Dale*(2), and distinguished *Sajjad Ahmad Khan* v. *Kadri Begum*(3), as here there was no change of possession.

V. Krishnasami Ayyar, for respondent, relied upon *Ranee Khujoorroonissa* v. *Mussamut Roushun Jehan*(4) decided by the Privy Council as being conclusive, and referred to *Morarji Cullianji* v. *Nenbai*(5) and *Kalidas Mullick* v. *Kanhaya Lal Pundit*(6).

JUDGMENT.—The District Munsif holds that exhibit A is a deed of gift, that possession was not transferred by the husband to his wife, but that it has been held that in the case of a gift by a husband to a wife actual transmutation of possession is not necessary and he refers to the decision in *Azim UnNissa Begum* v. *Clement Dale*(2). What, however, was there held was that all that was necessary to render a gift by a Muhammadan husband to his wife valid was that it should be accompanied with such a change of possession as the subject was capable of and as was consistent with the continuance of the relation of husband and wife. In a case where, for example, a husband made a gift of the house, in which he and his wife were living, to her and after the gift they both continued to reside in the building, it might be held that the gift was accompanied with such change of possession as was consistent with the continuance of the relation of husband and wife between the donor and donee. In the present case, however, it is shown that the husband and wife separated almost immediately after the gift was made, that the subject matter of the gift was land and that the donee never got possession of these lands in any way or received any of the produce obtained from them. It is not easy to see how it can be said that any possession passed.

The Subordinate Judge holds, in our opinion rightly, that the transaction evidenced by exhibit A constituted what is known as 'Hiba-bil-Iwuz' or a gift for consideration. That in such a case transfer of seizin is unnecessary is clear from the Privy Council case of *Rance Khujoorroonissa* v. *Mussamut Roushan Jehan*(4) cited for the respondent. The Muhammadan Law rules relating to sales or exchanges, on which the appellant's Vakil laid much stress have really no bearing in a case like this. For where a transaction by way of 'Hiba-bil-Iwuz' is shown to be a real transaction

(1) 1 Bom. H.C.R., 157 at p. 161.
(2) 6 M.H.C.R., 455.
(3) I.L.R., 18 All., 1.
(4) L.R., 3 I.A., 291; I.L.R., 2 Calc., 184.
(5) I.L.R., 17 Bom., 351.
(6) I.L.R., 11 Calc., 121.

and it is unaffected by undue influence, fraud or the like, all that has to be shown to support the transaction is, as will be seen from the case already referred to, the actual passing of the consideration agreed to be given. That such was the case in the present instance cannot be denied, since the consideration moving from the respondent was the release by her of the right to dower, which she was entitled to get from the appellant, her husband, and that release was complete when the transfer in question was accepted by her.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Michell.

COLLECTOR OF TRICHINOPOLY (PETITIONER), APPELLANT,

v.

SIVARAMAKRISHNA SASTRIGAL (COUNTER-PETITIONER), RESPONDENT.*

1899. July 28. August 4, 14.

Civil Procedure Code—Act XIV of 1882, *ss.* 211, 212, 244—"*Parties to the suit in which the decree was passed*"—*Application for sale of property of next friend in suit* in formâ pauperis—*Dismissal—Appeal against order of dismissal.*

An order having been made, in a decree dismissing a suit against the next friend of a minor plaintiff, to pay the Court fee due to Government in respect of the suit, the Collector attached the property belonging to the said next friend with a view to bringing it to sale. While the attachment was subsisting, the next friend died, and his son was thereupon brought upon the record. An application for an order for sale of the property of the son, as the legal representative of his father, having been dismissed, the Collector appealed against the order of dismissal:

Held, that the Collector was not a party to the suit in which the decree was passed within the meaning of section 244(*c*) of the Code of Civil Procedure and that he had, therefore, no right of appeal; also, that in proceedings relating to the enforcement of an order under section 412 against a next friend, the next friend cannot be considered to be a party to the suit, and that, in consequence, there is no appeal under section 244(*c*) of the Code of Civil Procedure from an order passed in such proceedings. Nor does section 440 apply to a case of an order passed under section 412.

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* Appeal against Order No. 122 of 1898.

COLLECTOR OF TRICHINOPOLY v. SIVARAMAKRISHNA SASTRIGAL.

APPEAL against the order of L. C. Miller, Acting District Judge of Trichinopoly, in Execution Petition No. 3 of 1898 in the matter of Original Suit No. 32 of 1894.

Application under section 287 of the Code of Civil Procedure praying that the properties of the next friend of a certain minor, attached for stamp fees due to Government, might be sold. One Egnasami Sastrigal, now deceased, as the next friend of his niece had sued six defendants *in formâ pauperis*. The suit was dismissed, and he was ordered to pay the Court fee payable to Government. The Collector, in execution of the order, attached his property with a view to bringing it to sale; but while the attachment was subsisting, Egnasami Sastrigal died. His son, the counter-petitioner, was thereupon brought on the record, but denied his liability and an application for the sale of his property for the Court fee, as the son and legal representative of Egnasami Sastrigal, was dismissed by the District Court on the ground that such property had devolved on the counter-petitioner by survivorship unaffected by either attachment or decree.

The petitioner preferred this appeal.

V. Krishnasami Ayyar, for respondent, took the preliminary objection that no appeal lay from the order of the District Court, on the grounds (1) that the Collector (petitioner) was not a party to the suit in which the decree ordering the counter-petitioner's father to pay the Court fee was passed, and (2) that the counter-petitioner's father, as next friend, was not a party either. He argued that the right of appeal must depend on section 244(*c*) of the Code of Civil Procedure and on the definition of "decree" in section 2 and in section 540, and that those sections did not apply to such a case as this. He relied on *Collector of Ratnagiri* v. *Janardan Vithal Kamat*(1) and *Collector of Kanara* v. *Rambhat*(2), which were followed in *Collector of Vizagapatam* v. *Abdul Kharim Sahib*(3). He referred to *Janki* v. *The Collector of Allahabad*(4) and *Secretary of State for India in Council* v. *Bhagwanti Bibi*(5), which laid down a different rule, but contended that the Bombay and Madras cases were rightly decided.

(1) I.L.R., 6 Bom., 590.
(2) I.L.R., 18 Bom., 454.
(3) I.L.R., 21 Mad., 113.
(4) I.L.R., 9 All., 64.
(5) I.L.R., 13 All., 326.

COLLECTOR OF TRICHINOPOLY v. SIVARAMAKRISHNA SASTRIGAL.

Mr. *N. Subramanyam* for appellant.—The cases are conflicting and afford no authority. In *Collector of Ratnagiri* v. *Janardan Vithal Kamat*(1) there had been no decree or dismissal of suit; and the plaint had been returned for presentation to a proper Court, no costs being provided for. The Collector could not be entitled to an order in such circumstances, and the case contains a mere dictum. In *Collector of Kanara* v. *Rambhat*(2), it was held, on the authority of the above case, that no appeal by Government would lie, and that the Court in the exercise of its extraordinary jurisdiction would rectify the decree by directing the plaintiff to pay the costs of Government. In *Secretary of State for India in Council* v. *Bhagwanti Bibi*(3), an appeal by Government for the recovery of Court fees was held to lie following *Janki* v. *The Collector of Allahabad*(4), where it was said that a Collector must be deemed to be a party to the suit in which the decree was passed within the meaning of section 244(*c*) of the Code of Civil Procedure. The Full Bench case in *Ram Dial* v. *Ram Das*(5) supports that view though it was decided with reference to another section. So does the case of *Amir Baksha Sahib* v. *Venkatachala Mudali*(6), decided on section 293, which is very similar in its terms to section 411; see the judgment of Shephard, J., at page 440. There the question related to an auction-purchaser who had made default in completing his purchase and was not on the record, and the Court said it made no difference whether he was a party or not. See also *Baijnath Sahai* v. *Moheep Narain Singh*(7) and *Vallabhan* v. *Pangunni*(8). In *Shek Suleman* v. *Shivram Bhikaji*(9), decided on section 253, a surety was regarded as not being a party, but an appeal was held to lie under section 244 as if he were. The cases decided on sections 253, 287, 293 and 411 are analogous, and show that an appeal lies in such a case as this. A "party" in the absence of definition in the Code should be defined as any person to whom notice is sent of any proceeding on the record. The definition of "party" in section 100 of the Judicature Act, 1873, (36 & 37 Vic., cap. 66), is "every person served with notice of or attending any proceeding, although not named on the record." Here the Collector was served

(1) I.L.R., 6 Bom., 590.
(2) I.L.R., 18 Bom., 454.
(3) I.L.R., 13 All., 326.
(4) I.L.R., 9 All., 64.
(5) I.L.R., 1 All., 181.
(6) I.L.R., 18 Mad., 439.
(7) I.L.R., 16 Calc., 535.
(8) I.L.R., 12 Mad., 454.
(9) I.L.R., 12 Bom., 71.

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with notice of the proceedings, and he should be heard. How can section 408 of the Code give him that right unless it also makes him a party? It would seem to have been held in *Manjunath Badrabhat* v. *Venkatesh Govind Shanbhog*(1) that a proceeding in execution is a proceeding which terminates in a decree as defined by section 244 of the Civil Procedure Code (Act X of 1877), and is, therefore, a suit within the meaning of the Code. The only difference between sections 411 and 412 is that section 411 provides for the case in which plaintiff succeeds, and section 412 for that in which he fails. With regard to the counter-petitioner's father's position as next friend, section 440 provides that he may be ordered to pay the costs as if he were the plaintiff. This is a case under section 412 and the order is not a separate one, but is entered in the decree. It cannot be contended that the only means of recovering an amount ordered to be paid under section 440 is by separate suit. A pauper suit commences under section 408 with the petition, notice of which is served on the Government Pleader; and Government or the Collector thereupon becomes a party. The suit continues as such until decree, and the appellant is in the decree. Section 415, which makes the costs of an application to sue *in formâ pauperis* costs in the suit, is a further indication that the enquiry into the fact of alleged pauperism is part of the suit itself, and the Collector was a party to that enquiry, being represented by the Government Pleader on notice being served under section 408.

V. Krishnasami Ayyar in reply.—The question is concluded by the decision in *Collector of Vizagapatam* v. *Abdul Kharim Sahib*(2), which was dealt with on revision under section 622—a procedure only possible in the absence of a right of appeal. Section 244 speaks of "parties to a suit" and not merely parties; and the definition of a plaintiff in the rules under the Judicature Act, 1873, shows that it and the definition of a defendant are too wide to be a safe index to the meaning intended to be attributed to the same words in the Code of Civil Procedure. A decree is an adjudication upon any right claimed or defence set up when it decides the suit or appeal; and section 412 does not direct that costs are recoverable as costs of suit, but merely that the Court may

(1) I.L.R., 6 Bom., 54. (2) I.L.R., 21 Mad., 113.

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order a plaintiff to pay them. In *Secretary of State for India in Council* v. *Jillo*(1), the Full Bench held that parties to an application for leave to sue *in formâ pauperis* prior to the registration of a suit were only parties to the application and not to the suit. With regard to the analogy relied on with reference to section 293, *Deoki Nandan Rai* v. *Tapesri Lal*(2) shows that no appeal would lie, that section only providing a *modus operandi* of recovering and not conferring a substantive right. With reference to section 211, the remarks of Shephard, J., in *Amir Baksha Sahib* v. *Venkatachala Mudali*(3) were not necessary for the decision of the case. The wording of section 411 differs from that of sections 315 and 293, but that of sections 293 and 315 is similar, and *Kunhamed* v. *Chathu*(4) is in favour of my contention as regards section 315, though the case of *Amir Baksha Sahib* v. *Venkatachala Mudali*(3) is against it as regards section 293. So the cases afford no guide by way of analogy. The question depends not upon whether the order is contained in the decree, but upon whether the person is a party to the suit within the meaning of section 244 (*Deoki Nandan Rai* v. *Tapesri Lal*(2)). The Privy Council case (*Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(5)) was decided on section 311 and goes on a different principle. Moreover the purchaser was a party respondent. Section 440 provides that costs may be recovered from a next friend as if he were a plaintiff, thus indicating merely the mode by which recovery is to be effected and not making the next friend a party to the suit. See also *Gopalasami Mudali* v. *Janadas Mudali*(6).

MICHELL, J.—This is an appeal by the Collector of Trichinopoly against an order of the District Court dismissing the appellant's application for issue of a sale proclamation under section 287 of the Civil Procedure Code, in respect of certain properties which had been attached upon a previous application made by him, and for sale thereof and payment to him from the sale-proceeds of the amount of certain stamp-duty ordered by the decree in Suit No. 32 of 1894 on the file of that Court to be paid to the Government, and of the costs of the two execution applications. That suit was brought by certain minors by their next friend, the respondent's

(1) I.L.R., 24 All., 133. (2) I.L.R., 14 All., 201. (3) I.L.R., 18 Mad., 439
(4) I.L.R., 9 Mad., 497. (5) L.R., 19 I.A., 166; I.L.R., 19 Calc., 683.
(6) Appeal against Orders Nos. 111 and 112 of 1898 (unreported).

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father, *in formâ pauperis*. The suit was dismissed, and by an order contained in the decree, the respondent's father, as the next friend of the plaintiffs, was ordered to pay the sum of Rs. 315, being the stamp-duty which would have been payable by the plaintiffs if they had not been allowed to sue as paupers. The respondent's father died while the attachment of his properties, effected on the appellant's former application, was subsisting, and the application, against the order passed on which the present appeal was preferred, was made against the respondent as the son and legal representative of such next friend, and was heard and decided on the merits and was dismissed by the Acting District Judge on the ground that the properties passed to the respondent on his father's death by survivorship unaffected by the attachment as well as by the decree.

A preliminary objection is raised to this appeal, that the order appealed against is not appealable, because the appellant, the Collector, was not a party to the suit in which the decree, by which the respondent's father was ordered to pay the Court fees, was passed, and also because the respondent's father, as the next friend of the minor plaintiffs in the suit, was not such party, and therefore section 244, sub-section (*c*), of the Code, on which together with the definition of "decree" in section 2, and section 540, the appellant relies, as giving him a right of appeal, does not, it is contended, apply to this case.

In support of the first of these grounds of preliminary objection to this appeal, two decisions of the High Court of Bombay are relied on. In *Collector of Ratnagiri* v. *Janardan Vithal Kamat*(1) it appears that the plaintiff was allowed under section 409 to sue *in formâ pauperis*, but the Court finding that it had no jurisdiction to try the suit, returned the plaint for its being presented in the Court having jurisdiction, and ordered the plaintiff to pay the Court fees from payment of which he had been exempted on the ground of pauperism. That order must have been an order purporting to have been made under section 412. The Collector applied to the Court which passed that order for its execution. The application was rejected, and on appeal to the District Judge, the order of rejection was upheld. On second appeal by the Collector to the High Court, it was held that no appeal lay against the original order refusing execution of the order for payment of

(1) I.L.R., 6 Bom., 590.

COLLECTOR OF TRICHINOPOLY v. SIVARAMAKRISHNA SASTRIGAL.

Court fees, and therefore no second appeal lay, because the question was "one arising not between the parties to the suit [clause (*c*), "section 244 of Act X of 1877], but between the Collector who is "a third party and one of the parties to the suit." This decision was expressly approved and followed in *Collector of Kanara* v. *Rambhat*(1), in which it was held that no appeal by Government lies in respect of the question as to the right of Government to recover the Court fees from the plaintiff who has failed in a suit brought by him *in formâ pauperis*. The respondent's vakil also relied on *Collector of Vizagapatam* v. *Abdul Kharim Sahib*(2), in which this Court entertained a revision petition under section 622 in a case in which a District Judge had refused to order the plaintiff, whose suit brought *in formâ pauperis* had been dismissed by him without contest, to pay the Court fees. This decision was relied on as showing that no appeal lies in such a case, because, if an appeal lay, the High Court could not have dealt with the case under section 622. On the other hand, the appellant's Counsel relies on the decision in *Secretary of State for India in Council* v. *Bhagwanti Bibi*(3), in which case, a District Judge having, in a suit brought *in formâ pauperis*, decreed the plaintiff's claim in part and dismissed it in part but having omitted to order, under section 412, payment by the plaintiff of the Court fees on the part of the claim which was dismissed, an appeal by the Government for recovery of such Court fees was held to lie. The learned Judges in that case referred to and followed the case of *Janki* v. *The Collector of Allahabad*(4) wherein it had been held that, in an application by the Collector for execution of an order for payment of Court fees passed under section 411 of the Code, the Collector must be deemed to be a "party to the suit in which "the decree was passed" within the meaning of section 244, sub-section (*c*), and that an order passed on such application was therefore appealable. It is to be observed, however, that, while in section 411 it is expressly provided that the Court fees, from payment of which the successful pauper plaintiff was in the first instance exempted, shall (besides being a first charge on the subject-matter of the suit) be recoverable by the Government from the party ordered by the decree to pay them in the same manner

(1) I.L.R., 18 Bom., 454.
(2) I.L.R., 21 Mad., 113.
(3) I.L.R., 13 All., 326.
(4) I.L.R., 9 All., 64.

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as costs of suit are recoverable under the Code, section 412 contains no such provision for recovery by Government of Court fees ordered under that section to be paid by a pauper plaintiff. Arguments, therefore, in favour of the Government being deemed "a party to "the suit" based on the special provision in section 411, which places the Government, in respect of the Court fees decreed to be paid, in the same position as a party to the suit in regard to execution of a decree, cannot, it appears to me, be applied to a case falling under section 412 without ignoring the fact that the Legislature has enacted no such provision in the latter section. The appellant's Counsel also relies on the decisions in *Ram Dial* v. *Ram Das*(1) (a Full Bench case), *Amir Baksha Sahib* v. *Venkatachala Mudali*(2), *Baijnath Sahai* v. *Moheep Narain Singh*(3) and *Shek Suleman* v. *Shivram Bhikaji*(4) as showing, by way of analogy, that an appeal ought to be held to lie in such a case as the present. In the first three of these cases the question was whether a defaulting purchaser at an execution sale was, with reference respectively to section 293 of the Code of 1882 and section 254 of the Code of 1859, which was substantially the same as section 293 of the Code of 1882, a party to the suit within the meaning of section 244 of the Code of 1882 and section 11 of Act XXIII of 1861, respectively, so as to render orders passed in such cases appealable, and the question was in all these three cases decided in the affirmative. In the case of *Shek Suleman* v. *Shivram Bhikaji*(4) it was held that a surety for the performance of a decree, against whom an application for execution has been made under section 253 of the Code, has a right of appeal, as if he were a party to the suit, against an order passed on such application. But the sections to which all these cases related expressly provide that execution proceedings may be taken against, in the one case the defaulting purchaser, in the other case the surety, in the same manner as they may be taken in execution of a decree, thus placing the defaulting purchaser and the surety respectively in virtually the same position as a judgment-debtor, just as section 411 contains a similar provision placing the Government in the position (for the purpose of recovering the Court fees) of a decree-holder; and the decisions in these cases turned mainly upon the effect of those provisions in the respective

(1) I.L.R., 1 All., 181.
(2) I.L.R., 18 Mad., 439.
(3) I.L.R., 16 Calc., 535.
(4) I.L.R., 12 Bom., 71.

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sections of the Code above mentioned. Whatever may be the value of those decisions as authorities bearing upon a case falling under section 411, they are not, I think, authorities bearing upon a case, such as the present, falling under section 412, which contains no such provision.

For the reasons given, I am of opinion, agreeing with the Bombay decisions in *Collector of Ratnagiri* v. *Janardan Vithal Kamat*(1) and *Collector of Kanara* v. *Rambhat*(2), that the Collector is not "a party to the suit in which the decree was passed" within the meaning of section 244(*c*) of the Code and that therefore he had no right of appeal in this case.

With reference to the other preliminary ground of objection taken, viz., that the next friend of the plaintiff is not a party to the suit and therefore the proceedings in question in this case do not involve any question falling within section 244(*c*), and no appeal lay, *primâ facie* a next friend is not a party to the suit. The appellant's Counsel, however, relied on the provision in section 440 that the next friend "may be ordered to pay any costs in the "suit as if he were the plaintiff." But that provision relates only to costs, and Court fees, though as between the plaintiff and the defendant they are costs, are not costs as between the plaintiff and the Government, but revenue. Section 440, therefore, does not, in my opinion, apply to a case of an order passed under section 412. It is true, section 411 makes the amount of the unpaid Court fees ordered by the decree to be paid by any party to the suit recoverable by the Government in the same manner as costs of suit are recoverable under the Code; but in the first place the present case does not fall under that section, and in the second place, that section does not say that these Court fees are to be deemed to be costs in the suit, but that they shall be recoverable in the same manner as costs of suit are recoverable. I am, therefore, of opinion that, at all events in such proceedings as those with which we are concerned in the present case, which relate to the enforcement of an order under section 412 which directed payment of Court fees by a next friend, the next friend cannot be considered to be a party to the suit, and that, consequently on this ground also, it must be held that no appeal lies in the present case.

(1) I.L.R., 6 Bom., 590.
(2) I.L.R., 18 Bom., 454.

COLLECTOR OF TRICHINOPOLY v. SIVARAMAKRISHNA SASTRIGAL.

This appeal should, therefore, in my opinion, be dismissed with costs.

Nor is this a case which we can deal with under section 622 of the Code, because the order appealed against dismisses the Collector's application upon grounds of law and no question of jurisdiction is involved.

MOORE, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice O'Farrell.

1899. July 11, 18.

PURAMATHAN SOMAYAJIPAD AND OTHERS (PLAINTIFFS NOS. 1 TO 4), APPELLANTS,

v.

SANKARA MENON AND OTHERS (DEFENDANTS NOS. 1 TO 41, 44 TO 49, 51 TO 63, 65 TO 72, 74 TO 112, AND 64, AND PLAINTIFF NO. 5), RESPONDENTS.*

Parties—Devasom—Property vested in three sabhas—Suit by members representing two—Maintainability of suit.

A temple was managed by three sabhas, and members representing two only of such sabhas brought a suit to recover land belonging to it, without alleging that the members of the third sabha had been consulted with reference to the suit, or that they had repudiated the right of the plaintiff to sue in conjunction with that sabha. Permission to sue as representing the whole of the members of the three sabhas had been refused:

Held, that the suit was not maintainable.

SECOND APPEAL against the decree of A. Venkataramana Poi, Subordinate Judge of Palghat, in Appeal Suit No. 472 of 1896, affirming the decree of P. P. Raman Menon, District Munsif of Angadipuram, in Original Suit No. 187 of 1894.

Suit to recover land belonging to the Attuthrikovil devasom, together with arrears of rent. The devasom belonged in common to three sabhayogams, but the suit was brought by members representing only two of them. It was objected, in defence, that plaintiffs were not competent to sue. The plaint alleged that the suit was brought on behalf of the sabhas, but contained no statement that

* Second Appeal No. 41 of 1898.

PURAMATHAN SOMAYAJIPAD v. SANKARA MENON.

the other members had been consulted with reference to its institution. Plaintiffs contended that such consultation was unnecessary. Leave had been obtained under section 30 of the Code of Civil Procedure, but only three months after the suit had been filed; it, moreover, only related to two out of the three sabhas to whom the devasom belonged. The members of the other sabha had been impleaded as defendants. The District Munsif dismissed the suit, treating it as one brought by plaintiffs in their own right and as such not maintainable. The Subordinate Judge, on appeal, upheld the finding of the lower Court.

Plaintiffs Nos. 1 to 4 preferred this second appeal.

Govinda Menon for appellants.—Appellants had the right to sue, though it must be admitted that the object of appointing many trustees is that they shall be consulted. See *Pyari Mohun Bose* v. *Kedarnath Roy*(1) which deals with section 32 of the Code of Civil Procedure. [O'FARRELL, J.—That is a case of contract. Here the question is as to the management of a religious institution, and whether litigation is to be forced upon it by a minority of its members.] It is submitted that the real question is whether the suit is for the benefit of the trust. See *Mahabala Bhatta* v. *Kunhanna Bhatta*(2) as to the object of section 32 of the Code of Civil Procedure. It is sufficient if all the managing members of all the three sabhas are parties—plaintiffs or defendants.

Sankaran Nayar and *Appu Nedungadi* for respondents.—Appellants, under section 30 of the Code of Civil Procedure, should be made parties before the suit is brought (*Oriental Bank Corporation* v. *Govind Lall Seal*(3) and *Geeree Balla Dabee* v. *Chunder Kant Mookerjee*(4)), though it must be admitted that the decisions on the point are conflicting. In *Parameswaran* v. *Shangaran*(5), where one of two co-uralers sued, the other being joined as a defendant and not consulted, it was held that there was non-joinder of parties. The case in *Pyari Mohun Bose* v. *Kedarnath Roy*(1) was between co-contractors. No leave was granted under section 30 of the Code of Civil Procedure until after the institution of the suit. Even assuming that to have been in time, it related to two only out of the three sabhas, and plaintiffs cannot be said to represent the members of the third sabha.

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(1) I.L.R., 26 Calc., 409.
(2) I.L.R., 21 Mad., 373.
(3) I.L.R., 9 Calc., 604.
(4) I.L.R., 11 Calc., 213.
(5) I.L.R., 14 Mad., 489.

PURAMATHAN SOMAYAJI-PAD v. SANKARA MENON.

Govinda Menon, in reply, referred to *Manavikrama* v. *Vythi Pattar*(1).

JUDGMENT.—We think the finding of the Courts below that the plaintiffs alone were not competent to maintain the present suit is correct. The point is really concluded by authority (see *Parameswaran* v. *Shangaran*(2)). The circumstances are precisely similar. The temple is managed by three sabhas, and the suit is only brought by certain members representing two sabhas, there being no allegation that the other sabha had been consulted or had repudiated the right of the plaintiffs to sue in conjunction with itself. Permission to sue as representing the whole of the members of the three sabhas, if it could have been granted under section 30, Civil Procedure Code—which is somewhat doubtful—was refused. The subsequent making of all the members defendants will not, in our opinion, cure the defect. To hold that it would do so would be to countenance the very evil struck at by such decisions as the one we have quoted, and allow a small minority of the governing body to dispute the acts of the majority and plunge the institution into litigation whenever they thought fit.

We dismiss this second appeal with costs.

APPELLATE CIVIL.

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

1899. April 10.

REFERENCE UNDER COURT FEES ACT, SECTION 5.*

Court Fees Act—Act VII of 1870—*Suit for ejectment—Claim by tenants for improvements of greater value than plaint valuation—Appeal by tenants for improvements—Court fees payable on such appeal.*

In a suit for ejectment, in which the plaint land was valued at Rs. 50 and Court fee paid on that valuation, the tenants claimed Rs. 500 as compensation for improvements, which claim was disallowed. The tenants appealed on the ground that their claim for improvements should have been allowed, but only paid Court fee on the plaintiff's valuation. On a reference as to whether the value of the improvements ought not to be taken into account for the purpose of levying the Court fee :

(1) Second Appeals Nos. 978 to 980 of 1895 (unreported).
(2) I.L.R., 14 Mad., 489.
* Referred Case No. 4 of 1899.

REFERENCE UNDER COURT FEES ACT, S. 5.

Held, that, as the claim for improvements was not the subject-matter of the suit, but was merely incidental to the decree for possession, and on grounds of convenience, the fee payable by an appellant in such a case should be that payable in a suit for possession of land.

CASE stated under Court Fees Act, section 5, by F. H. Hamnett, District Judge of South Canara, in the matter of Original Suit No. 195 of 1897, on the file of the District Munsif of Mangalore.

Plaintiff had obtained a permanent lease in 1896 from the fourth defendant, and sued to eject defendants Nos. 1 to 3, the tenants. Defendant No. 2 contended that the land had been held by her ancestors and herself for over seventy years on mulgeni tenure, and claimed Rs. 500, compensation for improvements. The District Munsif held the mulgeni tenure not proved and disallowed the claim for improvements and decreed surrender of the land. Defendant No. 2 appealed. In his plaint, plaintiff had valued the land at Rs. 50, and a Court fee of Rs. 4-2-0 had been paid thereon, including the expenses incurred for giving notice to the defendants. On appeal, second defendant paid a Court fee of Rs. 8-12-0, that being the fee payable on the value of the land as stated in the plaint. The question was whether the value of the improvements should also be taken into account for the purpose of levying the Court fee, the subject-matter of the appeal being the same as that in the suit, the question of improvements being raised incidentally by the defence.

The Acting Government Pleader (*Sankaran Nayar*) in support of reference.

JUDGMENT.—The question raised by this reference is by no means free from difficulty.

In this Presidency suits such as the one out of which this reference arises have been looked upon and treated as suits for possession of land. (See *Brahmayya* v. *Lakshminarasimham*(1).) The claim for improvements to the land is not the subject-matter of the suit, but is merely incidental to the decree for possession; and having regard to the difficulty and inconvenience of ascertaining the fee payable in each case if a different view were adopted, we think the proper answer to this reference is that on appeal even where the only question raised is as to the value of the improvements, the appellant should not be called upon to pay any fee other than that payable in a suit for possession of land.

(1) I.L.R., 16 Mad., 310.

APPELLATE CIVIL.

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

1899. March 3.

VASUDEVA SHENOI (PLAINTIFF), APPELLANT,

v.

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

Malabar Law—Tenant's right to compensation—Mortgage by tenant without notice to landlord—Acceptance of surrender by landlord—Rights of landlord and mortgagee.

The right of a tenant in Malabar to compensation is analogous to the right to a chose-in-action; and a transfer of such a right by a tenant to a third party cannot affect the landlord unless the latter has notice of the transfer when he accepts the surrender of the property demised and settles the account with his tenant in reference to arrears of rent and the amount due as compensation.

Whether notice to a landlord of such a transfer would affect his right to set off arrears of rent due to him against the amount payable as compensation, *Quære.*

SECOND APPEAL against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 136 of 1897, modifying the decree of V. Kelu Eradi, District Munsif of Tellicherry, in Original Suit No. 361 of 1896.

Suit to recover an amount due under a hypothecation bond (executed by first defendant to plaintiff) by sale of the kurikanom right held by first defendant over the plaint property, and the balance, if any, from first defendant personally. Plaintiff alleged that first defendant, with a view to avoid payment, had executed a deed of surrender in favour of the jenmi and obtained a new lease on the same day in the name of second defendant, his niece. He claimed that the rights created under the new lease were liable for the debt. The second defendant denied that the first defendant's debt was binding on her or the lease held by her: and third defendant, the jenmi, denied fraud, and alleged that he had no notice of plaintiff's mortgage when he accepted the first defendant's surrender. First defendant did not appear. The District Munsif found that third defendant had no notice of plaintiff's mortgage at the time of the surrender; and that the new

* Second Appeal No. 1816 of 1897.

lease created in favour of second defendant was granted for her own benefit and not benami for first defendant. He said:—"The first defendant was a kurikanom lessee under the third and there is no provision in the lease making the arrears of rent a charge on the improvements. The improvements have not been made security for rent by act of parties and no law has been pointed out to show that rent is always a charge on improvements. If the tenant has not mortgaged the improvements to a third party, the jenmi may set off the value thereof at the time of eviction against the rent due to him. But it is not shown that the jenmi's claim for rent has priority over that of a mortgagee. Defendants' vakil relies on the decision in *Achuta* v. *Kali*(1). In the case of a kanom the jenmi as mortgagor has the right to adjust accounts with the kanomdar at the time of redemption, and rent and value of improvements form items of the accounts. Thus the kanomdar can only pledge the net sum which may become payable to him at adjustment. But I do not think such a right of adjustment exists in the case of a lessor and lessee. Further, the whole value of improvements has not been set off against rent. The lessee may transfer absolutely or by way of mortgage the whole or any part of his interest in the property and there is no law requiring the mortgagee to give notice of the mortgage to the lessor; in the present case we have on the one side the plaintiff who has *bonâ fide* lent money on the security of the leasehold right, and on the other we have the third defendant who has taken a *bonâ fide* surrender of the leasehold right from first defendant and on the question of *bona fides* one cannot be said to stand on a better footing than the other. The fact then that the plaintiff is a mortgagee of the leasehold right is in his favour, and the subsequent surrender by first defendant should not be permitted to prejudice the existing encumbrance (Woodfall on 'Landlord and Tenant,' 15th edition, page 324)." He found that the surrender to third defendant, though *bonâ fide*, was invalid as against the plaintiff, and decreed, in default of payment by first defendant of the amount due, that the same should be recovered by sale of first defendant's rights as lessee, and the balance, if any, from first defendant personally and as karnavan. On appeal by third defendant, the District Judge held that first defendant's kurikanom lease expired when

(1) I.L.R., 7 Mad., 545.

VASUDEVA SHENOI v. DAMODARAN.

he surrendered the land to his jenmi, so that the passage from Woodfall (relied on in the Court below) was not in point: that plaintiff should have enforced his hypothecation rights against first defendant's kurikanom while that interest was still in existence, and that he could not do so after the expiration of the kurikanom term, and compensation of the tenant for his improvements by the jenmi. He held that plaintiff could only claim a personal decree against first defendant, and modified the decree accordingly.

The plaintiff preferred this second appeal.

Ryru Nambiar for appellant.

Sundara Ayyar for respondent No. 1.

JUDGMENT.—The right of a tenant to compensation in Malabar is, as pointed out in *Achuta* v. *Kali*(1), of a somewhat peculiar character. It is dependent on the state of the account between the tenant and the landlord as to the claims which the latter has against the former at the time the question of compensation cannot be settled, on account of rent or other dues payable under the demise by which the tenancy was created. The right to such compensation cannot properly be compared to a tenant's right to fixtures which formed the subject of consideration in *London and Westminister Loan and Discount Company, Limited* v. *Drake*(2) cited for the appellant.

The right in question, it seems to us, may be treated as possessing more analogy to the right to a chose-in-action, and a transfer of such a right by a tenant to a third party cannot possibly affect the landlord unless he has notice of the transfer when he accepts the surrender of the property demised and settles the account with the tenant in reference to arrears of rent, &c., on the one hand, and the amount of compensation on the other, and enters into an adjustment of the respective claims. In the present case no attempt was made to show that the landlord had notice. It is therefore unnecessary to consider whether, if he had had notice, that would have affected his right to set off the arrears of rent due to him against the amount payable as compensation. The decision of the Lower Appellate Court is, in our opinion, right and we dismiss the second appeal with costs.

(1) I.L.R., 7 Mad., 545.

(2) 28 L.J., C.P., 297; 6 C.B., N.S., 798.

APPELLATE CIVIL.

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

MARAPPA GAUNDAN (DEFENDANT), APPELLANT,

v.

RANGASAMI GAUNDAN AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1899. March 27. April 10, 27.

Hindu Law—Sale of land not joined in by all coparceners—Partial application of consideration towards debt binding on all—Suit for ejectment—Rights of purchaser.

In a sale of land the consideration was expressed to be the discharge, by the purchaser, of a debt owing by the vendor and secured by mortgage on the land, and of sundry other debts which had been incurred by the vendor for family necessity. In a suit for ejectment by the vendor's coparceners, who were minors at the time and had not joined in the sale, it was held that there had been no legal necessity for the sale, which was accordingly declared to be not binding on the plaintiffs. It was, however, found that a portion of the consideration had been applied to the discharge of a mortgage debt which would have been also binding on the plaintiffs. On its being contended that plaintiffs' interest in the property comprised in the sale should be held liable to the extent of their share of the mortgage debt:

Held, that, in making the purchase, defendant was, with reference to plaintiffs, a mere volunteer, and could not, as against them, claim by way of equity a charge on their shares even though part of the consideration had been applied towards the discharge of their joint debt; also that if a purchaser wishes to stand by a sale which is only partially valid, he must be content with the vendor's share; and that if he wishes to repudiate the transaction altogether his only remedy is by suit against the vendor for the return of the price paid on the ground that the consideration for the same has failed.

SECOND APPEAL against the decree of W. J. Tate, District Judge of Salem, in Appeal Suit No. 99 of 1897, modifying the decree of V. K. Desika Chariar, District Munsif of Namakkal, in Original Suit No. 380 of 1896.

Suit for ejectment and declaration that defendant had no right to certain lands. As to one-third of the lands, the District Munsif found the claim time-barred, and this finding was not contested on appeal in the District Court. As to the two-thirds, defendant (who was the illegitimate brother of plaintiffs' father), claimed to have acquired it by purchase and produced a registered sale-deed,

* Second Appeal No. 1345 of 1898.

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in support of that contention. This deed, filed as exhibit I, was executed in 1884 by plaintiffs' father in favour of defendant. Plaintiff alleged that there has been no consideration for the assignment and that it should be declared to be void. The deed recited that the alienation had been made (1) for the discharge of a debt of Rs. 120 secured by mortgage on the land and (2) for the discharge of the several sundry debts which had been incurred by the vendor (plaintiffs' father) from the vendee, since 1876, for family necessity and for the purchase of lift bullocks, &c. The District Munsif held that the sale was a real one and supported by proper consideration and that it was binding on the plaintiffs. He dismissed the suit. On appeal, the District Judge regarded the first item of the consideration (Rs. 120) as genuine. He said:—"Seeing that the plaint land was undoubtedly family land, the chief question is whether plaintiffs, then minors, are bound by the alienation. I think they are not. The newly-produced mortgage deed (exhibit V) contains not a word as to family necessity. Exhibit I terms the petty long standing debts (item 2 of the consideration) family debts, but there is not a particle of evidence in support of this, even the defendant's deposition being silent on the point. These debts, even if rightly incurred, could and should have been paid off otherwise than by sale. I am clearly of opinion that there is no established necessity justifying the alienation whatever; in other words, that the consideration for exhibit I is certainly not binding on the plaintiffs. I also think the second item of the consideration neither real nor *bonâ fide*. No doubt there has been delay almost amounting to twelve years in bringing the suit, but the plaintiffs were minors till recently and the suit in respect of this (two-thirds) item is not said to be barred." He allowed the appeal, and decreed plaintiffs' possession of two-thirds of the land.

Defendant preferred this second appeal.

Sivasami Ayyar for appellant.

Seshagiri Ayyar for respondents.

SUBRAMANIA AYYAR, J.—The lower Appellate Court has found with reference to the sale relied on by the defendant that there was no legal necessity for the sale and therefore it is not binding on the plaintiffs—the vendor's coparceners—who did not join in making the sale. In the argument before us the only

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point urged was that as the lower Courts had come to the conclusion that Rs. 120, out of the price paid by the defendant, went to discharge a mortgage debt which the plaintiffs also were bound to pay, their interest in the property comprised in the sale should be held to be liable for their share of the 120 rupees, viz., 80 rupees. But in making the purchase the defendant was, with reference to the plaintiffs, but a volunteer, and he cannot, as against them, claim by way of equity a charge on their shares for the 80 rupees, even though this sum was applied towards the discharge of their joint debt. Compare *Sivaganga Zamindar* v. *Lakshmana*(1). Even if there were any doubt as to whether the defendant was a volunteer one must hesitate to countenance the introduction of a new rule such as that suggested having regard to the practical inconvenience which is likely to arise in giving effect to it. Now a sale of joint property by a coparcener, though made without legal necessity, is in this presidency valid to the extent of the vendor's share. Suppose that that share is really worth the whole of the amount paid by the vendee as the price, why should he get anything more? Next, suppose that the share is worth less than the price paid. The vendee cannot, in such a case, reasonably ask for a charge for more than the difference between the real value of the share which he gets and the price he has actually paid. It is scarcely necessary to say that questions as to such valuation are often not capable of easy or satisfactory settlement. The simpler and the better view undoubtedly is that if the vendee wishes to stand by a sale which is valid only partially, such as the present, he must be content with the vendor's share but that if he wishes to repudiate the transaction altogether, his remedy is only against the vendor in a suit for the return of the price paid, on the ground that the consideration for the payment failed. This view will, on the one hand, avoid all necessity for enquiry into matters alluded to before and, on the other, tend to act as a check on a disposition on the part of speculative persons to enter with some coparceners into transactions calculated to affect the rights of other coparceners who are not parties thereto. The contention of the defendant is clearly unsustainable and cannot be accepted. The second appeal fails and is dismissed with costs.

BODDAM, J.—I agree.

(1) I.L.R., 9 Mad., 188 at pp. 197, 200, 201.

APPELLATE CIVIL.

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

1899. March 3.

APPAMMA NAYURALU AND OTHERS (DEFENDANTS), APPELLANTS,

v.

RAMANNA (PLAINTIFF), RESPONDENT.*

Evidence—Admissibility of receipt showing payment of money—Exclusion for want of registration—Document proving extinction of mortgage right.

Plaintiff purchased a portion of certain land from two persons who owed him money on mortgage bonds, and took a mortgage over another portion, taking possession of the whole estate as security for the balance of his debt. He then permitted defendants to purchase a portion and to take a mortgage over the remainder of the lands, and gave them possession, on condition that they should pay to him the said balance that was due. Plaintiff, alleging that defendants had failed to pay him the balance, now filed this suit to recover possession of the land. Defendants contended that the balance had been duly paid, and in support of that contention produced a receipt which, however, was held to be inadmissible in evidence for want of registration. Oral evidence of the alleged payment was also excluded:

Held, that the receipt had been wrongly excluded. It did not purport to extinguish the mortgage right, and even if it did so it was receivable as evidence of the payment, oral evidence as to which was also admissible.

SECOND APPEAL against the decree of E. C. Rawson, Acting District Judge of Vizagapatam, in Appeal Suit No. 347 of 1895, reversing the decree of B. Joga Rao, District Munsif of Rajam, in Original Suit No. 390 of 1894.

Suit to recover land with mesne profits. Viraraju and Varahalu each possessed a half share in certain lands. They also owed plaintiff money which was secured on mortgage bonds. Plaintiff purchased half of Viraraju's share, and took a mortgage over half of Varahalu's share; but he took possession of the whole of the lands as security for the balance of his debt. The defendants were then allowed to acquire interests over the same lands and plaintiff gave them possession on condition that they should pay plaintiff the said balance owing to him by Viraraju and Varahalu. Plaintiff now alleged that defendants, having thus obtained possession, had failed to pay him the amount due, which payment had been the condition precedent to the acquisition of their interests.

* Second Appeal No. 1111 of 1897.

Defendants contended that the debt had, in fact, been duly discharged. To prove this they filed a receipt (exhibit VI), which was rejected by the District Munsif on the ground that, in a previous suit, his Court and that of the District Judge had held the same receipt (and another similar one) to be inadmissible in evidence for want of registration. Defendants' pleader offered to prove the payments evidenced by the said receipt by oral evidence, but that course was not permitted. The District Munsif, however, found that the plaintiff's debt had been discharged. He dismissed the suit. On appeal, the District Judge, finding no evidence in support of the alleged payment, held that the bonds had not been discharged and reversed the decree.

The defendants preferred this second appeal.

Mr. *N. Subramanyam* and Mr. *Joseph Satya Nadar* for appellants.

Pattabhirama Ayyar for respondent.

JUDGMENT.—The question is whether the payment evidenced by the receipt (exhibit VI) is true. The lower Courts were clearly in error in holding that the receipt was not receivable in evidence of the payment therein recited. The instrument does not, in our opinion, purport to extinguish the mortgage right. Even if it did the document is receivable as evidence of the payment and oral evidence as to it was, of course, admissible. The lower Courts, however, refused to receive even oral evidence. The refusal to admit evidence on the point clearly affected the decision of the case in the lower Appellate Court, which proceeds entirely upon the absence of any evidence in support of the payment pleaded. We must therefore set aside the decrees of both the Courts and remand the suit for disposal according to law. The costs of this appeal and the costs in the lower Appellate Court will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

1899. August 24, 30.

APPA RAO (PLAINTIFF), PETITIONER,

v.

SURYAPRAKASA RAO AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Contract Act—Act IX of 1872, *s.* 25, *cl.* (3)—*Promise to pay a barred debt—Limitation Act—Act XV of* 1877, *s.* 19, *sched. II, art.* 110.

In defence to a suit for rent a tenant pleaded that a portion of the claim was barred by limitation. Plaintiff relied on a letter which had been signed by defendant, after the disputed portion had become barred, and in which the defendant, after referring to the periods in respect of which the arrears of rent were due, said "I shall send by the end of Vysakha month:"

Held, that the document contained the ingredients required by section 25, clause (3), of the Contract Act, and that the claim was not barred by limitation.

A document sufficiently complies with section 25 of the Contract Act when it is signed by the person to be charged, and refers to the debt in such a way as to identify it, and contains a promise to pay wholly or in part the debt referred to therein, or expresses an intention to pay which can be construed to be a "promise." To create a "promise" within the meaning of the section it is not necessary that there should be an accepted proposal reduced to writing, a written proposal, accepted before action, becoming by the definition clause, a promise when accepted.

The words of the section show that it is the debt and not a sum of money in consideration of the barred debt that the promisor should refer to.

SUIT for rent and interest thereon due for faslis 1300 to 1307. The defence was that the claim in respect of faslis 1300 to 1303 inclusive was barred by limitation. Liability for the balance was not disputed. A letter, signed by first defendant and filed as exhibit A, was in the following terms:—

"In your letters dated 21th March 1898 you said that the kattubadi from fasli 1300 to fasli 1307 was in arrears, and that the same should be sent through your peon. There are no collections now. I shall send by the end of the Vysakha month (April to May). Please to consider.

"27-8-98. (Signed) Kesavapalle Suryaprakasa Rao."

* Civil Revision Petition No. 12 of 1899, under Provincial Small Cause Courts Act, 1887, section 25, praying the High Court to revise the decree of T. Ramachandra Rao, Subordinate Judge of Kistna, in Small Cause Suit No. 1121 of 1898.

The said exhibit A was signed after the claim in respect of faslis 1300 to 1303 had become barred. The Subordinate Judge said:—"The document does not sufficiently show how much was due and it may even mean that nothing more than is now admitted by defendant is due. It does not certainly show that the sum sued for is payable by defendant to plaintiff." He held that the claim in respect of faslis 1300 to 1303 was barred by limitation and gave judgment for the plaintiff for the balance, liability for which was not denied by defendant.

Plaintiff preferred this petition.

Sivasami Ayyar for petitioner.—The Judge has held that the claim for kattubadi in respect of the first four faslis is barred. Exhibit A clearly contains a promise to pay the barred debt and the suit has been brought within three years from the date of exhibit A. The Subordinate Judge considers that in order to be a good promise to pay, the document should mention the exact amount due. It is submitted that this is wrong. The only issue raised in the case having reference to limitation, the claim should have been decreed.

Sundara Ayyar for respondents.—The document is not an agreement to pay the barred debt but only an acknowledgment of it. The document does not satisfy the requirements of section 25, clause (3). Under that section there must be an intention to create a new liability in consideration of the barred debt and then the cause of action for the suit is not the barred debt but the new contractual liability. Here the suit is not brought upon the new document but upon the old debt. This is clearly on the ground that it is an acknowledgment but as an acknowledgment it is invalid as it was executed after the debt was barred. In order to satisfy section 25 the old debt must be extinguished and a new obligation must come into existence. That is the general principle of the Contract Act. According to that Act every contract must be supported by consideration. And section 25, clause (3), declares that the barred debt is a sufficient consideration for the subsequent promise. A suit brought to recover the money must therefore be based upon the subsequent promise not upon the barred debt. The promise should refer to this barred debt and recite it as consideration for the promise. [MOORE, J.—There is a reference to the barred debt here.] But the document proceeds entirely upon the footing that the debt is still subsisting. There should be an

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intention to create a fresh obligation, inasmuch as no subsequent suit can be based upon the antecedent debt. Moreover in order that there may be a promise, there must be a proposal, and an acceptance, and both should be in writing. Here there is neither proposal nor acceptance. The whole must be in writing under section 25, clause (3). [BODDAM, J.—The section simply says that there should be a promise to pay the barred debt.] Before it becomes a promise the proposal has to be accepted. A written proposal is not a promise in writing. It is submitted that the document is a mere acknowledgment and the plaintiff cannot succeed upon it. He referred to the following cases:—*Tanjore Ramachendra Row* v. *Vellayanadan Ponnusami*(1), *Chatur Jagsi* v. *Tulsi*(2), *Samuel* v. *Ananthanatha*(3), *Ramji* v. *Dharma*(4), *Ranchhoddas Nathubhai* v. *Jeychand Khushalchand*(5) and *Watson* v. *Yates*(6).

Sivasami Ayyar in reply: The fact that the debt is barred need not be present to the mind of the promisor. Everybody must be presumed to know the law. The view contended for would make the section practically ineffectual in most cases. The words of the section show that the promise is to pay a barred debt and not to pay money in consideration of a barred debt. The suit was rightly brought upon the debt. As for the other question, it is the proposal that becomes a promise. The proposal in writing when accepted becomes a promise. The acceptance is a condition precedent to the proposal becoming a promise, but the section does not require an express acceptance; it may be presumed.

JUDGMENT.—The question in this case is whether exhibit A is within section 25, clause (3), of the Contract Act and constitutes "a promise . . . . to pay . . . . a debt of which the creditor might have enforced payment but for the law of limitations." The Subordinate Judge held that it did not, apparently because it did not name the amount: for he ends this part of his judgment by saying "it does not certainly show that there was an agreement that the sum sued for is payable by the defendant to the plaintiff."

(1) L.R., 18 I.A., 37; I.L.R., 14 Mad., 258 at p. 262.
(2) I.L.R., 2 Bom., 280.
(3) I.L.R., 6 Mad., 351.
(4) I.L.R., 6 Bom., 683.
(5) I.L.R., 8 Bom., 405.
(6) I.L.R., 11 Bom., 580.

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The plaintiff sued for the unpaid kattubadi due for faslis 1300 to 1307 inclusive and put in exhibit A as showing a fresh starting point from which the statute began to run. Exhibit A was written by the defendant to the plaintiff and is as follows:—"In your letters dated 24th March 1898 you said that the kattubadi from fasli 1300 to fasli 1307 was in arrears and that the same should be sent through your peon. There are no collections now. I shall send by the end of Vysakha month (April to May). Please to consider"—and he signed it.

It was argued before us that this was not sufficient to make a fresh contract but was really of not more effect than an acknowledgment under section 19 of the Limitation Act and did not give any cause of action for any part of the debt which was already barred.

The contention on behalf of the defendant was that this document did not satisfy the statute, because to come within the section the document must show a clear intention to create a fresh obligation; that the barred debt must be referred to and not only be referred to, but in such a way as to show that it formed the consideration for the promise to pay; and further that it was intended by the statute that this should be done by a formal proposal duly accepted and subsequently put into writing, because by section 2 the word "promise" used in section 25, clause (3), is defined as being "a proposal when accepted," and it does not become a "promise" until it has been accepted; that here the document was a mere "proposal" which had not been accepted when it was written and was not a promise within the section as it was not an accepted proposal put into writing after acceptance.

We are, however, of opinion that the document (exhibit A) is sufficient to satisfy the statute.

For this purpose we think the document is sufficient when it is in writing and signed by the person to be charged; when it refers to the debt—not necessarily to the fact that the debt is no longer recoverable owing to the law of limitation—but in such a way as to identify the debt; when it contains a promise to pay wholly or in part the debt referred to therein—that is, when it expresses an intention to pay which can be construed to be a "promise" within the meaning of the section. We do not think that to create a "promise" within the meaning of the section it is necessary that there should be an accepted proposal reduced into writing. The

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definition clause says a proposal when accepted becomes a promise. It does not say a proposal when accepted and reduced to writing becomes a promise and in our judgment all that is requisite is that there should be a written proposal accepted before action, for a written proposal becomes a promise when accepted—as was the case here: the action not having been brought until the time named in the document for payment had elapsed.

The section does not require that the document should contain a promise to pay a sum of money in consideration of a debt which is barred nor that it should show that the promisor knew that it was barred—for the words used in the section show that it is the debt and not a sum of money in consideration of the barred debt that the promisor should refer to and there is nothing whatever in the section to indicate that the promisor should do more than promise to pay a debt of which the creditor might have enforced payment but for the law of limitation of suits. The words are not "promise to pay a sum of money in consideration of a debt," nor does the section refer to the knowledge of the promisor. Every man is supposed to know the law and in this case the promisor has mentioned the years for which the rent was in arrear and must be supposed to have known the law of limitation so that even if that were a necessity in this case the promisor must be taken to have known that the debt referred to was barred to some extent at all events.

We think that exhibit A contains all the ingredients required by section 25, clause (3), of the Contract Act, and that the decree of the Subordinate Judge is wrong. We allow the petition and vary the decree of the Subordinate Judge and enter judgment for the plaintiff for the full amount of his claim with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice O'Farrell.

KAMARAJU AND OTHERS (DEFENDANTS NOS. 1 TO 3), APPELLANTS,

v.

ASANALI SHERIFF AND OTHERS (PLAINTIFFS AND DEFENDANT NO. 4), RESPONDENTS.*

1899. July 14.

Civil Procedure Code—Act XIV of 1882, *s.* 30—*Worshipper's suit to recover land—Trustee not a plaintiff—Non-maintainability of suit.*

An individual worshipper in a mosque is not entitled to sue for the recovery of possession of land belonging to the mosque. While there is a trustee who has not been removed from his office he is the only person entitled (irrespective of section 30 of the Code of Civil Procedure) to sue for the recovery of land belonging to the institution.

Zafaryab Ali v. *Bakhtawar Singh* (I.L.R., 5 All., 497) considered.

SUIT by worshippers in a mosque to eject defendants from land alleged to belong to the mosque. The trustee, who had not been removed from his office, did not join plaintiffs in the suit and was impleaded by them as fourth defendant. The defendants contended that plaintiffs could not maintain the suit. The District Munsif referring to *Zafaryab Ali* v. *Bakhtawar Singh*(1), *Jawahra* v. *Akbar Husain*(2), and *Baiju Lal Parbatia* v. *Bulak Lal Pathuk*(3) held that plaintiffs, as worshippers, were entitled to sue. The Subordinate Judge upheld this decision on appeal.

The defendants preferred this second appeal.

Sundara Ayyar, for appellants, contended that the suit was not maintainable as brought, and cited *Srinivasa Ayyangar* v. *Srinivasa Swami*(4), *Lutifunnissa Bibi* v. *Nazirun Bibi*(5), *Ex-parte Kearsley*(6) and *Subbarayadu* v. *Asanali Sheriff*(7).

Kumarasami Sastri, for respondents, argued that the duty of a trustee of a temple is only to collect rents as they become due, and that worshippers are entitled to sue. If the right of the worshippers is an individual one, could it be said to be lost merely

* Second Appeal No. 74 of 1898 against the decree of K. Krishna Rao, Subordinate Judge of Cocanada, in Appeal Suit No. 113 of 1897, affirming the decree of V. V. S. Avadhani, Acting District Munsif of Amalapur, in Original Suit No. 629 of 1896.

(1) I.L.R., 5 All., 497. (2) I.L.R., 7 All., 178. (3) I.L.R., 24 Calc., 385.
(4) I.L.R., 16 Mad., 31. (5) I.L.R., 11 Calc., 33. (6) L.R., 17 Q.B.D., 1.
(7) Second Appeal No. 20 of 1898 (unreported)—*vide* next page.

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because all who might also enjoy it did not join. The trustee is only the accredited agent of the community of worshippers. He cited *Madho Prakash Singh* v. *Murli Manohar*(1). [O'FARRELL, J.—It does not appear whether there was a trustee in that case.] He also referred to *Mohiuddin* v. *Sayiduddin*(2) as showing the principle contended for of the joint and several rights of worshippers to recover property, though that suit was for the removal of a trustee.

Sundara Ayyar was not called upon.

JUDGMENT.—We are of opinion that the decisions of the lower Courts cannot be upheld. The plaintiffs as worshippers in the mosque are certainly not entitled to sue for the recovery of possession of land belonging to the mosque. The fourth defendant not having been removed from the trusteeship is the only person (irrespective of section 30, Civil Procedure Code) entitled to sue for the recovery of the plaint property (*vide Subbarayadu* v. *Asanali Sheriff*(3)). The decision in *Zafaryab Ali* v. *Bakhtawar Singh*(4), quoted by the Subordinate Judge, does not, in our opinion, support the view that an individual worshipper in a mosque can sue for the recovery of land belonging to the institution. If it was the intention of the learned Judges to lay down such a rule, we are constrained to disagree with them. The decrees of both the lower Courts are set aside, and the original suit dismissed with costs throughout.

(1) I.L.R., 5 All., 406. (2) I.L.R., 20 Calc., 810 at p. 819.

(3) Second Appeal No. 20 of 1898 (unreported). The judgment of their Lordships (DAVIES and BODDAM, JJ.), delivered on 2nd January 1899, (in so far as is material for this reference) was as follows:—"The plaintiffs as worshippers are entitled (irrespective of sections 30 and 539, Civil Procedure Code), to maintain an action against any person improperly interfering with their rights to worship (*Jawahra* v. *Akbar Husain* (I.L.R., 7 All., 178)), but they are *not* entitled to sue for, or to recover possession of, the suit land. They might even sue to set aside the lease complained of had they been content to do so, but they cannot go further and claim possession as they have done. The third defendant not having been removed from the trusteeship is the only person entitled to possession of the plaint property."

(4) I.L.R., 5 All., 497.

APPELLATE CIVIL.

Before Mr. Justice O'Farrell and Mr. Justice Mitchell.

SRIDHARAN SOMAYAJIPAD AND ANOTHER (PLAINTIFFS Nos. 3 AND 4), APPELLANTS,

v.

PURAMATHAN SOMAYAJIPAD AND OTHERS (PLAINTIFF No. 1, DEFENDANT No. 4, PLAINTIFF No. 2 AND DEFENDANTS Nos. 1 TO 3, 5 TO 12, AND 14 TO 43), RESPONDENTS.*

1900. August 7, 14, 24. September 15.

Civil Procedure Code—Act XIV of 1882, ss. 375, 622—Compromise of suit—Dispute as to factum of compromise—Order dismissing suit in consequence of alleged compromise—Application to High Court by revision petition under section 622—Right of appeal against order dismissing suit—Appeal—Practice—Acceptance of civil revision petition as appeal on Court fee being paid.

During the pendency of an appeal in a District Court a petition was filed by the pleaders of the plaintiffs and defendants in the suit, praying on behalf of their clients that the case might be struck off the file on the ground that the matter in dispute had been compromised. Two of the plaintiffs then filed a counter-petition denying that a compromise had been arrived at and praying that the appeal might be heard on its merits. The District Judge, after some intermediate orders, struck off the appeal, as prayed in the petition. The two plaintiffs preferred a civil revision petition to the High Court whereupon it was objected that the petition could not be entertained as an appeal lay against the order of the District Judge inasmuch as it was not a decree in pursuance of a compromise under section 375 of the Code of Civil Procedure, but an order passed on a dispute as to whether a compromise had in fact been arrived at. The petition had been presented within the time allowed for appeal:

Held, that inasmuch as the petition impeached the alleged compromise as not being a "lawful compromise" an appeal lay against the order of the District Judge; but that the petition might be treated as an appeal, on the Court fee being paid.

Where a party to a suit impugns an alleged agreement or compromise by which he would be bound the Court must satisfy itself by evidence that the agreement or compromise is a lawful one and that its terms have been consented to by the parties to the suit before it can proceed under section 375 of the Code of Civil Procedure to record it and pass a decree in accordance therewith.

PETITION by two appellants in an appeal pending before a District Court, praying that the appeal might be heard and disposed

* Second Appeal No. 932 of 1899 (originally filed as Civil Revision Petition No. 397 of 1898) against the order of W. H. Welsh, Acting District Judge of South Malabar, in Civil Miscellaneous Petition No. 59 of 1898, in Appeal Suit No. 571 of 1896, presented against the decree of the District Munsif of Angadipuram, in Original Suit No. 503 of 1894.

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of on its merits. A petition (No. 59) had been filed on 3rd February 1898 by the pleaders of the plaintiffs and defendants in a suit praying on behalf of their clients that the case might be struck off the file on the ground that the matter in dispute had been compromised. On 10th March 1898, third and fourth plaintiffs presented a counter-petition (No. 96) praying that the appeal might be heard on its merits as the parties had not come to a compromise. On 30th March 1898 the District Judge passed an order on the first petition (No. 59) as follows:—"Notice to the other parties to show cause why the Munsif should not be required to take evidence in spite of the supposed compromise." On the same day he made the following order on petition No. 96:—"*Vide* order on M.P. No. 59 of 1898." On 27th June 1898 after reading the report of the Munsif to the effect that he was satisfied that the parties had compromised, the District Judge made the following further order on petition No. 59:—"The appeal will be struck off in accordance with the Munsif's report and the petition of the pleaders on both sides." He also passed an order dealing fully with the facts—which order is sufficiently set out in the judgment.

Against this order the third and fourth plaintiffs presented this civil revision petition (afterwards treated as second appeal) on the following among other grounds:—(1) That the lower Appellate Court erred in not receiving evidence or remanding the case for the taking of evidence after the appellants Nos. 3 and 4 had impeached the validity of the alleged compromise on the ground that they were no parties to it and that it was one obtained without their knowledge; (2) that the compromise being signed by appellant No. 1 and defendant No. 4 only shows that it is not a valid compromise under section 375 of the Code of Civil Procedure and that the District Judge ought not to have accepted it but should have tried the appeal on the merits; (3) that the compromise being fraudulent and invalid the application to strike the appeal off the file ought not to have been allowed and the appeal ought to have been proceeded with; (4) that the compromise being presented by the plaintiff's vakil without express authority empowering him thereto should not have been accepted and the Court acted erroneously in accepting it.

Sundara Ayyar, for respondents, took the preliminary objection that no civil revision petition lay there being an appeal:—The jurisdiction to pass a decree under section 375 of the Code of

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Civil Procedure depends on there being in fact a compromise, and a decree passed in pursuance of such compromise is final, being the act of the parties themselves against which no appeal is necessary. But a finding as to whether there has been a compromise or not is not final, and is subject to appeal; *Ramachandra Joishi* v. *Hazi Kassim*(1) and *Brojodurlabh Sinha* v. *Ramanath Ghose*(2). Here the revision petition impeaches the alleged compromise and the fact that a valid compromise has been entered into is disputed. So an appeal lies. See also *Hara Sundari Debi* v. *Kumar Dukhinessur Malia*(3), *Venkatappa Nayanim* v. *Thimma Nayanim*(4), *Ayyanna* v. *Nagabhooshanam*(5), *Dianat-ul-lah Beg* v. *Wajid Ali Shah*(6), *Gulab Rai* v. *Mangli Lal*(7), *Goculdas Bulabdas Manufacturing Company, Limited* v. *James Scott*(8), and *Zamindar of Tuni* v. *Bennayya*(9).

Mr. *C. Krishnan* for appellants:—The provision that a decree passed under section 375 is final should not be construed so as to mean final only if a real compromise exists. There would be no need for appeal in such a case. The true meaning is that there shall be no appeal at all in respect of any decree passed under the section, in which case a civil revision petition lies. In any case the Court may treat the petition as an appeal, it having been presented in time, and I ask it to do so, following *Mahomed Wahiduddin* v. *Hakiman*(10).

The Court made the following ORDER:—". . . . It is objected on behalf of the counter-petitioners in this revision petition that an appeal lay against the order of the District Judge allowing the application for striking the appeal before him off the file. The petition for striking the case off the file on the ground of an alleged compromise (petition No. 59 of 1898) was presented by two pleaders professedly on behalf of the plaintiffs and third and fourth defendants respectively. It was signed by those two pleaders and by first plaintiff and fourth defendant, and by no other person. It has been held by this Court that a compromise cannot be entered into by a pleader on behalf of his client without the

(1) I.L.R., 16 Mad., 207 at p. 212.
(2) I.L.R., 24 Calc., 908 at pp. 913, 935.
(3) I.L.R., 11 Calc., 250.
(4) I.L.R., 18 Mad., 410.
(5) I.L.R., 16 Mad., 285.
(6) I.L.R., 6 All., 438.
(7) I.L.R., 7 All., 42.
(8) I.L.R., 16 Bom., 202 at p. 212.
(9) I.L.R., 22 Mad., 155
(10) I.L.R., 25 Calc., 757 at p. 778.

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express authority of the latter:—*Jagapati Mudaliar* v. *Ekambara Mudaliar*(1). One of the grounds of their revision petition is that the petitioners, the third and fourth plaintiffs, were not parties to the alleged compromise, and were not bound by it, the plaintiffs' vakil's action without express authority from the petitioners not being binding on them. The revision petition thus impeaches the alleged compromise as not being a "lawful compromise," and therefore in our opinion the petitioners could have appealed:—See *Goculdas Bulabdas Manufacturing Company, Limited* v. *James Scott*(2). We do not agree with the view expressed by the District Judge that the suit being one brought by four plaintiffs, with permission given under section 30 of the Code, jointly on behalf of the sabha, the third and fourth plaintiffs have not the same right which one of several plaintiffs might ordinarily have to challenge an alleged compromise.

The petitioner's Counsel asks that, if an appeal is held to have lain, this petition may be treated as an appeal, as it was presented within the time allowed for an appeal, and he refers to *Mahomed Wahiduddin* v. *Hakiman*(3). We think, under the circumstances, we may properly accede to this request, on the understanding that the proper Court fee for the appeal be put in on or before the 8th September 1899."

[The case coming on again for final hearing after payment of the proper Court fee the Court delivered the following judgment:—]

JUDGMENT.—Upon the merits, we think that the alleged compromise not having been shown by evidence to have been entered into by the third and fourth plaintiffs or by any one duly empowered to enter into it on their behalf, the District Judge was wrong in treating the alleged compromise as a "lawful compromise." It appears from the District Judge's so-called order on the petitions Nos. 59 and 96 taken together, that both he and the District Munsif declined to allow evidence to be given as to whether third and fourth plaintiffs joined in or consented to the compromise. We agree in the view taken by the learned Judges of the Bombay High Court in *Goculdas Bulabdas Manufacturing Company, Limited* v. *James Scott*(2) that where an alleged agreement or compromise is impugned by a party to the suit sought to be bound by it, the Court must satisfy itself by evidence taken that the agreement or compromise is a lawful one, before it can proceed under section 375 to record it and pass a decree in accordance therewith. In that case the agreement was challenged on the ground that some of its terms had not been consented to by both parties to the suit; but the principal is the same, whether the legality of the compromise be called in question on that ground or, as in the present case, on the ground that some of the parties to the suit have not consented to the compromise. See also *Appasami* v. *Manikam*(1). We therefore reverse the order of the District Judge passed on petition No. 59 of 1898 on the file of his Court, and direct that he either take or cause the District Munsif to take evidence on the question whether the alleged compromise was entered into by the third and fourth plaintiffs and that after such evidence has been taken he do proceed according to law. Costs of this petition will abide and be disposed of on the final determination of the proceedings in the Appeal No. 571 of 1896 on the file of the District Court.

(1) I.L.R., 21 Mad., 274. (2) I.L.R., 16 Bom., 202 at p. 212.
(3) I.L.R., 25 Calc., 757 at p. 778.

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APPELLATE CIVIL.

Before Mr. Justice Boddam, Mr. Justice O'Farrell, and Mr. Justice Michell.

KUNHI AMMA (PLAINTIFF No. 2), APPELLANT,

v.

AHMED HAJI (DEFENDANT No. 1), RESPONDENT.*

1899. October 9, 18.

Registration Act—Act III of 1877, *s.* 17, *cl.* (*b*)—*Document compulsorily registrable—Valuation—Least sum payable—Sum repayble before expiry of stated term—Principal sum without interest.*

A charge on certain property to secure Rs. 50 was given by the jenmis in favour of defendant No. 1, who held a kanom on the property granted three years

(1) I.L.R., 9 Mad., 103.

* Appeal No. 4 of 1899, under Letters Patent, section 15, against the judgment of Subramania Ayyar, J., passed in Second Appeal No. 1813 of 1897, presented against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 57 of 1897, modifying the decree of V. Rama Sastri, District Munsif of Badagara, in Original Suit No. 272 of 1896.

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previously, containing the following terms:—"This amount of Rs. 50, together "with the customary interest thereon, will be added to the kanom amount when "after the expiry of the period of demise of the paramba a renewal is effected or "the paramba is caused to be surrendered. The jenmam right over the said "paramba has been mortgaged to you for this Rs. 50 and the interest thereon." The document was not registered. It was contended that the document was one compulsorily registrable under section 17 of the Registration Act, 1877, inasmuch as payment under it was postponed for at least nine years, *i.e.*, (the balance of the term granted by the kanom) by the end of which period the accumulations of interest would have amounted to Rs. 54 in addition to the principal sum of Rs. 50, making Rs. 104 in all:

Held, that the document did not contain a clear expression of intention that the sum of Rs. 50 was not repayable except at the end of the previous kanom term. Full effect would and could be given to the words by construing them to mean no more than that, in the event of the amount remaining unpaid when the kanom became redeemable, the Rs. 50 with interest thereon should be treated as if it were part of the kanom amount so as to entitle the appellant to insist on redemption upon payment of such amount in addition to what might be found due under the kanom.—That there was nothing in the document to prevent the interest accruing under it from being paid from time to time, even if the unpaid capital were not repaid until the kanom was redeemable.—And that the least sum payable being the test as to whether a document is compulsorily registrable, the document need not be registered under section 17 of the Registration Act, 1877.

Per O'FARRELL and MICHELL, JJ., that under clause (*b*) of section 17 of the Registration Act, 1877, only the principal amount secured should be taken into consideration.

SUIT to recover with arrears of rent a paramba demised on kanom of Rs. 313-1-8 by the third defendant's karnavan Kanara Kurup and his sister Kumba, deceased, to defendant No. 1 under a registered instrument (exhibit D), dated 21st March 1868. Defendant No. 1 admitted the demise sued upon but claimed a purangadom charge of Rs. 50 and interest under an unregistered instrument executed in his favour by the demisors—Kanara Kurup and Kumba—on 1st November 1870 (exhibit I), and contended that defendant No. 3 and plaintiff's brother Rama Kurup were aware of the purangadom charge, and had caused the suit to be brought to defeat it. He also claimed compensation for improvements. The other defendants claimed to hold as sub-tenants of the first defendant. The third issue was:—"Whether the purangadom document, being unregistered, is not rendered ineffectual by plaintiffs' registered assignment deed."

Exhibit I was in the following terms:—"Document executed by Kannoli Kandil Kannan Kanara Kurup, and sister Kumba Amma of Katamari Amsam thara in Kurumbanad taluk, to Ambaliyeri

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Vaniyambalon Ammad of Kummankot Amsam thara. In addition to the kanom amount due to you in respect of our jenmam property, Manchakandi paramba in Katamari Amsam thara, we received from you to-day Rs. 50 as purangadom. This amount of Rs. 50, together with the customary interest thereon, will be added to the kanom amount, when after the expiry of the period of demise of the said paramba, a renewal is effected or the paramba is caused to be surrendered. The jenmam right over the said paramba has been mortgaged to you for this Rs. 50 and the interest thereon. In witness hereof are Puthiyottil Etavattam Kunhammad Kutti and Othayinte Avitath Aniyapravan Pakran."

The District Munsif passed a decree ordering the defendants to surrender to the plaintiffs the plaint property with the improvements thereon, on plaintiffs' paying to the first defendant kanom Rs. 313-1-8 and Rs. 145-8-2 as compensation for improvements less the arrears of rent, and the future rent and costs of the suit. On appeal, the District Judge modified the decree by ordering the plaintiffs (in addition to the sum already adjudged) to pay to first defendant the purangadom of Rs. 50 with interest at 12 per cent. to date of payment and to pay their own and first to seventh defendant's costs in both Courts.

[On plaintiff No. 2 preferring a second appeal, which came on for hearing on 21st October 1898, their Lordships (SUBRAMANIA AYYAR and MOORE, JJ.) delivered the following dissenting judgments:—

SUBRAMANIA AYYAR, J.—The point on which this case turns is whether, as contended for the appellant, under exhibit I, the executants thereof were not at liberty to repay the 50 rupees borrowed thereunder, before the expiry of the ten years which had yet to run out of the term of the kanom mentioned in that exhibit. In support of that contention the appellant's pleader relied on the following passage in the document:—"This amount of Rs. 50, "together with the customary interest thereon, will be added to "the kanom amount when after the expiry of the period of "demise of the said paramba, a renewal is effected or the paramba "is caused to be surrendered." Now, as between a creditor and a debtor, a term is ordinarily taken to be inserted in favour of the debtor, and the creditor cannot decline to receive the debt, if the debtor is willing to pay even before the term agreed, unless it appears from the circumstances that the term was appointed

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in favour of both (*Bhagwat Das* v. *Parshad Singh*(1)). And it requires a clear expression of intention to deprive a debtor of his right to pay the debt at any time (compare *Marana Ammanna* v. *Pendyala Perubotulu*(2)). Construing the passage relied on by the appellant in the light of the principles stated above I am unable to hold that it contains a clear expression of an intention that the sum of Rs. 50 was not repayable except at the end of the previous kanom term. Full effect would and could be given to the words of the passage by construing them to mean no more than that, in the event of the amount remaining unpaid when the kanom becomes redeemable, the 50 rupees with interest thereon should be treated as if it were part of the kanom amount, so as to entitle the appellant to insist on redemption upon payment of such amount in addition to what might be found due under the kanom. The circumstance that the sum in question carried interest at 12 per cent. coupled with the fact that so long a period as ten years out of the kanom term had yet to run makes it, to my mind, improbable that the executants of exhibit I did intend to debar themselves from paying it off, if they could, at an earlier period. If this view is right, the least amount payable under exhibit I would come to much less than Rs. 100. The document, therefore, did not, in my opinion, require to be registered. I would therefore confirm the lower Appellate Court's decree and dismiss the appeal with costs.

MOORE, J.—The District Judge, disagreeing with the District Munsif finds that exhibit I is not a forgery, and this finding we must accept in second appeal. This document executed on the 1st November 1870 provides that a sum of Rs. 50 together with the customary interest on it is to be added to the kanom amount "when after the expiry of the period of demise of the said paramba "a renewal is effected or the paramba is caused to be surrendered." As the kanom document (exhibit D) is dated the 21st March 1868, the tenure under it cannot, according to the customary law of Malabar, be terminated before the 21st March 1880, and it must therefore be held that under the terms of exhibit I, the purangadom amount (Rs. 50) cannot be paid off till the same date, *i.e.*, for nine years and four months after execution. The District Judge finds that the customary interest agreed to be paid in exhibit I

(1) I.L.R., 10 All., 602 at p. 606. (2) I.L.R., 3 Mad., 230.

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is 12 per cent. and to this no objection is raised in appeal. It follows therefore that at the earliest date on which the debt due under exhibit I can be discharged, the amount due as principal and interest will exceed Rs. 100. Such being the case it appears to me that the registration of exhibit I was compulsory under section 17, clause (*b*), of the Registration Act, the view taken by the Madras High Court being that the value of the interest in immoveable property within the meaning of that clause is the least sum by the payment of which the interest would be determined (*Tiyagaraja* v. *Ramanujam*(1) following *Jagappa* v. *Latchappa*(2)). For these reasons I am of opinion that it must be held that exhibit I cannot affect the property dealt with in this suit, and that the decree of the District Judge must therefore be modified and the decree of the District Munsif restored.]

An appeal was then preferred by plaintiff No. 2 under Letters Patent, section 15, and the case came on for hearing before a Court constituted as above.

Ryru Nambiar for appellant:—The document ought to have been registered. The proper test for determining the value of the interest created by a mortgage for the purposes of registration is the amount of the least sum recoverable under the instrument; *Jagappa* v. *Latchappa*(2) and *Tiyagaraja* v. *Ramanujam*(1). This is not a money bond. On the true construction of the document the interest on the principal sum of Rs. 50 could not be paid before the expiration of the period limited in the kanom, namely, over nine years. The least amount therefore that could become due under it by accumulations of interest at the expiration of the period of the demise was over Rs. 100; it therefore falls within clause (*b*) of section 17 of the Registration Act, 1877. The question is, not what is the principal amount secured, but what is the interest created: and here the interest created exceeds Rs. 100.

Mr. *C. Krishnan* for respondent:—The document only creates a mortgage over the property which may be repaid at any time. The term of years limited is for the convenience of the mortgagor alone and he is not bound to postpone payment longer than he wishes; *Bhagwat Das* v. *Parshad Singh*(3) and *Marana Ammanna* v. *Pendyala Perubotulu*(4). The amount due on the document need

(1) I.L.R., 6 Mad., 422. (2) I.L.R., 5 Mad., 119.
(3) I.L.R., 10 All., 602 at p. 606. (4) I.L.R., 3 Mad., 230.

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not therefore be increased by accumulations of interest and consequently need not exceed Rs. 100. *Sadagopa* v. *Dorasami*(1), which follows a Bombay ruling, *Nana bin Lakshman* v. *Anant Babaji*(2), and approved *Narasayya Chetti* v. *Guruvappa Chetti*(3), shows that the document need not be registered. In *Jagappa* v. *Latchappa*(4), the case of *Narasayya Chetti* v. *Guruvappa Chetti*(3) is not referred to. In *Stri Seshathri Ayyengar* v. *Sankara Ayen*(5) an unregistered bond was received in evidence in a suit to enforce the personal liability of the person executing the bond; so in *Vani* v. *Bani*(6) and *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan*(7), and in *Rajah of Venkatagiri* v. *Narayana Reddi*(8), where an unregistered kabuliat was admitted to prove a contract.

Ryru Nambiar, in reply.

BODDAM, J.—The only question raised in this appeal is whether the document exhibit I required to be compulsorily registered under section 17, clause (*b*), of the Registration Act, to have any legal effect. Exhibit I is a purangadom for 50 rupees with the "customary interest" (which the District Judge finds is twelve per cent.). It contains these words, viz., "This amount "of Rs. 50 together with the customary interest thereon will be "added to the kanom amount when after the expiry of the period "of demise of the paramba a renewal is effected or the paramba "is caused to be surrendered. The jenmam right over the said "paramba has been mortgaged to you for this Rs. 50 and the "interest thereon," &c.

It was contended that as by the document payment could not be made before the expiry of the kanom—which would be more than 9 years after the date of the purangadom—and as interest would by that time amount to Rs. 54, the document came within section 17, clause (*b*), of the Registration Act and was compulsorily registrable and not being registered it could not affect the property.

Section 17 of the Registration Act (Act III of 1877) is as follows (so far as is material):—"Documents next hereinafter mentioned shall be registered . . . . if they have been executed on or after the date on which Act No. XVI of 1864 . . .

(1) I.L.R., 5 Mad., 214. (2) I.L.R., 2 Bom., 353.
(3) I.L.R., 1 Mad., 378. (4) I.L.R., 5 Mad., 119.
(5) 7 M.H.C.R., 296. (6) I.L.R., 20 Bom., 553.
(7) I.L.R., 9 Calc., 520. (8) I.L.R., 17 Mad., 456.

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or this Act came or comes into force (that is to say),—. . . . (*b*) other non-testamentary instruments which purport . . . . to create . . . . any interest . . . . of the value of 100 rupees and upwards to or in immoveable property."

In *Jagappa* v. *Latchappa*(1) it was held that the proper test for determining the value of the interest created by a mortgage for the purpose of registration is the amount of the least sum recoverable.

In *Habib-Ullah* v. *Nakched Rai*(2), it was, however, held by a Full Bench that the principal sum secured by a mortgage of immoveable property is alone to be considered for the purpose of deciding whether the registration of the instrument of mortgage is optional or compulsory under the Registration Act, and in *Tiyagaraja* v. *Ramanujam*(3), this Court held that for the purpose of registration the value of the interest created in immoveable property by a mortgage bond is that sum by the payment of which the interest could be determined.

I agree with Subramania Ayyar, J., that exhibit I does not "contain a clear expression of intention that the sum of Rs. 50 was not repayable except at the end of the previous kanom term. Full effect would and could be given to the words by construing them to mean no more than that, in the event of the amount remaining unpaid when the kanom becomes redeemable, the Rs. 50 with interest thereon should be treated as if it were part of the kanom amount so as to entitle the appellant to insist on redemption upon payment of such amount in addition to what might be found due under the kanom." And moreover there is nothing whatever in the document to prevent the interest being paid from time to time even if the capital were not repaid until the kanom was redeemable. To make this document compulsorily registrable would be to hold in effect that the largest sum recoverable was to be taken as the test and not the least sum, as the amount would not be Rs. 100 unless nothing were paid until the kanom was redeemable.

I would therefore dismiss this appeal with costs.

O'FARRELL, J.—I concur. There is nothing, so far as I am aware, in the customary law of Malabar to prevent repayment of

(1) I.L.R., 5 Mad., 119. (2) I.L.R., 5 All., 447. (3) I.L.R., 6 Mad., 422.

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even the kanom amount before the expiry of the period of twelve years, though, of course, the land cannot be required to be surrendered before the period has expired, and instances of the kind are hardly likely to be of frequent occurrence. It is a common practice, however, for the interest on the kanom amount, as well as on any further advance secured by a purangadom deed, to be deducted from the payments due as purapad to the jenmi.

Independently of all questions as to the amount of interest I should be prepared to follow the other High Courts in holding that the amount which determines the value for registration purposes (as well as for the purposes of the Transfer of Property Act, section 59) is the principal amount secured by the document irrespective of any interest which may subsequently accrue.

MICHELL, J.—As in respect of a kanom, so in respect of the further charge made by a purangadom document, the mortgagor cannot redeem till the expiration of the 12 years from the date of the kanom, unless there is an agreement between the parties to the contrary; *Shekhara Paniker* v. *Raru Nayar*(1). But it does not necessarily follow from this that he cannot pay the mortgagee the purangadom amount at any time before expiration of the period. If by the Malabar customary law the mortgagor was not at liberty to do this, but was bound to wait till the expiry of the kanom period before he could repay the purangadom amount, then the amount of the interest secured by the purangadom document would be an ascertainable and certain amount, being the amount of interest (at the rate provided for) which would accrue between the date of the document and the expiration of that period. I do not agree with the view that, in that case, it makes any difference if the interest is paid by the mortgagor year by year, or taken by the mortgagee out of the yearly profits of the land or deducted from the rent reserved by the kanom (which apparently can be done by a kanomdar in respect of interest on a purangadom as well as in respect of interest on the kanom sum), instead of being paid at the end of the fixed period when the principal is payable. For in the end the mortgagor would pay just the same amount of interest if he paid or otherwise discharged it year by year as he would if he paid it all in a lump at the end of that period, and if interest is to be regarded as part of what is secured by the

(1) I.L.R., 2 Mad., 193.

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instrument, in the valuation for the purpose of section 17 of the Registration Act, it is just as much so if paid or discharged in the former as it is if paid in the latter manner.

But it has not been shown that any custom exists precluding repayment by the mortgagor of the purangadom principal sum at any time before the expiration of the period of the kanom, nor is there anything in the terms of the purangadom document in this case which has that effect. The mortgagor therefore being entitled to repay that sum at a time when it, with the interest then due superadded, would not exceed Rs. 100, I think that, on principle as well as authority, the document is not liable to compulsory registration; *Jagappa* v. *Latchappa*(1); *Tiyagaraja* v. *Ramanujam*(2).

In *Jagappa* v. *Latchappa*(1) a mortgage bond which would not have been liable to compulsory registration if the principal sum secured alone had been taken into account, that sum being below Rs. 100, was held so liable, it being provided in the instrument that the principal should be repaid by four annual instalments and the whole of the interest on the due date of the last instalment, and the amount of the principal together with the interest being in excess of Rs. 100. On the other hand in *Habib-Ullah* v. *Nakched Rai*(3), the majority of the Court held that the principal sum secured alone is to be taken as the value with reference to section 17, clause (*b*), of the Registration Act, even in a case, which that was, in which it is known at the time of the execution of the instrument that a certain amount of interest must necessarily become payable, and if that amount is added to the principal the total sum exceeds Rs. 100. Similar cases similarly decided are those of *Korban Ally Mirdha* v. *Sharoda Proshad Aich*(4), *Ram Doolary Kooer* v. *Thacoor Roy*(5), *Nana bin Lakshman* v. *Anant Babaji*(6). There have no doubt been decisions to the contrary, but the more reasonable and better view appears to me to be that which regards the principal sum secured alone as the value of a mortgage for the purposes of section 17, clause (*b*), of the Registration Act, excluding interest accruable; and that, as well in cases in which, the mortgage being redeemable at any time, it is uncertain whether at the time of redemption principal and interest together

(1) I.L.R., 5 Mad., 119. (2) I.L.R., 6 Mad., 422. (3) I.L.R., 5 All., 447.
(4) I.L.R., 10 Calc., 82. (5) I.L.R., 4 Calc., 61. (6) I.L.R., 2 Bom., 353.

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will exceed Rs. 100, as in cases in which, the ge not being redeemable till expiry of a fixed period, it is a that at the time of redemption principal together with t will exceed that amount. It may also be remarked tha was the view taken by the Legislature when by section 5(e Transfer of Property Act it made the principal money s alone, in all cases, the measure of value determining the n whether a mortgage instrument is or is not compulsorily ble.

For these reasons, I think exhibit I in th nt case is not liable to compulsory registration under sectic clause (*b*), of Act III of 1877.

APPELLATE CIVIL

Before Mr. Justice Boddam and Mr. Ju ichell.

1899. April 28. September 11, 26.

RAMAYYA AND ANOTHER (PLAINTIFFS), ANTS,

v.

KRISHNAMMA AND ANOTHER (DEFENDANTS ONDENTS.*

Mortgage—Construction of documents—Sale-deed with co d undertaking to re-transfer land in event of payments bein

In a document described as a sale-deed, plaintiff's rofessed to give "in absolute sale," certain lands to the defendant, inasn ie was unable to pay a debt owing by him to the defendant. On the same endant executed a counter-deed in which he referred to the said sale-de ndertook to get the said lands transferred to plaintiff's father in the e he latter paying the said debt within a certain time, together with inter ste of payment; and in that event to cancel the said sale-deed and deli me to plaintiff's father. The counter-deed further provided that plainti r should pay the principal and interest of the said debt by instalment at in default of payment of any instalment plaintiff's father should pay le amount due; and in default of payment in that manner, defendant s edit the land to himself according to the sale-deed, after getting the cou cancelled:

***Held*, that on their true construction the documen d nothing more than an intention to secure repayment of the debt: th n the provisions for payment by instalments and of the whole amount t of instalments were contained in the counter-deed signed only by th ree of the land,

* Second Appeal No. 1500 of 1898 against the decr Murray, District Judge of Ganjám, in Appeal Suit No. 186 of 1897, r the decree of N. Lakshmana Rao, District Munsif of Chicacole, in Origina . 673 of 1895.

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they were equivalent to a covenant by the transferor so to repay, because, the two documents being parts of one transaction, both parties were bound by or could take advantage of every stipulation, whether contained in one or other of the deeds, as would have been the case if the transaction had been embodied in a single document:

Held, therefore, that the transferee had a right to recover the debt (with interest) from the transferor personally: and that the provision entitling the transferee to credit the land to himself in default of payment could not be construed as negativing that right.

Two documents relating to the transfer and re-transfer of land which were so connected as to constitute one transaction having been executed in the year 1882, prior to the passing of the Transfer of Property Act:

Held, that the transaction should be regarded as having been entered into with reference to the law as propounded in the course of Madras decisions commencing in 1858 and referred to in *Thambusami Mudali* v. *Hossain Ravuttan* (L.R., 2 I.A., 241; I.L.R., 1 Mad., 1), and that the documents must be construed accordingly.

SUIT for the recovery of land with profits. The father of first plaintiff had on 26th June 1882 executed what was described as a sale-deed in favour of first defendant, filed as exhibit I, which contained the following other terms:—

"Sale-deed executed in favour of Ponnana Krishnamma, first defendant . . . . . Being unable to liquidate the debt of Rs. 200 (two hundred rupees) which I hitherto owe you, I have this day given you in absolute sale towards the said debt (unable to pay the same) all the lands belonging to me, of about six acres comprised . . . . . within the boundaries mentioned in the list herewith annexed in Kothuru village . . . . So, you may henceforward permanently and hereditarily enjoy the crops thereof according to your will." This deed was signed by plaintiff's father.

On the same day Ponnana Krishnamma, the first defendant, executed another deed filed as exhibit II, in favour of plaintiff's father, which contained the following among other terms:—

"Counter-deed executed in favour of plaintiff's father . . . . . As I have obtained, through sale in consideration of the debt of two hundred rupees due by you, the jeroyati wet lands, belonging tō you . . . . . of about 6 acres, comprised within the boundaries mentioned in the list of boundaries annexed herewith in Kothuru village . . . . . and as I have got the sale-deed executed by you, I shall get the patta lands referred to above transferred to your name in the event of your paying the

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said debt by the 30th Pushya Bahulam of Virodhi, together with interest on the whole amount due, at 1 Rupee per cent. per mensem from the year Chitrabhanu to the date of payment. I shall cancel the sale-deed in my favour and deliver the same to you. On the 30th Pushya Bahulam of each year up to the expiry of the term you should be paying Rs. 33 towards the principal and interest of the amount referred to above. In default of such payment during any year you shall pay the whole amount due without laying any claim to future instalments. In default of payment even in that manner I should credit the land (for myself) according to the sale-deed after getting this counter-deed cancelled." PONNANA KRISHNAMMA, first defendant, affixed his mark to this counter-deed.

Plaintiffs contended that the debt due under exhibit I had been fully discharged, and that exhibits I and II, taken together, constituted not an absolute sale but a mortgage, and that plaintiffs were in consequence entitled to recover possession of the said land. On this point the District Munsif said :—

"To arrive at a correct understanding as to the nature of the transaction between first plaintiff's father and the first defendant, exhibits I and II should be read together and when so read they go to show that the transaction was intended to be a mortgage. Exhibit I standing by itself is a sale-deed in clear terms. But it is a perfectly legitimate inference to draw from the terms of exhibit II that plaintiff's father himself remained in possession of the plaint lands. The total amount of exhibit I was Rs. 200. That amount was to be discharged by the 20th January 1890 with interest at 12 annas per cent. per mensem ; in the interval between June 1882 [date of exhibits I and II] and January 1890 [date fixed for repayment of the debt], plaintiff's father was to pay the first defendant Rs. 33 about February every year ; eight instalments of Rs. 33 each [or in all Rs. 264] were to be paid ; if there should be failure in the payment of any one instalment, the whole amount was to fall due and should be paid by plaintiff's father ; in default, exhibit II should stand cancelled and first defendant should enjoy the lands according to exhibit I. If, as contended by the defendants, the transaction was a sale with a condition for re-purchase, and if, as soon as exhibits I and II were executed, the lands were put in first defendant's possession, why should there be a stipulation for payment of interest on the Rs. 200 ? The first defendant would enjoy the produce of the lands and that would be his compensation for the capital lent by him for plaintiff's father's use. Nothing more need have been paid. Again, why should it be stipulated that, year after year, for eight years, plaintiff's father should pay the first defendant Rs. 33 ? If the lands were in first defendant's possession, he would be in the enjoyment of the usufruct of the lands in lieu of interest, and all that need have been re-paid in January 1890 by plaintiff's father to first defendant would be the principal, Rs. 200. . . . . I must therefore assume that plaintiff's father himself retained possession of the suit lands as alleged by plaintiffs. Towards the end, exhibit II is wrongly worded, but that is only a clerical error." He referred to *Thambusami Mudali* v. *Hossain Ravuttan*(1), *Bapuji Apaji* v. *Senavaraji Marvadi*(2), *Ramasami Sastrigl* v. *Samiyappanayakan*(3), *Bhup Kuar* v. *Muhammadi Begam*(4), *Bhagwan Sahai* v. *Bhagwan Din*(5), *Ayyavayyar* v. *Rahimansa*(6), *Venkatasubbayya* v. *Venkayya*(7), and *Kader Moideen* v. *Nepean*(8). He held that the transaction evidenced by exhibits I and II constituted a mortgage, and decreed for the plaintiff. The District Judge on appeal reversed that decision and dismissed the suit.

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Plaintiffs preferred this second appeal.

Sundara Ayyar for appellants.

Mr. *C. Krishnan* for respondents.

On the question whether exhibits I and II constituted a mortgage, the Court delivered the following judgments :—

MICHELL, J.—The two documents sued on, exhibits I and II, which must be taken together as constituting one transaction, were both executed on 26th June 1882, that is before the Transfer of Property Act came into force. In accordance therefore with what was indicated by observations of their Lordships of the Privy Council in *Thambusami Mudali* v. *Hossain Ravuttan*(1), that transaction should, I think, be regarded as having been entered into by the parties thereto with reference to the law as propounded in the course of Madras decisions commencing in 1858 referred to

(1) L.R., 2 I.A., 24 1 ; I.L.R , 1 Mad., 1.
(2) I.L.R., 2 Bom., 231.
(3) I.L.R., 4 Mad., 179.
(4) I.L.R., 6 All., 87.
(5) L.R., 17 I.A., 98 ; I.L.R., 12 All., 387.
(6) I.L.R., 14 Mad., 170.
(7) I.L.R., 15 Mad., 230.
(8) L.R., 21 I. A., 96 ; I.L.R., 21 Calc., 882.

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in that case, and the documents must be construed accordingly. Though the documents now under consideration were executed in 1882, that is about seven years after the decision of the Privy Council in *Thambusami Mudali* v. *Hossain Ravuttan*(1), which was passed in 1875, they must, I think, be construed similarly as documents executed before 1875 but not before 1858, because the supposed effect of the current of Madras decisions between 1858 and 1875, cannot, I think, be considered to have been removed by the Privy Council judgment in *Thambusami Mudali* v. *Hossain Ravuttan*(1), so as that documents executed subsequently to that judgment and before the Transfer of Property Act came into force should be construable as having been made with reference to the law as it existed before 1858 and as approved by the Privy Council in that judgment. The question therefore is whether, regard being had to their terms, these documents (taken together), construed agreeably to the law enunciated by the series of decisions which began in 1858, constituted a sale which was subject to a condition at first, but which became absolute on default made by the transferor in paying the debt of Rs. 200 by the 30th Pushya Bahula of Virodhi, or a mortgage, the transferor having an equity of redemption after the period expressly fixed had expired without such payment being made.

It appears to me that the real intention which the terms themselves of these documents show is that of securing the repayment of the debt mentioned therein and nothing more. The consideration is not stated to be the price of the property transferred, but a debt of Rs. 200 which the transferor owed but was unable to pay to the transferee.

In the case of *Ibrahim Bhai* v. *Fletcher*(2) relied on by the respondents' Counsel the document in question recited the fact that a sale of certain land by the one party to the other which had been mortgaged by the former to the latter was to have been made but had not been effected because the parties could not come to an agreement as to the price, but that they had then come to an agreement and settled the price. It proceeded to state that Rs. 200 was due in respect of the mortgage, and that the price of the land which had been mortgaged was Rs. 125, and provided that if the transferor paid this sum with interest within five years he was to

(1) L.R., 2 I.A., 241; I.L.R., 1 Mad., 1. (2) I.L.R., 21 Bom., 827.

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have back that land but if he failed so to pay, that land was to become the absolute property of the transferee, and that for the Rs. 75 balance the transferor was to be personally liable, and if he failed to pay it within one year, he was to give the transferee another piece of land. One of the points to which the judgment in the case shows that the Court attached considerable weight, in deciding that the transaction was a sale and not a mortgage, was the fact that the conveyance of the land purported to be made for a price, fixed by the parties as the value of the land, and not as security, for payment of a debt.

Then, there is a personal obligation imposed on the transferor to repay the debt with interest. "On the 30th Pushya Bahulam of each year up to the expiry of the term you should be paying Rs. 33 towards the principal and interest of the amount referred to above. In default of such payment during any year, I" (here, clearly, "I" should be "you") "shall pay the whole amount due without laying any claim to future instalments" (sic).

Though these provisions are contained in the document which was signed by the transferee, they are equivalent to a covenant by the transferor to repay, because, the two documents being parts of one transaction, both the parties were bound by or could take advantage of every stipulation whether contained in the one or the other of the two documents, just as they could have done if the transaction had been embodied in a single document. The provisions of exhibit II just now quoted are followed immediately by the following provision:—"In default of payment even in that manner I should credit the land (to myself) according to the sale-deed after getting this counter-deed cancelled." This latter provision cannot, I think, be properly construed as meaning that the right against the property given to the transferee thereby shall be his only right on occurrence of the default on the part of the transferor to pay, thus negativing the right to recover the debt from the transferor personally which would otherwise have been created by the immediately preceding provisions. There is no more reason, I think, for regarding this construction as the right one, than there would be in the case of a simple mortgage for construing the provision entitling the mortgagee to bring the property to sale on default made by the mortgagor in payment as nullifying the mortgagee's right under the mortgagor's preceding covenant to pay to proceed against him personally. The

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transferee thus has, in my opinion, under the documents, a right to recover the debt (with interest) from the transferor personally, whereas in *Bapuji Apaji* v. *Senavaraji Marvadi*(1), which was also relied on by the respondents' Counsel, there was nothing in the documents there in question giving such a right to the transferee, and the absence of any such provision was one of the grounds on which the Court held the transaction in that case not to be a mortgage.

Then, by the effect of the two documents taken together, possession of the lands was, I think, to remain with the transferor. Under exhibit I, indeed, it is provided "so you" (the transferee) "may henceforward permanently and hereditarily enjoy the crops thereof according to your will." But exhibit I forms only part of the entire transaction. It is controlled by exhibit II, from which, I think, it appears that the transferor was to retain possession. For he is to pay interest on the debt, year by year, for eight years, and, as observed by the District Munsif, it could hardly be that first defendant was to have both the usufruct of the lands and also interest on the debt, and there is no provision in exhibit II for first defendant accounting to the transferor for the profits upon the lands becoming the absolute property of the former in default of payment by the transferor in the manner provided. Moreover, defendants admit in their written statement that plaintiffs' father was in possession for one year, Chitrabhanu, corresponding with 1882–83, while plaintiffs' case is that first plaintiff's father and first plaintiff were in possession up to the end of Sarvajit (1887–88) when first defendant usurped the lands. Evidence of the conduct of the parties in connection with and at or immediately after the time of the transaction comprised in the documents is admissible for the purpose of construing the terms of the documents. I am therefore of opinion that exhibits I and II together constituted a mortgage. . . . . .

This appeal should, therefore, in my opinion, be allowed and the decree of the District Judge should be reversed and that of the District Munsif restored, and the defendants should pay the plaintiffs' costs in the Lower Court and in this Court.

BODDAM, J.—I concur.

(1) I.L.R., 2 Bom., 231 at p. 246.

APPELLATE CIVIL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

SANKARA MENON AND OTHERS (DEFENDANTS AND COUNTER-PETITIONERS NOS. 1 TO 3, 9 AND 10), APPELLANTS,

v.

GOPALA PATTAR (PLAINTIFF AND PETITIONER), RESPONDENT.*

1899. August 7.

Civil Procedure Code—Act XIV of 1882, *ss.* 246, 247—*Execution of decree—Cross-decrees—Parties entitled under same decree to recover from each other.*

A plaintiff obtained a decree for the surrender to him of certain mortgaged property on his paying the defendants the mortgage amount within three months together with the value of improvements, and for the payment by defendants to him of the costs of suit. He applied to recover the said costs by the arrest of the defendants:

Held, that the defendants were entitled under section 247 of the Code of Civil Procedure to set off the amount payable by them to plaintiff by way of costs against the mortgage amount and value of improvements payable by plaintiff to them.

Bhagwan Singh v. *Ratan* (I.L.R., 16 All., 395) approved.

IN Second Appeal No. 42 of 1897 the High Court decreed that on plaintiff paying into Court or to the first to eighth defendants' tarwad within three months.....the mortgage amount (Rs. 800) and the value of improvements (Rs. 100) in all Rs. 900 and on his further paying into Court or to the defendants Nos. 9 and 10 Rs. 642–11–0 the defendants should.....surrender to plaintiff .....the mortgaged property, that if such payment were not made by plaintiff within the said three months, the said property should be sold and the proceeds applied in a certain specified manner, and that the defendants should pay, to plaintiff Rs. 363–10–6 being the total amount of the costs incurred by him in all the three Courts.

Plaintiff applied to the District Munsif for the recovery of the said costs by the arrest of the first and second defendants; and for Rs. 61–11–0 from defendants Nos. 9 and 10, which they had recovered from plaintiff, under the decree of the Original Court,

* Civil Miscellaneous Second Appeal No. 68 of 1898 against the order of N. Sarvothama Rao, Acting Subordinate Judge of South Malabar, in Appeal Suit No. 233 of 1898 reversing the order of P. Raman, District Munsif of Chowghat, in Miscellaneous Petition No. 187 of 1898.

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(which had been reversed by the High Court in the decree hereinbefore referred to), together with the interest which had accrued due thereon. Defendants Nos. 1 and 2 objected to the execution of the decree, contending that under section 247 of the Code of Civil Procedure the sum due by them for costs ought to be set off against the mortgage amount and value of improvements decreed to them; and that if such set off were made nothing would be due by them to the plaintiff. The District Munsif allowed the objection and declined to issue the warrant of arrest prayed for. He further ordered the Rs. 61-11-0 which had been paid into Court by plaintiff under the said original decree to the credit of defendants Nos. 9 and 10, but which had never been drawn out by them, to be paid out to plaintiff, but allowed no interest. On appeal, the Acting Subordinate Judge reversed the Munsif's order, holding that the words "recover from each other" in section 247, contemplated personal liability on the part of both parties to pay each other the sums decreed against each and that they must hold the same character and possess identical rights of enforcing execution, as laid down in *Kalka Prasad* v. *Ram Din*(1). He considered that identical rights did not exist since defendants Nos. 1 to 8 were personally liable for plaintiff's costs whereas their right to the mortgage amount and value of improvements awarded to them in the decree, could only be enforced by sale of the lands specified therein, after failure on plaintiff's part to pay within the period allowed. The reciprocal rights would not therefore be enforceable if plaintiff should choose to apply for execution as against the defendants before the period had expired which was allowed him by the decree for payment of the mortgage amount. He also held that the Munsif had rightly disallowed interest on the Rs. 61-11-0. He directed the Munsif to restore the application to his file and to pass the necessary orders for the execution of the decree against defendants Nos. 1, 2, 9 and 10.

The said defendants appealed. The plaintiff filed a memorandum of objections claiming interest on the Rs. 61-11-0.

Govinda Menon for appellants.

V. Krishnasami Ayyar and *Appu Nedungadi* for respondent.

JUDGMENT.—The decision in *Kalka Prasad* v. *Ram Din*(1) relied upon by the Subordinate Judge is inconsistent with the

(1) I.L.R., 5 All., 272.

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view taken by a later bench in *Ishri* v. *Gopal Saran*(1), to both of which decisions Straight, C.J., was a party. The former decision has lately been dissented from by another bench of the same Court (see *Bhagwan Singh* v. *Ratan*(2)). We think that the latest decision is in accord with equity and common sense and prefer to follow it rather than the decision relied upon by the Subordinate Judge. We must therefore allow the appeal, and, reversing the order of the Subordinate Judge, restore that of the District Munsif with costs.

As regards the memorandum of objections filed by the respondent we think that it must prevail. The plaintiff was compelled to deposit a certain amount in Court which was afterwards ordered to be restored to him, and is entitled to interest during the period for which it was out of his control. No objection is taken to the amount claimed. We allow the memorandum of objections with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar (Officiating Chief Justice) and Mr. Justice O'Farrell.

VENKATAGIRI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

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

1899. February 24. July 24. August 3.

Hindu law—Sapindas tracing relationship to common ancestor through two females.

The widow of a Hindu having acquired property from her husband, and having died issueless, without disposing of it, the plaintiffs claimed, as the heirs of the husband, to recover it from the defendants, who were the brother and sister of the widow. The plaintiffs were found to be the sons of the daughter's daughter of the husband's paternal grandfather:

Held, that inasmuch as plaintiffs were sapindas of the deceased husband, it was immaterial that their relationship to the common ancestor should have to be traced through two females. They must therefore be held to be his bandhus and as such entitled to succeed to the property left by the widow.

(1) I.L.R., 6 All., 351. (2) I.L.R., 16 All., 395.

* Second Appeal No. 1299 of 1898 against the decree of H. G. Joseph, District Judge of South Canara, in Appeal Suit No. 181 of 1897, reversing the decree of S. Raghunathayya, District Munsif of Mangalore, in Original Suit No. 47 of 1896.

VENKATAGIRI v. CHANDRU.

Krishna Naik died in 1882 leaving him surviving his widow Durgi, to whom he left certain property by will. The property thus devised was considered by the District Munsif to be Durgi's stridhanam, following *Musammat Thakro* v. *Ganga Pershad*(1); and she died issueless in 1895 and without having disposed of the said property. Shortly after Durgi's death, plaintiffs instituted this suit praying for a declaration that the property left undisposed of by Durgi belonged to them as sapinda heirs of the late Krishna Naik. Plaintiffs were found to be the sons of the daughter's daughter of Krishna Naik's paternal grandfather. The District Munsif granted the declaration as prayed. On appeal the District Judge reversed the decision holding that no reason had been shown why the property devised by will to Durgi did not belong to her absolutely, in which case it would descend to her heirs, who were the defendants.

The plaintiffs preferred this second appeal.

Sivasami Ayyar for appellants.

Madhava Rao for respondents.

The Court, as constituted above, called for findings (1) as to whether the plaintiffs' alleged pedigree had been proved, and (2) whether Krishna Naik had been validly married to Durgi. Both questions were answered in the affirmative.

JUDGMENT.—We accept the finding that Durgi, who had acquired the property in dispute under the will of the late Krishna, was lawfully married to him and that the appellants are the sons of the daughter's daughter of Krishna's paternal grandfather.

As Durgi died issueless her property descends, according to the Mitakshara, to the heirs of Krishna, her marriage with him not having been shown to have been in one of the disapproved forms.

The question for determination is whether the appellants are Krishna's heirs.

It cannot be denied that the appellants are Krishna's sapindas in the sense of the Mitakshara as being connected with him by particles of the body. The fact that they have to trace their relationship to the common ancestor through two females is immaterial and cannot make them any the less sapindas (see *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram*(2) and *Umaid Bahadur* v. *Udoi Chand*(3)), and it is not disputed that they belong to a gotra different from that of Krishna.

(1) L.R., 15 I.A., 29; I.L.R., 10 All., 197. (2) I.L.R., 19 Bom., 631.
(3) I.L.R., 6 Calc., 119.

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The respondents contend that only such bhinnagotra sapindas as belong to any one of the lines expressly referred to in Mitakshara, Chapter II, Section VI, paragraph 1, possess heritable rights. This, of course, is clearly untenable, it being now well established that the enumeration therein is not exhaustive.

It must therefore be held that the appellants are Krishna's bandhus, and hence entitled to succeed to Durgi's property.

In coming to the above conclusion we have not overlooked the contention of Mr. Ramachandra Rao Saheb questioning the correctness of the proposition enunciated in *Umaid Bahadur* v. *Udoi Chand*(1) and reiterated in *Babu Lal* v. *Nanku Ram*(2), that to enable a person to claim as a bandhu he and the propositus must have been mutually related in the manner explained therein. We do not enter into that matter since the appellants must be held to be bandhus of Krishna whether that proposition is sound or not.

The decree of the lower Appellate Court is reversed and that of the District Munsif restored with costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

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

1899. September 4, 12.

MUSALA REDDI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

RAMAYYA AND OTHERS (DEFENDANT No. 1, REPRESENTATIVES OF DEFENDANT No. 2, FOURTH AND FIFTH (SUPPLEMENTAL) RESPONDENTS IN THE LOWER APPELLATE COURT, REPRESENTATIVES OF THE FOURTH SUPPLEMENTAL RESPONDENT, AND SUPPLEMENTAL RESPONDENTS IN THIS COURT), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 365, 366—*Abatement of appeal—Decease of appellant—Application by representatives to be brought on record—"Legal representative"—More than one legal representative—Effect of application being made by some only of several legal representatives.*

During the pendency of an appeal two persons applied under section 368 of the Code of Civil Procedure to be brought on the record as legal representatives

(1) I.L.R., 6 Calc., 119. (2) I.L.R., 22 Calc., 339.

* Second Appeal No. 1275 of 1898 against the decree of T. Ramachandra Rao, Subordinate Judge of Kistna, in Appeal Suit No. 472 of 1896, reversing the decree of I. L. Narayana Rao Naidu, District Munsif of Bapatla, in Original Suit No. 74 of 1895.

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of the appellant, who had died. In their petition they stated that there were two other persons having interests equal to their own in the representation who did not join in the application and were not made parties by the applicants for reasons that were given. The applicants were duly placed on the record as representatives of the deceased appellant within the time limited by article 175A of schedule II of the Limitation Act. After the period of limitation had elapsed the respondents applied under sections 366 and 582 of the Code of Civil Procedure for an order that the appeal had abated on the ground that the former petitioners had not added all the persons who had interests equal to their own in the representation. The Subordinate Judge held that the representation of the two applicants was sufficient to prevent the abatement of the appeal, but he made the other two representatives respondents on the record. He subsequently heard and allowed the appeal. On its being contended, on second appeal, that the appeal to the Subordinate Court had abated and should have been dismissed by reason of the non-joinder of the other two representatives:

Held, that though, in article 175A of schedule II of the Limitation Act, the application is expressed to be an application under section 365 of the Code of Civil Procedure and section 366 is not mentioned, yet for the purpose of considering the question of abatement the two sections must be read together. When there are more than one legal representative of a deceased appellant, all those representatives must, so far as it is possible for this to be done, join in an application under section 365 and the words "legal representative" in section 365 of the Code of Civil Procedure, (and similarly the words "any person" and "the legal representative" in section 366) strictly construed must, in such a case, be read in the plural and as including all the legal representatives. But where all the representatives cannot be joined as applicants, sections 365 and 366 should not be construed so as to have the effect of rendering the application no application by "the legal representative" within the meaning of the sections so that the appeal must be held to have abated.

Bhikaji Ramchandra v. *Purshotam*, (I.L.R., 10 Bom., 220), and *Ghamandi Lal* v. *Amir Begam*, (I.L.R., 16 All., 211) considered.

SUIT for money due on a registered mortgage bond. The District Munsif decreed for plaintiffs for the amount claimed and in default for sale of the mortgaged property. The second defendant, Seshamma, on 9th July 1896 preferred an appeal to the Court of the Subordinate Judge but died in the same month, during the pendency of the appeal. On 14th September 1896 a petition was presented under section 368 of the Code of Civil Procedure by two out of four sapindas of equal degree to the last male holder of the mortgaged property, praying that they might be brought on the record as representatives of the deceased Seshamma, to save the property from being sold under the decree then under appeal. The remaining two sapindas did not join in the application and the petitioners alleged misconduct as their excuse for not including them. On 3rd December 1897, the respondents applied, under

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sections 366 and 582 of the Code of Civil Procedure, that the appeal might be dismissed, contending that it had abated in consequence of the former petitioners not having added all the persons who were entitled as reversioners to the mortgaged property. On 4th December 1897, the former petitioners again applied under sections 366 and 368 of the Code of Civil Procedure and section 5 of the Limitation Act of 1877. They referred to the previous petition in which it had been mentioned that there were two other persons who also had rights to the mortgaged property and had been excluded for the reasons there given. They relied upon *Bhikaji Ramchandra* v. *Purshotam*(1), as showing that any one of several representatives may represent a deceased party, and though they did not consider it necessary to ask the Court to make the other sapindas parties, they added that if the Court should follow *Ghamandi Lal* v. *Amir Begam*(2), they prayed that the said two sapindas might be so added. They stated that the omission to make that request in the prior petition did not arise from any negligence, inaction or carelessness but from a *bonâ fide* belief that the representation by the petitioners was sufficient, and relied upon section 5 of the Limitation Act, the delay being excusable inasmuch as the decisions referred to, as governing the proper practice, were conflicting. The Subordinate Judge, following *Bhikaji Ramchandra* v. *Purshotam*(1), was of opinion that an application by the petitioners as two out of four representatives of the deceased appellant was sufficient to prevent an order of abatement being made under section 366 of the Code of Civil Procedure, but deeming it necessary to bring all the representatives on the record he directed, under section 32 of the Code of Civil Procedure, that the two remaining sapindas should be added as respondents Nos. 4 and 5, and that notice should be sent them. Upon the appeal coming on for hearing the said respondents did not appear; and the Subordinate Judge reversed the decision of the Court below and dismissed the suit.

The plaintiffs preferred this second appeal on the ground, among others, that the first appeal should have been dismissed on the ground of non-joinder of all proper and necessary parties, inasmuch as the two representatives of the deceased Seshamma had not included the two other sapindas in their first petition, above

(1) I.L.R., 10 Bom., 220. (2) I.L.R., 16 All., 211.

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referred to, and as the said remaining sapindas had not been brought on the record within the time allowed by law.

Rama Rao for appellants.

Narayana Rao for respondents Nos. 2, 3 and 8.

JUDGMENT.—The first contention raised on behalf of the appellants before us (plaintiffs) is that, as the appellant in the appeal to the lower Appellate Court, Seshamma, (second defendant) died during the pendency of that appeal and the two persons who applied within the time limited by article 175A, schedule II, Act XV of 1877, for applications under sections 365 and 582 of the Civil Procedure Code, to be made appellants in her place as her legal representatives, admitted in their application that there were two other sapindas of her deceased daughter's son (the last male holder) of equal degree with themselves, but did not within the time so limited apply to have those two other sapindas made co-respondents (the latter not having joined with the appellants in their application to be made appellants), the appeal to that Court therefore abated, and that Court ought to have accordingly dismissed it. The facts are these. The appeal to the lower Appellate Court was presented by Seshamma on 9th July 1896. On some day in July 1896 not specified she died. On 14th September 1896 the persons who are second and third respondents in this second appeal applied to be entered on the record in place of the deceased appellant and their application was granted. In this application they stated that there were two other sapindas of equal degree with themselves to the late Sivaramayya, the deceased husband of Lakshmidevi, the deceased daughter of Seshamma, but that these two other sapindas had not joined them in making the application, "having all along "colluded with persons who set up a forged will and false adoption "against the title of the late Seshamma and having been ordered "to be prosecuted for offences committed by them in the litigation "against Seshamma." Nothing further appears to have been done till 3rd December 1897, when the plaintiffs, as respondents before the lower Appellate Court, presented a petition praying that the appeal might be dismissed as having abated by reason that the substituted appellants (in that Court), though admitting that there were two other legal representatives of Seshamma besides themselves, had not joined them as parties to the appeal. On 4th December 1897 the substituted appellants presented another application to the lower Appellate Court, in which, after referring to

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their former application, they stated that on the authority of *Bhikaji Ramchandra* v. *Purshotam*(1), they did not consider it necessary to apply to have the said other two sapindas made parties to the appeal, but that if the decision in *Ghamandi Lal* v. *Amir Begam*(2) was considered to be a correct exposition of the law, they prayed that the two other persons mentioned in their former petition might be made parties; that their omission to make this request did not arise from any negligence on their part, but from a *bonâ fide* belief that the representation by them was sufficient; and that as the point did not appear to have been authoritatively settled by any decision besides the two mentioned the delay was excusable under section 5 of the Limitation Act. The Subordinate Judge was of opinion that, with reference to the terms of section 366 of the Civil Procedure Code an application by one or some of several representatives of a deceased plaintiff or appellant if made within the prescribed period was sufficient to prevent an order of abatement being made under that section, and that he ought to follow the Bombay decision rather than the Allahabad decision. He therefore refused to pass an order of abatement; but being of opinion that all the representatives must be brought on the record, he directed under section 32, Civil Procedure Code, that the two legal representatives of the deceased who had not been brought on the record should be made co-respondents.

Though in article 175A, schedule II of the Limitation Act, the application is expressed to be an application under section 365 of the Code, and section 366 is not mentioned, yet for the purpose of considering the question of abatement the two sections 365 and 366, must, we think, be read together. In the Allahabad decision, above referred to, no reference is made to section 366. It is section 366 which contains the provision as to abatement, and that section provides that "if within the time limited by law no "such application be made to the Court by any person claiming "to be the legal representative of the deceased plaintiff, the Court "may pass an order that the suit shall abate."

The Bombay High Court in the case above referred to construed the words "any person claiming to be the legal representative" in section 366 as meaning any person claiming to be the, or (where

(1) I.L.R., 10 Bom., 220. (2) I.L.R., 16 All., 211.

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there is more than one) a, legal representative of the deceased. The Bombay case is not referred to in the judgment in the Allahabad case above cited. In the Allahabad case the learned Judges held that when an appellant dies during the pendency of the appeal, leaving more than one legal representative, all the representatives or all those who are willing to join in the application must apply to be made appellants in place of the deceased appellant within the limitation period, otherwise the application is barred and the appeal abates. They were of opinion that the application being to carry on the appeal, the appeal could only be carried on by those who represented the deceased appellant's interest in its entirety, and that an application for bringing on the record a person or persons who represented only a share or shares in, but not the entirety of, such interest was therefore not an application within the meaning of section 365 of the Civil Procedure Code. If an application is made to bring on the record only one or some of two or more heirs of the deceased appellant then though he or they might be capable of representing their respective shares in the estate of the deceased, they would not, it was considered, represent the interest of the deceased, in whose place they sought to be substituted in the appeal. " In section 365," the Court said in their judgment, " the " words 'the legal representative' must, where there are more than " one legal representative, be read in the plural."

It does not appear that in that case the two co-heirs of the deceased appellant who did not join with the heir who made the application under section 365 were unwilling to join with him in that application, and therefore that case differed, in that respect, from the present case. It is true, however, that the Court went on to say in their judgment :—" It might be that one only of the legal " representatives of a deceased appellant was willing to carry on the " appeal. In that case that legal representative should make the " other legal representatives parties to the appeal as respondents, if " they refused to join as appellants, so that the Court might have " before it all the persons whose interests might be affected by the " decree in appeal. The legal representatives of the deceased " appellant not having been brought upon the record in the Court " below within time, or at all, the appeal below abated, and an order " to that effect should have been made." These observations were therefore obiter, and we cannot take this as amounting to a decision that in such a case as the supposed case there referred to, which is

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such a case as the present, if the recusant legal representatives are not brought on the record as respondents within the period limited for an application under section 365, or at all, the application is no application with the meaning of the section or is barred and the appeal abates.

We so far agree with the learned Judges in the Allahabad case that we think, when there are more than one legal representative of a deceased appellant, all those representatives must, so far as it is possible for this to be done, join in the application under section 365 and that the words " legal representative " in section 365 (and similarly the words " any person " and " the legal representative " in section 366), strictly construed, must, in such a case, be read in the plural and as including all the legal representatives. But if their observations above quoted can be taken to mean that, in the opinion of the learned Judges, if, in such a case, one or some of the representatives refuse to join in the application, then unless the recusant representative or representatives be joined by the Court, or application to join them be made, within the time limited for an application under section 365 the application which has been made is no sufficient application within the meaning of sections 365 and 366 or is barred and the appeal abates, we are unable to concur in that view. It is clear that there may be cases in which where there are more than one representative sections 365 and 366 cannot, assuming that the words " legal representative " must then be read in the plural and so as to include all the representatives, be strictly complied with, that is to say all the representatives cannot be joined as applicants in the application. One of such cases would be that in which the representative or representatives applying within time is or are not aware of the existence of one or more other representatives who in fact exists or exist. Another is that in which one or some of the representatives apply within time, but one or more other representatives have refused to join in the application or to make a separate application themselves. In neither of these cases is it possible for the applicants to comply with the terms of those sections, if they are construed, strictly, as meaning that all those who represent the entire estate of the deceased appellant must " apply to the Court." We cannot think that in such cases, those sections should be construed to have the effect of rendering the application no application by " the legal representative " and

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therefore no application within the meaning of the sections, so that the appeal must be held to have abated. The learned Judges of the Allahabad Court appear to admit that, in the case of one or some only of the legal representatives applying, another or others refusing to join, if such other or others be joined as a respondent or respondents or at all events if such joinder be made within the limitation period, the sections are complied with. Yet that is an admission that the terms of the sections need not always be strictly or to the letter complied with, for in that case all the legal representatives (the words "the legal representative" being required, by the hypothesis, to be read in the plural and so as to include all those representing the entire estate of the deceased appellant) have not applied to the Court. It is departing from a literal construction of the sections, but putting upon them a construction which, regard being had to the subject-matter, is, the learned Judges apparently admit, a legitimate construction and one in accordance with the principles governing the construction of statutes.

Again an applicant or applicants under section 365 might believe that he or they were the only legal representatives and *bonâ fide* deny a right set up by some other claimant or claimants and therefore not attempt to join them in the application, yet it might be found subsequently by the Court (see section 367) that such claimant or claimants were also legal representatives, and should therefore also have been joined in the application or sought by the applicants to be made respondents. We do not think it could have been intended to put the question of the representation of a deceased plaintiff or appellant for the purpose of carrying on a suit or appeal upon the extremely hazardous footing which would result from the strict literal construction of sections 365 and 366 contended for by the appellants' Counsel in this second appeal.

We are therefore of opinion that, in the present case, in which two out of the four legal representatives of the deceased appellant have applied under section 365 within time and the other two have not joined in the application owing to their unwillingness to do so and to the other reasons stated above, and the applicants have subsequently, but, in consequence of a *bonâ fide* belief, as we see no reason to doubt, entertained by them, that it was unnecessary for them to do so, not within the time limited by law for an application under section 365, applied to have the other two brought on the record as respondents, we are not unduly straining,

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or rather perhaps we should say relaxing, the terms of sections 365 and 366, but placing on them a construction which, having regard to the subject-matter, is one in accordance with the principles governing the construction of statutes, if we hold as we do, that the application to the lower Appellate Court of the 14th September 1896 was an application fulfilling the requirements of those sections, and that the appeal before that Court therefore did not abate.

It was not disputed that the applicants, the second and third respondents in this second appeal, as reversionary heirs to the last male holder, are legal representatives of the deceased appellant before the lower Appellate Court, Seshamma, within the meaning of sections 365 and 366, nor was there any room for questioning this. (*Katama Natchiar* v. *Raja of Shivagunga*(1), *Premmoyi Choudhrani* v. *Preonath Dhur*(2), *Tribhuwan Sundar Kuar* v. *Sri Narainsingh*(3).

[Their Lordships then, dealing with the merits of the case, dismissed the second appeal with costs.]

ORIGINAL CIVIL.

Before Mr. Justice Boddam.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF BUKTHAWAR MULL SOWCAR (DECEASED).* 1899. August, 22.

Probate and Administration Act—Act V of 1881, *ss.* 2, 4—*Document in form of will passing no property and only appointing guardians.*

A document in the form of a will, which was presented for probate, dealt with no property, the petition stating that the family of which the testator had been managing member was undivided, and that the testator's property had devolved by survivorship on his sons and nephews. The document, however, appointed persons to manage the family business during the minority of the said minors :

Held, that it was not a document of which probate could be granted.

PETITION for probate. After setting out that the testator had died leaving two minor sons and nephews him surviving, that he was managing member of an undivided family which was carrying on business as bankers and money-lenders, and that considerable

(1) 9 M.I.A., 539. (2) I.L.R., 23 Calc., 636. (3) I.L.R., 20 All., 341.

* Testamentary Petition No. 92 of 1899.

BUKTHAWAR MULL SOWCAR.

property had been left belonging to the said undivided family, the petition proceeded as follows :—"That on the death of the said testator the said properties devolved on his said minor sons and nephews, and they, by right of survivorship, are entitled to the same. That the said testator with the object of continuing the said family business and for the benefit of the said minors left his last will and testament appointing your petitioners executrixes and executors thereof so as to enable your petitioners to manage the said family business during the minority of the said minors."

JUDGMENT.—I do not think, having regard to the definition of a will in the Probate and Administration Act, section 2, that probate should be granted of a document in the form of a will which admittedly deals with no property of the testator and where, under section 4 of that Act, nothing would pass to the executor. The mere fact that guardians are appointed by such a document is not sufficient of itself to bring the document within the statute or to render probate necessary. The fact of the appointment of a guardian by a so-called will can be proved otherwise. I therefore refuse probate and dismiss this petition.

Messrs. *Ranganadham Naidu & Tirumalai Pillai*—Attorneys for petitioners.

ORIGINAL CIVIL.

Before Mr. Justice Boddam.

1899. September 5.

RAMASAMI CHETTI (PLAINTIFF),

v.

SUBBU CHETTI AND OTHERS (DEFENDANTS). *

Attorney—Rules of Madras High Court, rule No. 320—Leave of Court for proposed change of attorney—Grounds upon which leave will be given or withheld—Payment of costs due to attorney.

Leave will not be given by the Court for a change of attorney under rule No. 320 of the Rules of the Madras High Court (which provides that leave must be obtained before such a change of attorney can be made) until the costs of the attorney are first paid or provided for.

* Civil Suit No. 213 of 1898.

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PETITION by fourth defendant in a suit praying for an order that one of the attorneys of the High Court might be at liberty to conduct the further proceedings on petitioner's behalf in the place and stead of another attorney who had hitherto acted for him. The suit was one for partition, in which family disputes had arisen and petitioner's reason for desiring the change of attorney was, in effect, that the latter had acted for many years for his father with whom petitioner was now on inimical terms, in consequence of which he wished to become a plaintiff instead of a party defendant. The attorney referred to had consented to the change on the understanding that a razinamah decree would be consented to by which the costs of the said attorney in respect of the petitioner would be secured to him, but petitioner having opposed the said razinamah decree, the attorney objected to the change taking place and had withdrawn the consent and now opposed the order prayed for.

Mr. *Allan Daly* for petitioner.

The attorney, as counter-petitioner, in person.

JUDGMENT.—There is no real difficulty in enunciating the law or in applying it in this case. Before a change of attorneys can be made in this country, it is necessary to obtain the leave of the Court, rule No. 320; and it is in consequence of this leave being necessary that the question is now before me.

There is no such necessity in England. There, under the old chancery practice a client was entitled to change his attorney at his option and the only right the attorney had was to retain any papers of the client until his costs were paid. At common law the client could not change his attorney without paying his costs. In *Newbiggin-by-the-Sea Gas Company* v. *Armstrong*(1), it was held by the Court of Appeal that where no rule of practice is laid down and there is a variance between the old practice of the Chancery and Common Law Courts, that practice is to prevail which is considered by the Court most convenient.

In these circumstances and in this country it would not be right, in my judgment, to adopt the old chancery practice in preference to the common law practice for reasons that must be obvious to all practitioners and in addition to this in each case the leave of the

(1) L.R., 13 Ch.D., 310.

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Court has to be obtained, which rule is, I imagine, intended as much for the protection of the attorney as of the client.

Here it is contended that a client has a right at any time to change his attorney at his own option, and that this Court will not refuse to sanction that change if the former attorney has once given his consent. In this case it appears that the petitioner was a client up to July of the former attorney, who, in that month, consented to his changing attorneys and wrote a consent on the new attorney's vakalat.

It is said on behalf of the petitioner that this was done upon the former attorney being given an undertaking. The former attorney, however, says he consented upon an understanding that the petitioner consented to a razinamah decree which provided for the payment of his costs. The petitioner however changed his mind and now opposes that razinamah, so that there is little or no chance of the former attorney getting his costs and naturally he now declines to consent to the change, as he is entitled to say "I object unless my costs are paid or satisfactorily provided for." The so-called undertaking does not satisfactorily or at all provide for the former attorney's costs unless the razinamah decree is passed.

In my opinion, a litigant in this country may, at his option, change his attorney, but he must first pay or satisfactorily provide for the payment of his costs, and I for my part should decline to sanction a change of attorneys until that is done.

It is not done here and I therefore refuse to give leave, and dismiss this petition unless the former attorney is satisfied with respect to the payment of his costs, within the next half hour.

[The petition having been again called on, his Lordship made the following further order :—]

Mr. Branson is satisfied and I accordingly sanction the change of attorneys.

Mr. *Subbayya Chetti*—Attorney for petitioner.

Messrs. *Branson & Branson*—Attorneys for counter-petitioner.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar (Officiating Chief Justice), Mr. Justice Moore, and Mr. Justice O'Farrell.

SUBRAHMANIA AYYAN (DEFENDANT No. 2), APPELLANT,

v.

KRISHNA AYYAN AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

1899. February 1, August 1,

Construction of document—Alteration in material part—Effect of alteration as vitiating document—Vesting of interest by execution of mortgage instrument.

By an agreement entered into between plaintiff and defendants' predecessors in title plaintiff undertook to sell and convey certain lands to the purchasers and to allow half the purchase money to remain at interest for three years on security of the lands sold. Plaintiff's mother was alive, as also his son, who was then a minor. In order to protect the purchasers from any claims by the said mother or son as against the lands so agreed to be sold plaintiff further agreed to give the purchasers a bond indemnifying them from any such or other claims. Plaintiff in pursuance of the said agreement duly executed a conveyance of the lands; he also gave the purchasers an indemnity in respect of claims by his mother as against the lands. The purchasers executed a mortgage over the lands in plaintiff's favour, in which the indemnity to be furnished by plaintiff was at first referred to in general terms, but the document concluded with the words, "a security should be furnished for this sum on account of the minor only." The balance of purchase money so secured not having been paid plaintiff brought a suit for the sale of the mortgaged land and before doing so tendered an indemnity protecting the defendants against any claims that might be made as against the lands by the plaintiff's said minor son. It was found that the words "for the minor only" had been added to the mortgage instrument after its execution and without the mortgagors' consent. On its being contended that the alteration was a material one and vitiated the document, and that the suit, being based on the altered document, must fail; and that the tender of a general guarantee as originally agreed upon was a condition precedent to the plaintiff's right to sue:

Held, (O'FARRELL, J., dissenting), that on the execution of the mortgage instrument an interest in the property comprised therein at once became vested in the plaintiff; that such interest was not and could not have been devested from him by the subsequent addition of the words referred to, and that in asking for the sale of the land plaintiff was seeking to enforce, not a right resting on the contract or covenant, but one arising by operation of law with reference to the vested interest created by the instrument having been executed;

* Second Appeal No. 613 of 1898 against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in Appeal Suit No. 493 of 1897, reversing the decree of B. Virasami Ayya, District Munsif of Mannargudi, in Original Suit N 53 of 1895.

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that though reference was made in the plaint to the provisions relating to the mortgage instrument in its altered state, such reference was not an essential part of plaintiff's cause of action, and that the suit was not necessarily based on the altered instrument;

that the execution of a security bond in terms of the mortgage instrument before it was altered was not a condition precedent and the suit was sustainable though no such security had been given before the institution of the suit; and

that (the question of damages not arising) plaintiff was entitled to a decree on the mortgage instrument, which would also provide that he must furnish a proper security bond before an order absolute would be passed.

Per COLLINS, C.J., and BENSON, J.—, (in the order calling for a finding),—that the mortgage instrument having provided for security to be given by plaintiff in general terms, the addition of the words for "the minor only" restricted the liability of the property to be given by plaintiff as security to claims made by the said minor son. It diminished the guarantee to be given by plaintiff against claims by the mother or others. It was thus an alteration in a material part of the document and would vitiate it as a basis for the plaintiff's suit unless the plaintiff could show that the alteration had been made with the consent of the mortgagors, who executed the document.

Per O'FARRELL, J.—That inasmuch as the suit was based not on the transferred right but on the altered document and as no obligation had as yet attached under the unaltered document, the suit should be dismissed; that the defendants' liability was contingent upon the prior execution by plaintiff of a general guarantee and not of the limited one which he, relying on the fraudulent alteration, had tendered; that where an agreement has, as to one of the parties, been wholly executed, the altered contract may be given in evidence of the correlative obligations incurred by the other party; but that here the agreement so far as it related to repayment of the purchase money was executory and contingent upon the fulfilment by the plaintiff of the prior obligation to execute a proper guarantee; and that a conditional decree upon a proper security bond being executed could not be given.

By an agreement (exhibit II), dated 20th July 1891, the plaintiff agreed to sell certain lands to first defendant's late husband Vydinada Ayyar and his mother Sitha Ammal for the sum of Rs. 4,000. Of this sum, Rs. 300 was received by the plaintiff on the date of the said agreement and the balance of Rs. 3,700 was agreed to be paid as follows:—Rs. 1,700 on the day upon which a sale deed should be executed; and the balance Rs. 2,000 within three years with interest at a half per cent. per mensem. Plaintiff agreed to receive the principal sum of Rs. 2,000 on giving proper security; he further agreed to execute a bond indemnifying the vendees in respect of any claims to maintenance which might at any time be put forward by plaintiff's mother Mangalathammal against the land. Plaintiff had a minor son, who did not join with him in the sale. On 4th September 1891 a conveyance of the lands was executed by plaintiff in pursuance of the said agreement and on the same

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day a deed (exhibit A) was executed by the vendees hypothecating the same lands to the plaintiff as security for the payment of Rs. 2,000, the balance of purchase money. Among other terms were the following:—"As we owe you the sum of rupees two thousand as per particulars mentioned in the said sale deed, we shall pay you interest for the above said sum for three years from this day at Re. ½ per cent. per mensem, paying the interest of each year on the 3rd September of each year. We shall pay you the said sum of Rs. 2,000 either on the 3rd September of 1894 which is the said third year, or before that time or on any other day, on which a security deed is executed either by you or by any other person on property worth Rs. 2,000 and free from all incumbrances whatever. If within the said fixed date the security be not furnished and the amount received, you shall receive the principal sum without interest for the period subsequent to that on the day on which the security is furnished. If the interest due for every year within the said three years be not paid at the time so fixed, we shall add interest to the said interest at the rate of 10 annas per cent. per mensem. The sum for which the security has to be furnished as said above is Rs. 2,000. A security should be furnished for this sum of rupees two thousand on account of the minor only."

On the same day plaintiff executed an indemnity bond (exhibit C) in respect of any claims against the lands as follows:—"If in any year there should be default in paying the said income, if any suit were brought for it by the said Mangalathammal, and if it should happen that the amount be made recoverable from the income of the lands which have been sold to you, or if any other claim or incumbrance be found out and if such be made recoverable from the property that have been sold to you, for the said purposes and for all the expenses that might be incurred, and for loss of interest sustained, the following properties which belong to me ancestrally and are in my enjoyment are given to you as security."

The lands in question were sold to second defendant who now alone contested the suit. The Rs. 2,000 not having been paid, plaintiff, in October 1894, tendered a bond of indemnity, exhibit B, in respect only of any claims that might be made against the land by plaintiff's minor son. This was refused by second defendant, who asked for an indemnity in general terms. Plaintiff thereupon obtained the signature of another bondsman, sent the bond to

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second defendant by registered post and ultimately brought this suit to recover the Rs. 2,000 due on the mortgage bond (exhibit A). Defendant No. 2, among other defences, contended that the bond of indemnity should not be restricted to claims by the plaintiff's minor son alone, and, after seeing the deed of hypothecation, exhibit A, he set up the further contention that the concluding words therein restricting the indemnity to claims by "the minor only" had been interpolated since the execution of the bond, and that the bond was vitiated thereby and the suit should fail. The District Munsif found that plaintiff had tampered with the document, and that the alteration related to a material part of it since it altered the nature of the covenant upon the performance of which plaintiff's right to enforce repayment of the money depended. He relied on *Govindasami* v. *Kuppusami*(1) and said:—"The money being made expressly payable on the furnishing of security according to the agreement between the parties, the plaintiff cannot recover it except by acting in conformity to the terms of the document, which he rendered himself incapable of complying with by the unauthorised addition he made to it, which vitiates it as a whole. The claim, as also observed in the case quoted, is neither based on any antecedent transaction for which the instrument is given as security, nor does the execution of the instrument vest in the plaintiff any estate or right of the existence of which the deed would be evidence. I hold under the first issue therefore that the bond sued on is not genuine, having been fraudulently altered in a material part." He dismissed the suit.

On appeal, the Subordinate Judge concurred in the finding that the words "for the minor only" in exhibit A had been interpolated, but considered that the alteration was not in a material part of the document, since the claims of plaintiff's mother had been provided against by exhibit C, and the only indemnity to be given was in respect of his minor son, in accordance with the alteration. He did not find as to whether the words had been added with the consent of the executants of exhibit A. Following *Tikamdas Javahirdas* v. *Ganga kom Mathuradas*(2) he held that the bond was not vitiated, and, allowing the appeal, decreed that second defendant should accept the indemnity (exhibit B) and pay the Rs. 2,000 to plaintiff within three months with interest from

(1) I.L.R., 12 Mad., 230.

(2) 11 Bom. H.C.R., 203.

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the date of plaint to that of the judgment and that in default of payment the mortgaged property should be sold and the sale-proceeds applied in discharge of the debt.

Defendant No. 2 preferred this second appeal which came on for hearing, in the first instance, before COLLINS, C.J., and BENSON, J., who passed the following

ORDER.—We are unable to accept the view of the Subordinate Judge that the alteration of exhibit A by the addition of the words "for the minor only" is not a material alteration. It may be that by the execution of exhibit C the plaintiff gave the security therein mentioned as a guarantee against claims by Mangalathammal and other incumbrances, but that is no reason why he should not have been also required by the mortgagors under exhibit A to give further security in general terms as a guarantee not only against the son's possible claims but also against the claims of Mangalathammal and other incumbrances already guaranteed by exhibit C to the extent of the property therein mentioned. The property in exhibit C might prove an insufficient security, and the mortgagors might reasonably have thought fit to obtain a further security. Such further security was given in general terms by exhibit A before the words "for the minor only" were added. The addition of those words restricted the liability of the property in that document to claims made by the son of the plaintiff. It diminished the guarantee given by the plaintiff against claims by Mangalathammal and other incumbrances. It was thus an alteration in a most material part of the document (*Govindasami* v. *Kuppusami*(1)) and would vitiate it as a basis for the plaintiff's suit, unless the plaintiff could show that the alteration was made with the consent of the mortgagors who executed the document.

On this question the finding of the Subordinate Judge is by no means distinct. We must ask him to return a finding on this point within six weeks from the date of receipt of this order.

We observe that two of the witnesses who attested the document have not been examined, nor does it appear that their evidence is not procurable. In a case like the present it is highly desirable that all available evidence as to the circumstances under which the alteration was made should be exhausted. The Subordinate

(1) I.L.R., 12 Mad., 239.

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Judge should therefore examine these witnesses if their evidence is available.

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

[The finding of the Subordinate Judge was duly returned and was to the effect that the words "for the minor only" were not added with the consent of the mortgagors who executed the document.]

The case came on again for hearing, after the return of the above finding, before the Court constituted as above.

Ramachandra Ayyar, for appellant, contended that the alteration of exhibit A being a material one vitiated it as a basis for plaintiff's suit, since the finding was that it was made without the consent of the mortgagors, who executed the document. He referred to the order of the Court; also to *Govindasami* v. *Kuppusami*(1), *Ramasamy Kon* v. *Bhavani Ayyar*(2) and *Christacharlu* v. *Karibasayya*(3). If no such obligation to pay arose before tender of security, the decree could only be given after something else had been done;—the tendering of the security by plaintiff in terms originally agreed upon was a condition precedent to the plaintiff's right to sue. If it were conceded that a conditional decree should be passed, that showed that the condition was a condition precedent and its non-performance fatal to institution of the suit.

V. Krishnasami Ayyar for respondent No. 1.—On the language of the instrument (exhibit A) plaintiff may sue and can be made to execute such a document as the Court directs. The only alternative is to hold that no cause of action arose until after tender of the document, plaintiff being at liberty to bring another suit after tender has been made; *Sahib Zadah* v. *Parmeshar Das*(4). Here, there were two covenants, one to be performed by each of the parties; and it is submitted that in such circumstances the Court will pass a conditional decree. The passing of a conditional decree will only give effect to the accepted principles of equity that he who seeks equity shall do equity; and does not show that the covenant to give an indemnity was a condition precedent or that the suit should be dismissed for its non-performance; *Ramaiya* v. *Narayanasamy*(5). By the terms of the security bond,

(1) I.L.R., 12 Mad., 289. (2) 3 M.H.C.R., 247. (3) I.L.R., 9 Mad., 399.
(4) I.L.R., 1 All., 524. (5) 3 M.H.C.R., 209.

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interest is lost and that is the only penalty that plaintiff should suffer. On the authority of the Full Bench decision in *Christacharlu* v. *Karibasayya*(1), it not being a mere agreement that is sought to be enforced but a right *in rem*, plaintiff is entitled to fall back on the instrument as it stood prior to the alteration.

SUBRAMANIA AYYAR, OFFG. C.J.—The first point for decision is whether the addition of the words "for the minor only" in the sentence 'a security should be furnished for this sum of rupees two thousand,' which occurs at the end of the mortgage instrument (exhibit A), bearing date the 4th September 1891,—an addition now found to have been made wrongfully after the instrument was duly executed and registered—precludes the mortgagee, the first respondent (plaintiff), from seeking as against the appellant (second defendant), claiming through the mortgagor, a sale of the mortgaged property for the mortgage money, assuming for the present that the money had become due on the 3rd September 1894, notwithstanding the failure on the part of the first respondent to execute a security bond as provided in the mortgage instrument.

Now it is unquestionable that on the execution of exhibit A an interest in the property comprised therein became at once vested in the first respondent, that such interest was not and could not have been devested from him by the subsequent addition of the words referred to and that one of the incidents annexed by law to the interest so vested is a right to have the property sold through the Court should the mortgagor or other person bound to pay the mortgage money fail to pay it. Therefore, in asking for the sale of the land it is obvious that the first respondent is seeking to enforce, not a right resting on contract or covenant, but one arising by operation of law with reference to a vested interest created by the instrument having been executed. It is true that reference is made in the plaint to the provisions relating to the security bond in exhibit A as altered. But such reference is not an essential part of the first respondent's cause of action, in the view I take of the effect of the provisions relating to the security, on the respondent's right. I am therefore unable to say that the suit is to be taken as necessarily based on the altered instrument. The case is, under the circumstances, in principle, similar to *Agricultural Cattle Insurance Company* v. *Fitzgerald*(2), where it was held

(1) I.L.R., 9 Mad., 399. (2) 16 Q.B., 432 at p. 441; 16 A. & E., 432.

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that though the deed of settlement of the Company had, since its execution, been altered by the erasure of the name of a shareholder subscribed before that of the defendant, still the deed was available as evidence in an action for calls against the defendant. Lord Campbell, C.J., said:—"This is not an action on the deed, but "upon the Act of Parliament which renders the defendant liable to "be sued in this form (debt) if he was a shareholder when the calls "were made. His execution of the deed shows that he was then a "shareholder; and the erasing of the name of another shareholder, "rightfully or wrongfully, could not devest from the defendant the "shares which he before held. The deed therefore was evidence "that he was a shareholder when the calls were made." Similarly in the present case the addition of the words 'for the son only' could not and did not devest from the first respondent the mortgage interest already vested in him and the instrument in question is evidence of such interest entitling him to enforce the incidental right of selling through the Court annexed to the interest by the law. Be this as it may, *Ramasamy Kon* v. *Bhavani Ayyar*(1) in so far as it is unaffected by the Full Bench decision in *Christacharlu* v. *Karibasayya*(2), and the very clear observations to be found in the latter case itself bearing on the present question, are distinct and direct authorities in favour of the view that the first respondent is not precluded from enforcing his mortgage right against the appellant to the extent sought by him.

The other point for determination is whether the execution of the security bond, referred to in exhibit A as it stood before it was altered, is a condition precedent to the accrual of the right to payment of the mortgage money. This is of course a question of construction, the intention of the parties being collected from the whole instrument. Now the most important passage bearing on the point runs thus:—"we shall pay you the said sum of rupees "two thousand on the 3rd September 1894, which is the third year, "or before that, on the day on which a security deed is executed by "you or any other person on good immoveable property which is "worth rupees two thousand and which is not subject to any claim "or dispute." The obvious meaning of the parties is that the sum of rupees two thousand was to become payable at all events on the 3rd September 1894, though payment thereof might be claimed

(1) 3 M.H.C.R., 247. (2) I.L.R., 9 Mad., 399.

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even before that date should the first respondent execute or cause to be executed a security bond of the description mentioned in the instrument. That the two thousand rupees were to be paid unconditionally on the 3rd September 1894 would seem to be pointed to even by the terms of the instrument as to interest on that amount. They are as follows:—"As we owe you this sum of rupees two "thousand, as per particulars mentioned in the sale-deed, we shall "pay you interest for the above said sum for three years from this "day at ½ rupee per cent. per mensem, paying the interest of each "year on the 3rd September of each year . . . . If perhaps "within the said fixed date (3rd September 1894) the security "be not furnished and the amount received, you shall after that "date, on the date on which security is furnished, receive from us "the principal alone."

The intent of the parties would seem to be that failure on the first respondent's part to furnish security will entail on him only the loss of interest subsequent to the 3rd September 1894, but will not affect in any way his right to interest prior to that day or to the payment of the principal which, as already stated, was taken as accruing due unconditionally on the 3rd September. If it were otherwise the parties would surely have stated in express terms that apart from the loss of interest the principal amount too could not be demanded until the security is furnished.

As to the statements in the plaint bearing on the question of the security bond, they are averments of the plaintiff's readiness to perform his covenant in the matter—a covenant the breach of which would entitle the mortgagor to claim a set-off for the damages caused thereby. I am unable to hold that the statements in question imply any admission on the part of the plaintiff that the giving of the security was a condition. Lastly, the agreement exhibit II, executed in July 1893, on which reliance is placed on behalf of the appellant, is not in my opinion inconsistent with the view that there is no condition. Assuming that it is open to refer to that document in construing exhibit A which was executed in September, the language of the former exhibit II with reference to the point under consideration is substantially the same as that of the latter exhibit A.

Though with reference to a question of construction of the terms of a document decisions upon the construction of other documents may not be of binding authority, still I think reference may

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be made to *Campbell* v. *Jones*(1) the facts of which present some analogy to the facts of this case. There, by an indenture made between A (a patentee) and B, which recited an agreement that in consideration of £500 to be paid by B to A in manner thereinafter mentioned A would instruct B in his method and should also permit B to use his patent, A in consideration of £250 paid by B and of the further sum of £250 to be paid, &c., covenanted that he would with all possible expedition instruct B in his method; and B covenanted that he would on or before the 25th February 1794 or sooner if A should before that time have instructed him, &c., pay the further sum of £250. The Court of King's Bench held that A might sue B for the £250 without averring that he had taught B the method, &c. Lord Kenyon, C.J., observed with reference to the first ground on which the conclusion of the Court was rested "the "intent of the parties appears to be that the payment might be "accelerated, but should not in any event be delayed." The other ground taken by the Court for their view was that "the teaching "of the defendant was not the whole consideration of the covenant "to pay." So, here the covenant to give security was of course not the whole consideration for the covenant to pay the two thousand rupees, if it formed any part of the consideration at all; for, that sum was the unpaid moiety of the price of the lands sold and delivered to the mortgagor and mortgaged by him for that moiety under the instrument in question. In conclusion it may not be superfluous to add that in cases like this where the parties have not chosen to declare in the instrument that the performance of any particular covenant therein is a condition precedent, as it was open to them to declare, those who construe the instrument should, in the language of Bramwell, B "be chary in doing for them that "which they might, but have not done for themselves."—*Tarrabochia* v. *Hickie*(2). For all these reasons, I am of opinion that the execution of a security bond as provided in exhibit A was not a condition precedent and the suit is sustainable though no such security was given before it was instituted.

However, upon the finding now come to as to the terms of the security bond undertaken to be given by the first respondent, the declaration made in the lower Appellate Court's decree that the appellant do accept the security bond, exhibit B, must be expunged

(1) 6 T.R., 570; 3 R.R., 263.

(2) 1 H. & N., 183 at p. 188.

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since the bond is not in accordance with the provisions of exhibit A as unaltered. Nor is the first respondent entitled to interest after the 3rd September 1894 he having failed to furnish by that date such a bond, as he was bound to furnish. Therefore in so far as the appellant is concerned that decree must be modified with reference to the two points mentioned. As to the failure on the first respondent's part to furnish a proper security bond, it is not necessary to determine what damages the appellant is entitled to, since the respondent is willing now to execute it or cause it to be executed and the appellant is willing to take it. The decree will therefore provide that he shall do so before an order absolute is passed. The appeal is otherwise disallowed, but the first respondent must pay the appellant's costs throughout. The memorandum of objections is dismissed with costs.

MOORE, J.—On the 20th July 1891 an agreement (exhibit II) was entered into between the plaintiff and Vydinada Ayyar, the husband (since deceased) of the first defendant and his mother Sitha Ammal under which the plaintiff undertook to sell certain lands to Vydinada Ayyar and his mother for Rs. 4,000. Of this sum it was agreed that Rs. 2,000 should be paid to the plaintiff with interest within three years from the date of exhibit II and it was further stipulated that before the plaintiff received this sum he should furnish security to the extent of Rs. 2,000 and that in case he failed to do so and to receive the money within the term of three years fixed he should whenever he subsequently furnished the security receive the Rs. 2,000 but without interest. It is shown that on the 4th September 1891 the sale deed agreed upon in exhibit II was executed and that on the same day a deed of mortgage (exhibit A) was drawn up under which the vendees, Vydinada Ayyar and his mother, mortgaged to the vendor, the plaintiff, the property comprised in the deed of sale. In this latter document stipulations almost identical to those to be found in exhibit II were inserted and it was agreed that the mortgagors should pay to the mortgagee Rs. 2,000 either on the 3rd September 1894 or before that date or on any other day on which a security deed should be executed either by the mortgagee (plaintiff) himself or by some other person on his behalf and it was further agreed, as in exhibit II, that if within the date fixed the security was not furnished and the sum of Rs. 2,000 paid the plaintiff was to receive the principal on whatever date the security might

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eventually be furnished but without any interest for the period subsequent to the 3rd September 1894. Later on, after the death of Vydinada Ayyar, his widow (first defendant) and his mother sold the property to the second defendant. The plaintiff has brought the present suit on exhibit A alleging in the plaint that he had offered to get a security deed executed as agreed on but that the second defendant had ignored his offer. He therefore sued for the recovery of Rs. 2,000 together with interest from the defendants and by sale of the mortgaged property. The first defendant did not contest the suit and the second defendant pleaded that no deed of security drawn up as agreed upon had been tendered to him and that he was ready to pay the amount due by him provided a "proper deed" of indemnity was tendered. He subsequently added a plea that exhibit A had been altered subsequent to execution and contended that on that ground the suit should be dismissed. The further inquiry that has now been made by the Subordinate Judge under the order of this Court shows clearly that exhibit A was altered by the plaintiff after the document had been registered. It is therefore clear that that portion of the decree which directs the second defendant to accept exhibit B, a security bond drawn up according to the terms of exhibit A as altered by the plaintiff, cannot stand. I however agree with the learned Officiating Chief Justice that it is open to us to pass a decree directing that on the plaintiff tendering to the second defendant a security bond drawn up in accordance with exhibit A as it stood before alteration, time should be allowed to the second defendant to pay Rs. 2,000 with interest up to the 3rd September 1894 and that on his failure to do so the mortgaged property should be sold. It will be seen that in his first written statement the second defendant expressed his consent to such a decree being passed and that his only objection to the plaintiff's suit was that exhibit B had not been drawn up in accordance with the terms of exhibit A. The decree proposed by the Officiating Chief Justice is also in my opinion in accordance with the terms of the agreement entered into, as set forth in exhibit II taken with exhibit A, which, as I read them, were that whenever the plaintiff should tender a properly drawn up security bond the mortgagors should be bound to accept it and pay the sum of Rs. 2,000 due subject to the condition that if the security bond was not tendered on or before the 3rd of September 1894 the plaintiff was to lose all

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interest subsequent to that date. This condition was not in my opinion a condition precedent to the plaintiff's right of action. It will be satisfied if even after the final decree in this suit is passed the plaintiff offer to the second defendant a security bond drawn up as agreed upon.

I would therefore modify the decree of the lower Appellate Court as proposed by the Officiating Chief Justice.

O'FARRELL, J.—The finding now submitted is to the effect that the alteration was made without the consent of the defendants who executed the mortgage deed, and the learned Vakil for the respondents does not venture to contest the correctness of this finding. Following, therefore, the opinion of the Judges who ordered the remand, the plaintiff's suit should be dismissed. It is for the first time, however, contended in argument by the Vakil for the respondents, that the suit should not be entirely dismissed, but decreed conditionally on the plaintiff now executing a proper guarantee according to the terms of the unaltered agreement. He relies upon *Ramasamy Kon* v. *Bhavani Ayyar*(1) and the Full Bench decision in *Christacharlu* v. *Karibasayya*(2). The effect of those decisions, so far as concerns the present case, would seem to be, that where a vested interest has been created by the execution of a document, such right will not be affected by any subsequent alteration, and the document may be given in proof of the creation and extent of the right. The remarks of Lord Abinger in *Davidson* v. *Cooper*(3) were referred to. But the rider was added that even in such a case the suit must be framed on the transferred right and not on the altered document.

It appears to me plain from the recital of the pleadings contained in the District Munsif's judgment that the suit was based not on the transferred right but upon the altered document. In that view the cases cited are against the respondent's contention. I think, moreover, that these cases are inapplicable for another reason, viz., that no obligation has as yet attached under the unaltered document. The defendants' liability to pay the balance of the purchase money is contingent upon the prior execution by the plaintiff of a general guarantee and he, relying on the fraudulent alteration, has tendered only a limited one which the defendants have naturally refused to accept. I quite concede

(1) 3 M.H.C.R., 247. (2) I.L.R., 9 Mad., 399. (3) 11 M. & W., 778.

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that where an agreement has, as to one of the parties, been wholly executed, it is deducible from the Madras cases that the altered contract may be given in evidence of the correlative obligations incurred by the other party. But here the agreement so far as relates to the payment of the balance of the purchase money is executory, and contingent upon the fulfilment by the plaintiff of the prior obligation to execute a proper guarantee. I think this is plain from the language of the document sued upon—though that is somewhat involved.—"If within the fixed date the security be "not furnished, you shall receive the principal sum without interest "for the period subsequent to that on the day on which the "security is furnished." I think it appears, however, still more clearly from the stipulation in the agreement for sale (exhibit II). A term of three years is there fixed and the principal is made payable on or before the expiry of that term with interest at the rate of six per cent. per annum. The document then goes on to say "Before I receive the principal sum, security shall be given of "immoveable property . . . . . If within the said three "years I fail to do so, I shall, at the time when I furnish security "subsequent to the said stipulated time, receive the said sum of "Rs. 2,000 without charging interest up to that time." It seems to me that nothing could be clearer than this, and it was evidently understood as creating a condition precedent by the plaintiff himself when he framed his plaint and stated that "to entitle the "plaintiff to take payment of the amount . . . . the "vendees should beforehand be furnished with an indemnity bond;" and he accordingly had such a bond drawn up and presented along with the plaint. I may further point out that the District Munsif certainly understood the condition as to the furnishing of security as a condition precedent, for he distinctly says so in paragraph 7 and again in paragraph 11 of his judgment, and the plaintiff never contested that view in his grounds of appeal or even in special appeal. He has not taken the ground he now seeks to press upon us even in the memorandum of objections to the finding of the Subordinate Judge. It was put forward for the first time in argument when he was unable to sustain the objections to the finding of fact and even then I understood him to ask not for an unconditional decree, but for a decree conditional upon his executing a proper security bond in accordance with the unaltered instrument. I am unable to see how he can get any such decree

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in the present suit, except, perhaps, by consent. It is urged that if the plaintiff's suit is wholly dismissed he will be driven to fresh litigation. I do not think this necessarily follows, as the defendants—quite honestly so far as I can judge—have always professed themselves ready and willing to pay the money if a proper guarantee be executed. But even if this consequence did follow, I do not think it ought to affect our judgment. We are not specially concerned to make the paths of forgery easy or relieve the plaintiff from the consequences of his criminal folly. I would, therefore, as originally contemplated by the late learned Chief Justice and Mr. Justice Benson, allow this second appeal and dismiss the plaintiff's suit with costs throughout.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

QUEEN-EMPRESS,

v.

CHINNA PAVUCHI AND OTHERS.*

1899. November 29, 30.

Evidence Act—Act I of 1872, *s.* 30—*Confession by one of several persons jointly tried for the same offence—Plea of guilty by person so confessing—Criminal Procedure Code—Act V of* 1898, *s.* 271—*Discretion to continue trial after plea of guilty.*

The trial of an accused person does not necessarily end if he pleads guilty. Under section 271 of the Code of Criminal Procedure, where an accused pleads guilty, "the plea shall be recorded," and the accused "may be convicted" thereon; but evidence may be taken in sessions cases as if the plea had been one of "not guilty," and the case decided upon the whole of the evidence including the accused's plea. When such a procedure is adopted the trial does not terminate with the plea of guilty, and therefore a confession by the person so pleading may be taken into consideration under section 30 of the Indian Evidence Act, 1872, as against any other person who is being jointly tried with him for the same offence. A trial does not strictly end until the accused has been either convicted or acquitted or discharged.

* Referred Trial No. 55 of 1899 for confirmation of the sentences of death passed by G. F. T. Power, Sessions Judge of Tanjore, upon the prisoners in Calendar Case No. 75 of 1899, on the file of the Stationary Second-class Magistrate of Tanjore; and Criminal Appeals Nos. 702 to 704 of 1899 by the said prisoners.

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THREE persons being tried on a charge of murder, the second and third accused gave information to the Magistrate which led to the discovery of jewels which had belonged to the deceased and had been worn by her immediately before the murder. The third accused then attempted to commit suicide and while in hospital made a full confession to the Taluk Magistrate, stating how the murder had been committed by himself and the first and second accused. On the following day, the second accused made a similar confession to the Taluk Magistrate. These confessions were repeated before another Magistrate who held the preliminary enquiry. Before the Sessions Court, the second accused adhered to his confessions and pleaded guilty, but the third accused retracted his, alleging that he had been induced to make them by police torture. The trial of the second accused before the Sessions Court continued notwithstanding his plea of guilty. The first accused did not at any time confess, nor was any of the murdered woman's property traced to his possession. The Sessions Judge and the assessors, accepting the evidence of four prosecution witnesses and the two confessions, convicted all the three accused of murder and they were sentenced to death.

The accused appealed.

Subrahmania Sastri for accused No. 1.—The confession of the second accused was wrongly relied on. Under section 30 of the Evidence Act the Court may take into consideration the confession of one of more persons who are being tried jointly for the same offence, but here the second accused was no longer on his trial, he having pleaded guilty. See *Queen-Empress* v. *Lakshmayya Pandaram*(1).

Kuppusami Ayyar for accused Nos. 2 and 3.

Mr. *N. Subrahmanyam* for the Crown.—Though an accused pleads guilty, his plea need not necessarily be accepted. If accepted, and he is convicted on his plea, possibly his trial ends and his evidence might not be receivable under section 30 of the Evidence Act. But under section 271 of the Code of Criminal Procedure it is in the discretion of the Court to convict on the plea or not, though it is imperative that the plea should be recorded. Here, the Sessions Judge recorded the plea, but the trial proceeded and the second accused actually cross-examined witnesses

(1) I.L.R., 22 Mad., 491.

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and was still on his trial throughout. He was still therefore being jointly tried with the first accused and his confession was properly received in evidence as against first accused. If *Queen-Empress* v. *Lakshmayya Pandaram*(1) lays down that a trial necessarily comes to an end with a plea of guilty, it goes too far: and that is shown by the unreported case referred to in *Queen-Empress* v. *Pahuji*(2) which latter case was relied on in *Queen-Empress* v. *Lakshmayya Pandaram*(1). But this question was not before the Court in *Queen-Empress* v. *Lakshmayya Pandaram*(1) as there the plea of the accused seems to have been in fact accepted and his trial ended.

JUDGMENT.—(After stating the facts their Lordships continued).—It has been urged by the Vakil for the first accused that the confessions of the second accused before the Magistrate and the Sessions Court, ought not to be considered as against the first accused, on the ground that when the second accused pleaded guilty before the Sessions Judge his trial must be taken to have terminated, and he was therefore no longer a person who was being "jointly tried" with the first accused, so as to fall within the rule laid down in section 30 of the Indian Evidence Act. The rule is that "when more persons than one are being tried jointly "for the same offence and a confession made by one of such persons "affecting himself and some other of such persons, is proved, the "Court may take into consideration such confession as against such "other person, as well as against the person who makes such "confession." The Vakil for the first accused contends that the trial ends with the plea of guilty, and in support of this view he has referred us to the observation of Boddam, J., to that effect in *Queen-Empress* v. *Lakshmayya Pandaram*(1). The actual procedure adopted by the Magistrate in that case does not appear from the report, and the learned Judge upon the evidence found that the then appellant was not guilty. The observation relied on by the present appellant's Vakil follows as an additional reason for acquitting the accused. If the learned Judge intended to lay down as a proposition of law that the trial of an accused person necessarily ends as soon as he pleads guilty, we could not agree with the proposition; for under the Criminal Procedure Code the Court is not bound to convict an accused person on his plea

(1) I.L.R., 22 Mad., 491. (2) I.L.R., 19 Bom., 195.

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of guilty. The Code (section 271) only says that "the plea shall "be recorded, and he may be convicted thereon." As a matter of practice in Sessions trials—especially in murder cases—many Judges, as we think very properly, prefer not to act on the plea of guilty, but proceed to take the evidence just as if the plea had been one of not guilty, and decide the case upon the whole evidence, including the accused's plea. When this procedure is adopted it is obvious that the trial does not terminate with the plea of guilty, and this view is in accordance with the decision of the Bombay High Court in the case referred to and distinguished in *Queen-Empress* v. *Pahuji*(1), to which the learned Judge refers in *Queen-Empress* v. *Lakshmayya Pandaram*(2). Strictly speaking a trial does not come to an end until the accused has been either convicted or acquitted or discharged. The proper course therefore to be adopted when an accused person pleads guilty is either to convict him on his plea and remove him from the dock, in which case his trial would be manifestly at an end so as to warrant his being called as a witness for or against any persons who had been accused along with him; or else to allow the trial to go on as if the plea had been one of not guilty. When this is done it is clear that the trial does not end with the plea of guilty, and therefore any confession made by the person so pleading could be taken into consideration under section 30 of the Indian Evidence Act as against any other person who was being jointly tried with him for the same offence.

The only case in which there may be a doubt is where neither of these courses has been explicitly adopted, but the accused who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the Court intends ultimately to convict him on the plea of guilty. In such a case we should be inclined to hold that it would not be fair to allow his confession to be considered as against his co-accused for that would be, in effect, to comply with the forms of justice while violating it in substance; compare *Reg* v. *Gardner*(3). It is not, however, necessary to pursue this subject further, for in the present case it is clear that the trial of the second accused continued, notwithstanding his plea of guilty. His Vakil cross-examined the witnesses, the accused himself was examined in the

(1) I.L.R., 19 Bom., 195. (2) I.L.R., 22 Mad., 491. (3) 9 Cox Cr. C., 332.

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usual course at the end of the evidence for the prosecution, and the opinion of the assessors was taken as to his guilt. In these circumstances we have no doubt but that his confessions may be considered as against the first accused.

The result is that we agree with the Sessions Judge and the assessors in finding all the accused guilty of murder. We dismiss their appeals and confirm the sentences of death passed upon them by the Sessions Judge.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar (Officiating Chief Justice) and Mr. Justice O'Farrell.

QUEEN-EMPRESS,

v.

SOMASUNDARAM CHETTI.*

1899. August 24. September 14, 19.

Stamp Act—Act I of 1879, *ss.* 61, 67—*Defrauding Government of stamp revenue by a contrivance or device not otherwise specially provided for—Receipt of unstamped document—Abetment of an offence under section* 61 *of Stamp Act,* 1879—*Penal Code—Act XLV of* 1860, *s.* 40.

Two letters were written to petitioner in which the writer recommended him to advance sums of money to the bearers of the letters and bound himself to repay those sums, if lent, in case of default on the part of the borrowers. The loans were made by petitioner, who kept the letters. A prosecution having been subsequently commenced against petitioner under section 67 of the Stamp Act, 1879, for defrauding Government of stamp revenue by an illegal device, and he having been convicted on the ground that when the loans were granted the documents became letters of guarantee and as such liable to stamp duty:

Held, that the execution of a document which on its face required to be and was not stamped, could not be said to be an act "contrivance or device not specially provided for by this Act or any other law for the time being in force"; and that punishment for the act of the executant of such a document, if it were punishable at all, was provided for under section 61 of the Stamp Act, 1879, and it could not therefore be dealt with under section 67.—Also that the act of a person receiving

* Criminal Revision Case No. 244 of 1899, under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the judgment of W. F. Graham, Sessions Judge of South Arcot, in Criminal Appeal No. 56 of 1898, confirming the finding and sentence of the Deputy Magistrate of Cuddalore in Calendar Case No. 19 of 1898.

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an unstamped document *might* amount to abetment of an offence, having regard to section 61 of the Stamp Act, 1879, and to the definition of an "offence" in section 40 of the Indian Penal Code, and if so, would be an act provided for by "any other law for the time being in force," and so not within the terms of section 67 of the Stamp Act, 1879.

PETITIONER had been second accused in a charge, under section 67 of the Stamp Act I of 1879, of defrauding Government of stamp revenue by illegal devices. The first accused in the case had written to the second accused two letters in which he recommended second accused to lend Rs. 400 and Rs. 500 to the bearers of the letters and bound himself to repay those sums, if lent, in case of default on the part of the borrowers. The loans were made and second accused kept the letters, which were not stamped. At a subsequent enquiry, held in connection with the assessment of income-tax, the letters were produced and a prosecution ordered under section 67 of the Stamp Act, I of 1879, for defrauding Government of its stamp duty by an illegal device. The accused were convicted and sentenced to pay fines of Rs. 100 and 200, respectively, with terms of imprisonment in default of payment.

Against these convictions both accused appealed. The Sessions Judge allowed the appeal of the first accused, holding that his letters to second accused to give loans to certain persons and binding himself to make good the loans in a stated contingency could have no force against him, unless and until the loans were made. He referred to *Narayanasami Mudaliar* v. *Lokambalammal*(1) as laying

(1) Civil Revision Petition No. 247 of 1896 (unreported). Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge of Kumbakonam in Small Cause Suit No. 78 of 1896. The suit was for the recovery of Rs. 225 borrowed from plaintiff by defendant's deceased husband on the following letter, which was conveyed to plaintiff by one Souriraja Mudaliar, referred to therein :—"(To plaintiff) :—As I have to purchase the sembalai paddy which . . . . has settled for me with . . . . in . . . , *you* will send Rs. 200 through Souriraja Mudaliar. I will send these two hundred rupees with interest according to mera rate at Rs. 2-1-4 per cent. per mensem, and have it credited in this letter on cadjan; and get it back. Should there be a delay in your sending, the bandy will return in vain. You will have to send without delay." This letter was signed by defendant's deceased husband. The Subordinate Judge dismissed the suit, which was not defended, on the ground that the letter was an unstamped promissory note containing terms similar to the document in *Channamma* v. *Ayyanna*, (I.L.R., 16 Mad., 283), and inadmissible in evidence. The Court, (COLLINS, C.J., and SHEPHARD, J.), on 29th January 1897, delivered the following JUDGMENT :—"There "can be no doubt that in the letter the defendant's husband merely asked for a "loan of money. The letter does not amount to a promise, and no obligation "would have arisen unless the addressee had consented to comply with the

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down that "acceptance of the offer made in the letter was necessary before any obligation could be said to arise." He found no proof that first accused knew that the loans had been made or that he was aware that an obligation had arisen in connection with the letters. With regard to second accused, the Sessions Judge held that inasmuch as he knew that the loans had been made it was his duty to call upon first accused to stamp the letters, which had become letters of guarantee. From his omission to do so and from the other circumstances which led to his prosecution the Sessions Judge held that second accused had wilfully acted fraudulently with interest to cause loss to Government. He dismissed the appeal by second accused and affirmed his conviction and sentence.

Against this order the second accused preferred this criminal revision petition.

Balamukunda Ayyar for accused No. 2.—The letters written to the petitioner are mere proposals and not completed agreements and do not require to be stamped. *Dhondbhat Narharbhat* v. *Atmaram Moreshvar*(1) and *Narayanasami Mudaliar* v. *Lokambalammal*(2). The terms of the document alone must be looked to and no external circumstances can be considered in determining whether it requires to be stamped. Nor can the letters be fairly described as devices or contrivances within the meaning of section 67 of the Stamp Act merely because they are unstamped. Intent to defraud cannot be inferred from the failure to stamp a document. Section 61 expressly provides for the punishment of persons executing or signing a document chargeable with duty without the same being duly stamped, but the petitioner here did none of the acts referred to in that section. *Channamma* v. *Ayyanna*(3) was also referred to.

"request and to lend the money. Acceptance on the plaintiff's part of the offer "made in the letter was necessary before any obligation could be said to arise. "Whereas if the letter were equivalent to a promissory note, it would follow that "on mere proof of the writing and signature, the plaintiff would have been "entitled to recover. We cannot understand how such a letter can be construed "as a promissory note or how the request of the writer to send the letter back "can make any difference. The terms of the letter in *Channamma* v. *Ayyanna*, "(I.L.R., 16 Mad., 283) are not quite the same as they are in the present case. "The case more closely resembles that of *Dhondbhat Narharbhat* v. *Atmaram* "*Moreshvar*, (I.L.R., 13 Bom., 669). We must reverse the decree. There must be "a decree for plaintiff for amount claimed with interest and costs throughout."

(1) I.L.R., 13 Bom., 669.

(2) Civil Revision Petition No. 247 of 1896 (unreported)—vide *ante* p. 156.

(3) I.L.R., 16 Mad., 283.

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Mr. *N. Subrahmanyam* for the Crown.—The documents contain promises to pay money, as the writer says that he will be responsible for the repayment of the loan, when it is given. If the letters had been written in pursuance of a request by petitioner he would have been concerned in a contrivance or device coming within section 67. The habitual practice by the petitioner of this contrivance which the Judge refers to would establish guilty intention under section 67.

JUDGMENT.—The petitioner is the recipient of a letter which requests that a loan may be granted to a certain person, and that when this is done the writer will be responsible for the amount of the loan, if the borrower does not repay it. Both the petitioner and the writer of the letter were prosecuted under section 67 of the Stamp Act and convicted. On appeal the writer of the letter was acquitted by the Sessions Judge on the ground that no obligation had attached under the letter at the time it was written. The conviction of the petitioner was, however, upheld on the view that when the loan was granted the document became a letter of guarantee and therefore liable to stamp duty as an indemnity bond. In the view we take of the case, section 67 of the Stamp Act has no application.

The execution of a document which on its face requires to be, and is not, stamped cannot be said to be an "act, contrivance or device not specially provided for by this Act or any other law for the time being in force."

There can be no device or contrivance if the document is what on its face it purports to be, and the act of the executant, if punishable at all, is provided for under section 61 of the Stamp Act and cannot therefore fall under section 67.

The act of the person receiving the unstamped document may amount to abetment of an offence, under section 61 (see definition of 'offence,' section 40, Indian Penal Code), and would then be "an act provided for by any other law for the time being in force"—viz., the Penal Code—and equally not within the terms of section 67 of the Stamp Act.

We must therefore reverse the conviction and sentence and the order of the Sessions Court in appeal and direct that the fine if levied be refunded.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

QUEEN-EMPRESS,

1899. August 31.

v.

PAPA SANI.*

Penal Code—Act XLV of 1860, s. 373—Obtaining a girl under the age of 16 for purposes of prostitution—Evidence of intent.

In a charge against a dancing girl under section 373 of the Indian Penal Code for having purchased a young girl with intent that she would be used for the purpose of prostitution or knowing it to be likely that she would be so used, evidence was given of the fact of purchase for a consideration and that numerous other dancing girls residing in the neighbourhood were in the habit of obtaining girls and bringing them up as dancing girls or prostitutes, and that there were no instances of girls brought up by dancing girls ever having been married. On its being contended that there was no evidence of intent to support a conviction under section 373 of the Indian Penal Code:

Held, that there was evidence before the Court to support the conviction.

FIRST accused, a dancing girl, was charged before a Deputy Magistrate, under section 373, for buying a girl of five years of age from her mother with the intention of using her or knowing it to be likely that she would be used for the purpose of prostitution. Second accused was charged with having abetted the said offence. The mother subsequently complained that she had given the child to first accused to be reared up for a family life but, finding that she was being reared for the purpose of prostitution, had demanded the return of the child, which was refused. The evidence showed that first accused paid Rs. 60 to the complainant and obtained the child from her in the house of the second accused, who was also present and settled the bargain and handed the money to the complainant. The further evidence was set out by the Deputy Magistrate as follows:—"From the evidence above alluded to and from the admission of the first accused, it is clear that she bought the girl from her mother for a consideration. The next and the most important

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* Criminal Revision Case No. 298 of 1899, under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the judgment of T. M. Horsfall, Acting Sessions Judge of Bellary, in Criminal Appeal No. 39 of 1899, affirming the conviction of, and the sentence passed on, the petitioner in Calendar Case No. 11 of 1899 on the file of the Deputy Magistrate of Adoni.

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question for decision is with what intention was the purchase made. Although it may be notorious that the daughters of dancing girls or girls brought up by them when they have no children generally become dancing girls or prostitutes, still the law presumes their intention to be innocent till the contrary is proved, and requires evidence in each case that the intention or knowledge of the likelihood or probability of the girl obtained becoming a prostitute was present at the time of the transaction. This is not capable of direct proof and can only be inferred from the surrounding circumstances. Such evidence is available in this case. Prosecution fifth witness Venkaji Rao, a landholder and merchant of Adoni town, states that he knew the first accused from her infancy. One Hulugasani, a dancing girl, had no children. She brought up four girls obtained from others and the first accused is the eldest of them. All the four girls became dancing girls or prostitutes. These facts are admitted by the first accused herself. The witness further states that there are forty dancing girls' houses in Adoni and that their chief source of income is prostitution. He adds that the dancing girls of this town who have no daughters of their own get girls from others and bring them up and eventually make them dancing girls or prostitutes and he gives several instances in this town of girls obtained and brought up having become prostitutes. He swears that there is no instance of girls brought up by dancing girls having been regularly married, and that the dancing girls derive good incomes by bringing up girls in preference to boys. He states also that the dancing girls commit prostitution with those who pay them. Prosecution sixth witness Subbayya more or less corroborates the above witness. He adds that dancing girls when they get old obtain girls and bring them up to follow their profession and that good-looking girls are generally bought. He gives instances and says that the girls so brought up are never married. The first accused admits that she and three other girls were brought up as prostitutes by another prostitute and that she has no children nor has any of her foster-sisters any children. She is now forty years old and she says she carried on prostitution for about twenty years. She wishes us to believe that being disgusted she gave up her profession and took to money-lending by which she lives. She admits she bought, or, as her pleader would put it, obtained a girl for a consideration. She says she intended to obtain a boy in adoption and to get the

girl married to him, so that both of them might inherit her property. This is very laudable if true or probable." The defence was that the child had been obtained with the object that it should be brought up as a daughter. The Magistrate dealt with this as follows :—"She called seven witnesses for her defence. First defence witness, a woman from Bellary, says that first accused came and asked her to give to her her sister's grandson, but that his father refused to give. Second defence witness is called to support her. Fourth defence witness says he was asked by the first accused to give to her his concubine's son but he did not. Fifth defence witness was asked to give up his nephew, but he did not. These are people of no position and can be got for nothing. Second and third defence witnesses say that some girls brought up a boy and got him married. Seventh defence witness is the first accused's foster-sister and is called to prove that she has confined herself to one man. Even if we take all the defence to be true, it does not prove much. . . . Although first accused was defended by three pleaders they were not able to prove or point out one single instance of a girl brought up by a dancing girl having been regularly married. On the contrary fifth and sixth prosecution witnesses say that there were no such instances but there have been many instances of girls so brought up having become prostitutes. From a careful consideration of the foregoing facts the Court has no hesitation in finding that first accused bought the girl with intent that she shall be used for the purpose of prostitution or knowing it to be likely that she would be so used." He also found the second accused guilty of abetment, and sentenced both accused to be kept in simple imprisonment till the rising of the Court, and imposed a fine of Rs. 200 on first accused, and of Rs. 50 on second accused, with three months' rigorous imprisonment in default in each case.

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Against these convictions both accused appealed on the ground that the accused should not have been convicted on the evidence of the habits prevailing amongst other dancing girls, and that the intent necessary to constitute an offence under section 373 of the Indian Penal Code had not been proved. On this point the Sessions Judge said :—"The sole question for determination in appeal is whether appellant intended at the time of purchase to use the girl eventually, but during minority, as a prostitute, or knowing it to be likely that she would be so used; or whether she bought her intending to adopt her and get her respectably married. . . .

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I was referred to a dictum of Muttusami Ayyar, J., in *Queen-Empress* v. *Ramanna*(1) to show that dancing girls do occasionally adopt *bonâ fide*. The argument is unsound. It is both common sense and law that in such cases the rare exception in the matter of intention must be affirmatively proved by those who assert it (see Evidence Act, section 106). And, in a similar and recent case, the Calcutta High Court has laid it down that once the prosecution has proved a probability of future prostitution during minority, it is for the defendant to show that defendant's intention was exceptional and different; *Deputy Legal Remembrancer* v. *Karuna Baistobi*(2). In the present case the *primâ facie* likelihood of prostitution (and more is not required for conviction under section 373 of the Indian Penal Code) was very great indeed; and that likelihood must have been present in the minds of all parties to the bargain. The child is smart and pretty; it was sold for a sum which to its disreputable beggar mother must have seemed very large; it was sold to a prostitute who herself had been brought up from her childhood to be a prostitute; there is nothing to show that appellant has any special means or property so as to make it worth her while to adopt a girl to inherit that property. . . . And no case is proved that in Adoni or Bellary a girl so purchased was ever brought up respectably. This is a very strong *primâ facie* case for the prosecution, and the evidence put forward to rebut it is worthless. I have no doubt that the girl was bought in order to be trained up to follow appellant's profession." He dismissed the appeals and characterised the sentences as extraordinarily lenient.

Notices were served on both accused to show cause why their sentences should not be enhanced; and first accused presented this criminal revision petition against the conviction.

Mr. *R. F. Grant*, for first accused, contended that the evidence of intent was insufficient to support the conviction. Under section 373, the intention of the accused must be proved, and the evidence of the customs of other dancing girls was no evidence of such intention. He referred to *Queen-Empress* v. *Ramanna*(1) in which Mr. Justice Muttusami Ayyar pointed out that it would be no offence if the intention were that the girl should be brought up as a daughter, and that when she attained her age she should be allowed

(1) I.L.R., 12 Mad., 278. (2) I.L.R., 22 Calc., 164.

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to select either to marry or follow the profession of her prostitute mother. He also cited *Venku* v. *Mahalinga*(1) as showing that intention is a question of fact and law and must be made out properly, and referred to *Deputy Legal Remembrancer* v. *Karuna Baistobi*(2).

Mr. *D. Chamier* for second accused.

Mr. *N. Subrahmaniam* in support of the conviction and of the application for enhancement.

JUDGMENT.—We are of opinion that there was legal evidence before the Courts sufficient to justify the conviction. It is proved by the purohit of the first accused, who has known her since infancy, that the first accused was herself in her infancy acquired by a dancing girl, was brought up to become and became a dancing girl, that it is the practice among dancing girls to acquire children for the purpose of bringing them up as dancing girls, and that there is no case known to him of a girl so acquired being married. The first accused lived the life of a dancing girl for twenty years and she gave a large sum of money, viz., Rs. 60 for this girl at the age of five years, who is said to be good-looking. There is no suggestion that the first accused acquired the girl for the purpose of adopting her. In these circumstances it seems difficult to arrive at any conclusion other than that arrived at by the Courts below. We must therefore dismiss the criminal revision petition.

The Courts below, however, whilst convicting the accused, the first accused of purchasing and the second of abetting her in purchasing this child for immoral purposes, inflicted only a nominal sentence of imprisonment of one day upon each, but fined the first accused Rs. 200 and the second accused Rs. 50. We think these sentences are wholly inadequate and should be enhanced.

The crime is a very bad one and should be dealt with as such. In this case, however, for the reasons given by the lower Courts, that hitherto among dancing girls it has not been considered wrong, much less a crime, we do not think it necessary to do more than increase the term of imprisonment given by the lower Court from one day in the case of the first accused to six months' rigorous imprisonment, and in the case of the second accused to three months' rigorous imprisonment and we vary the sentences accordingly. The fines remain.

(1) I.L.R., 11 Mad., 393. (2) I.L.R., 22 Calc., 164.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar (Officiating Chief Justice), Mr. Justice Moore and Mr. Justice O'Farrell.

1899. August 24, 30. September 4, 12.

PERUMAL (ACCUSED), PETITIONER,

v.

MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS (COMPLAINANTS), COUNTER-PETITIONERS.*

City of Madras Municipal Act (Madras)—Act I of 1884, s. 307—Prohibition against depositing stable refuse in a street—Deposit of stable refuse in a dust-bin—Liability of person so depositing.

By the first clause of section 307 of the City of Madras Municipal Act, 1884, the president of the municipality "shall provide in the streets of the city suitable and sufficient dust-bins for the temporary deposit of dust, dirt, ashes, kitchen refuse and other inoffensive matter excepting building, stable and garden refuse which shall be removed by the owner thereof." By the second clause of the same section "whoever, after such provision has been made, deposits any of the said matters or any building, stable or garden refuse in any street, pavement or verandah of any building". . . . . is rendered liable to fine. Petitioner having deposited stable refuse in one of the dust-bins provided in accordance with the Act was charged before a Magistrate and fined under the latter clause of the said section:

Held, that the dust-bin was not a part of the street and that the throwing of stable-refuse into the dust-bin was not a deposit of such refuse in the street so as to constitute an offence under the said section.

PETITIONER was charged at the Presidency Magistrate's Court, Black Town, Madras, with having deposited stable refuse in a dust-bin in a street in the municipality, contrary to section 307 of the City of Madras Municipal Act I of 1884 (Madras). He admitted having thrown the stable refuse into the dust-bin, but contended that it was not an offence within the meaning of the section. The Magistrate held that as stable refuse was not inoffensive matter a person throwing it into a dust-bin would be liable. He convicted the petitioner and imposed a nominal fine.

The accused preferred this petition.

Virabhadra Mudaliar for the petitioner.

Mr. *Allan Daly* for the complainants.

[The arguments appear from the judgments.]

* Criminal Revision Case No. 176 of 1899, under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the order of Sultan Mohidin Sahib, Presidency Magistrate, Black Town, Madras, in Calendar Case No. 7159 of 1899.

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SUBRAHMANIA AYYAR, OFFG. C.J.—In this case the petitioner was convicted by the Magistrate under section 307 of the City of Madras Municipal Act (I of 1884) for having deposited stable refuse in a municipal dust-bin in a street. The section runs as follows:—

"The President shall provide in the streets of the city suitable "and sufficient dust-bins for the temporary deposit of dust, dirt, "ashes, kitchen refuse and other inoffensive matter excepting "building, stable and garden refuse, which shall be removed by "the owner thereof."

"Whoever, after such provision has been made, deposits any of "the said matters or any building, stable or garden refuse in any "street, pavement or verandah of any building, on any ground "between the building and the street or on any public quay, jetty "or landing-place or on any part of a river bank, whether above or "below high-water mark, or on any part of any private premises or "land without the consent of the owner or occupier thereof shall be "liable to a fine not exceeding rupees ten for each offence."

On behalf of the petitioner it was contended that the act complained of is not punishable under the section and the argument in support of that contention was this:—To bring the present case within the language of the second paragraph quoted above, the word 'street' there should be understood to be inclusive of the parts thereof which are occupied by dust-bins. If that construction be adopted, a deposit in a dust-bin of even dust, dirt, ashes or kitchen refuse must be treated as an offence. But that must be absurd since the deposit of such matter in a dust-bin is distinctly authorised by the first paragraph. Therefore the term 'street' in the second paragraph should be taken to be exclusive of the sites of dust-bins and it follows that somehow the Legislature failed to impose a penalty on persons who deposit stable refuse in dust-bins.

Now, according to the first paragraph of the section, building' garden or stable refuse is, by clear implication, prohibited from being deposited in dust-bins. And the clause "the President shall provide in the streets of the city suitable and sufficient dust-bins," makes it clear that, so far as that paragraph goes, 'street' does include even those parts in which dust-bins may be erected. How can the same term, in the next paragraph, be, in the absence of indubitable indications to the contrary, taken in a different sense? Nor does the view that 'street' means the same thing in both the

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paragraphs necessarily involve the absurdity sought to be imput to the Legislature. For, if the paragraphs are read together, they undoubtedly must be, the meaning, so far as we are he concerned, is exactly what it would be, had the Legislature, out abundant caution, inserted after the words 'said matters' i paragraph 2, the clause 'save as aforesaid' or words to that effec And the meaning is any person, who deposits dust, dirt, ashe kitchen refuse or other inoffensive matter, not being buildin stable or garden refuse, in a street except in a dust-bin and person who deposits building, stable, or garden refuse in an part of a street inclusive of the sites of dust-bins shall be liable t the prescribed penalty.

This seems to be the proper view to take having regard to th principle laid down by the Judicial Committee in "*The Gauntl* (1)" where their Lordships observe :—

"No doubt all penal statutes are to be construed strictly, tha is to say, the Court must see that the thing charged as an offence i within the plain meaning of the words used, and must not strai the words on any notion that there has been a slip, that there ha been a *casus omissus*, that the thing is so clearly within the mischie that it must have been intended to be included and would hav been included if thought of. On the other hand, the perso charged has a right to say that the thing charged, although withi the words, is not within the spirit of the enactment. But when the thing is brought within the words and within the spirit, ther a penal enactment is to be construed, like any other instrument according to the fair common sense meaning of the language used and the Court is not to find or make any doubt or ambiguity i the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in an other instrument."

I would, therefore, dismiss the petition.

O'FARRELL, J.—The petitioner has been convicted under sec tion 307 of the Act (I of 1884) and Mr. Daly, who appears for th municipality, admits that if that section does not apply, there is n other that does. Mr. Daly also admits, what appears to have bee doubted by the Magistrate, that stable refuse is, within the term of the section, inoffensive matter. We have then to see whethe

(1) L.R., 4 P.C., 184 at p. 191.

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the deposit of 'building, stable or garden refuse' in a dust-bin, primarily intended for 'dust, dirt, ashes, kitchen refuse and other inoffensive matter' is an offence within the terms of the second clause of the section. Now it appears to me that no one reading the second clause by itself would be likely to contend that it was, and that the view which is put forward by the municipality is based upon the prohibition supposed to be implied in the concluding words of the first clause. It is then sought to make out that to deposit stable refuse in a dust-bin standing in a street, or on any ground between a building and a street, is the same thing as to deposit it in the street or on the ground. This appears to me to be an entirely non-natural use of language which in itself is simple and plain. It is open also to the fatal objection, in my opinion, that the section makes no distinction between the deposit of the different kinds of matters, and that if it is an offence to deposit stable refuse in a dust-bin, it is equally an offence to deposit therein 'dust, dirt, ashes or kitchen refuse'—the very things for which the dust-bin is provided. It appears to me impossible to avoid this absurd conclusion except on the supposition that 'ground' or 'street' means one thing when used in connection with 'dust, dirt, ashes, &c.,' and another thing when applied to 'garden or stable refuse.' This method of interpretation appears to me to be extremely forced, and I think the only other conclusion possible is that the deposit of stable manure, &c., in a dust-bin is not intended to be made an offence by this section of the Act. The conclusion is strengthened by a comparison of the wording of section 312, where the deposit, in a receptacle for night-soil, of other matter is made an offence in language which is plain and unambiguous. There is no reason why similar language should not have been used in section 307 if it was intended to make the act now under consideration an offence. It appears to me that what the former part of the section (307) primarily had in view was not to create offences, but to define the duties of the President, and that the concluding words 'excepting building, stable and garden refuse, which shall be removed by the owner thereof' were inserted to make it clear that it was no part of the duty of the President to provide receptacles for the temporary deposit of such refuse. I may also, I think, point out that the deposit of stable or garden refuse in a street or other public place, where it may be carried about by the wind or washed by rain into drains or sewers (compare section 317) is a more serious matter

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than depositing it in a receptacle not properly intended for it. The latter act can do no great harm. It may have been some such considerations as these which induced the Legislature not to make the act an offence. However this may be, I am of opinion that the case, whether by accident or intention, has not been provided for, and I would allow the petition, set aside the conviction and direct that the fine levied be refunded.

[Under section 439, paragraph i, Criminal Procedure Code, the case was laid before Mr. Justice Moore, and his Lordship heard it and, after taking time for consideration, delivered the following judgment :—]

JUDGMENT.—The question for decision is as to whether a person who deposits stable refuse in a municipal dust-bin erected in a street can be convicted of an offence under the latter clause of section 307 of Madras Act I of 1884. The former clause of this section provides that the president of the municipality shall provide in the streets of the city suitable and sufficient dust-bins for the temporary deposit of dust, dirt, kitchen refuse and other inoffensive matter excepting building, stable and garden refuse which, it is directed, shall be removed by the owner thereof. The present petitioner has been convicted by a Magistrate under the latter clause of this section because he deposited stable refuse in a municipal dust-bin. That clause, however, does not relate to the deposit in a dust-bin of matter not allowed to be thrown there, but merely renders it penal to deposit any of the matters for the receipt of which the President is bound to erect dust-bins as well as building, stable and garden refuse in any street, pavement or verandah of any building or in certain other places there mentioned among which dust-bins are not specified. It is, however, now urged in support of the conviction that it should be held that a dust-bin is a part of the street and that such being the case any one who throws stable refuse into a dust-bin should be considered to have deposited such refuse in the street. To read the section in this manner would, in my opinion, be to strain its language in a somewhat violent manner. It is further perfectly clear that the Legislature cannot have intended that such an interpretation should be put on this clause for, if this were done, it would be illegal to deposit in a street dust-bin not only stable refuse, &c., but also dust, ashes, &c., *i.e.*, the very articles for the reception of which the bins are ordered to be provided. Section 308, clause 2, of the Act makes it an offence to deposit any offensive matter in a dust-bin, but has no similar provision with regard to inoffensive matter of any description and the first clause of section 307 lays down that, in so far at all events as these sections of the Act are concerned, stable refuse is inoffensive matter. For these reasons, I agree with O'Farrell, J., in the decision arrived at by him and would accordingly direct that the conviction of the petitioner be set aside and that the fine imposed on him, if it has been collected, be refunded.

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[Under sections 439 and 429, Criminal Procedure Code, the judgment of Mr. Justice Moore prevailed and operated as the decision of the Court.]

Messrs. *Barclay, Orr & David*—Attorneys for the complainants.

APPELLATE CIVIL.

Before Mr. Charles Arnold White, Chief Justice, and Mr. Justice Benson.

VENKATARAMA AYYAR (PETITIONER AND PLAINTIFF), APPELLANT,

v.

MADALAI AMMAL (COUNTER-PETITIONER AND DEFENDANT), RESPONDENT. *

1900. February 16.

Letters Patent, s. 15—Appeal from order of refusal to send for records—Dismissal on ground that no appeal lies.

An order refusing to send for the record on a petition filed under section 25 of the Provincial Small Cause Courts Act, 1887, is not a judgment, and no appeal lies therefrom.

PETITION presented under section 25 of the Provincial Small Cause Courts Act IX of 1887, praying the High Court to revise the judgment of the District Munsif of Valangiman dismissing Small Cause Suit No. 42 of 1899, in which petitioner had claimed Rs. 22-8-0 in respect of cist paid by him for lands in defendant's

* Appeal No. 17 of 1899 under Letters Patent, section 15, presented against the order of Mr. Justice Moore in Civil Revision Petition No. 162 of 1899 (in Small Cause Suit No. 42 of 1899 on the file of the District Munsif of Valangiman).

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enjoyment on usufructuary mortgage, together with interest. The petition coming on for orders as to admission, Mr. Justice Moore on 26th July 1899 passed the following.

ORDER:—"There are no grounds for interference. The petition is rejected."

From the above order, the petitioner preferred this appeal under section 15 of the Letters Patent.

Sivasami Ayyar for appellant.

Sundara Ayyar for respondent.

JUDGMENT.—This is an appeal from an order of a Judge refusing to send for the record on a petition put in under section 25 of Act IX of 1887. A preliminary objection has been taken to the hearing of this appeal on the ground that no appeal lies.

It has been held by this Court that in such a case there is no right of appeal, on the ground that the order appealed against is not a judgment within the meaning of section 15 of the Letters Patent (see *Gurappa* v. *Venkatanarasimha Bhupala Bhallerow*(1)).

We agree with this decision and with the grounds on which it is based. The appeal is dismissed with costs.

(1) Letters Patent Appeal No. 23 of 1898, decided on 9th February 1899:—Suit to recover balance of cist. The answer put in by defendants alleged that the terms of the cowle said to have been tendered by plaintiff were not acceptable. The clauses related to the cultivation of new lands, to payment of wet rates of assessment if dry lands should be cultivated with tank water, and to payment of interest. The District Munsif held all the three clauses to be proper. On a civil revision petition being presented against this decision under section 25 of Act IX of 1887, the Court (SHEPHARD, OFFG. C.J.) passed the following ORDER:—"I do "not think that any of the three clauses mentioned are objectionable. There "is nothing vague in them. The higher rate of rent is ascertainable. There is "nothing unreasonable in requiring that crops shall not be removed. The petition "is rejected." Against this order defendants presented an appeal under section 15 of the Letters Patent, which came on for hearing before COLLINS, C.J., and BENSON, J., who, on the date referred to, delivered the following JUDGMENT:—"The order of the learned Judge refusing to send for the record on a petition put "in under section 25 of Act IX of 1887 is not a 'judgment' within the meaning "of the Letters Patent. There is therefore no appeal against the order of the "learned Judge. We dismiss this appeal with costs."

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

SUBBARAYA PILLAI (PLAINTIFF), APPELLANT,

v.

RAMASAMI PILLAI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1899. November 3. December 19.

Hindu Law—Estate of deceased widow who lived a life of unchastity—Right of step-son to inherit—Caste Disabilities Removal Act—Act XXI of 1850, s. 1.

The step-son of a deceased Hindu widow sued as her heir for possession of certain property. The defence was that the widow had deserted her husband in his lifetime and lived a life of unchastity and that the plaintiff's right of inheritance was in consequence destroyed:

Held, that assuming the widow to have been guilty of unchastity and to have been actually degraded for it, plaintiff's right to inherit her property in the absence of nearer heirs could not be affected by such degradation.

Held also, that though Act XXI of 1850 gives relief against the forfeiture of rights of persons deprived of caste on other grounds besides that of renouncing or being excluded from the Hindu religion, it does not restore to an outcaste all the rights which he, as a casteman, could have civilly enforced; nor does it contemplate the restoration of privileges the granting of which would amount to an interference with the autonomy of caste; nor does it interfere with the forfeiture of such a right, as, *e.g.*, to participate with other members of a caste in the benefits of a religious institution appropriated to the members of the caste, or to participate jointly with fellow castemen in the benefit of a caste institution; nor can it apply where the question is not as to the rights of a degraded person, but as to who is entitled to the property of a degraded person. *Kery Kolitany* v. *Moneeram Kolita* (13 B.L.R., 1) referred to.

Held further, that though under the Hindu Law a loss of caste by expulsion for specified reasons causes forfeiture of rights, it has never broken the relationship of the person expelled to those who remain within the caste, degradation having merely the effect of rendering the tie of kindred but dormant; and, *e.g.*, the degradation of either spouse does not dissolve the tie of marriage. It is impossible to construct out of the smritis and commentaries a consistent doctrine of "civil death" or "fiction of death."

Prostitution does not sever the legal relation, and therefore the degradation of a woman in consequence of her unchastity does not in law entail a cessation of the tie of kindred between her and the members of her natural family or between her and the members of her husband's family. Nor does a wife's adultery, unattended by degradation, dissolve the marriage: *In re Kamineymoney Dewah*, I.L.R., 21 Calc., 697), referred to.

Held, therefore, that the step-son was entitled to inherit the property, as sapinda of the widow's late husband in the absence of nearer heirs.

* Second Appeal No. 1531 of 1898 against the decree of Ll. E. Buckley, acting District Judge of Tanjore, in Appeal Suit No. 22 of 1898, reversing the decree of K. Krishnama Chariar, District Munsif of Kumbakonam, in Original Suit No. 453 of 1895.

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SUIT to recover possession with mesne profits of certain property alleged to have belonged to plaintiff's deceased step-mother, Virayi, one of whose heirs plaintiff claimed to be. The other heir was impleaded as second defendant. The first defendant contended, *inter alia*, that Virayi had deserted her husband, Sami, within two years of her marriage and had lived an unchaste life and that in consequence plaintiff's right of inheritance was destroyed. The District Munsif found that the property in dispute was that of Virayi. He also found that plaintiff and second defendant were legitimate sons of Sami, and the heirs of Virayi. He said:—"In the beginning, I felt some doubt in the matter, having regard to the fact that Virayi abandoned her husband, went beyond the seas, and purchased the plaint properties subsequently with money she acquired there. But on a reference to the law on the subject, I am of opinion that the abandonment by Virayi of her husband, and even her subsequent unchastity, granting for the sake of argument that she was unchaste as alleged by the first defendant in his examination as plaintiff's fourth witness, cannot affect the plaintiff's and second defendant's right of inheritance to her. There is no allegation of any divorce between Virayi and her husband at any time, nor even an allegation of a custom of divorce in the caste to which Virayi belonged. Consequently, the relationship created between Virayi and her husband and his relations, by means of Virayi's marriage to her husband, Sami Pillai, never ceased, and first plaintiff and second defendant are none the less her step-sons, because of her abandonment of her husband." He decreed in plaintiff's favour for possession and for mesne profits as prayed.

On appeal, the District Judge said:—"This appeal is based on . . . . the ground that the plaintiff has no right to succeed to the property of his step-mother, acquired after she had left her husband to live an unchaste life. Reliance is placed on *Sivasangu* v. *Minal*(1) and *In the goods of Kamineymoney Bewah*(2). The first case is not decisive with regard to the present case. Here the plaintiff is the step-son of the deceased, and the only claimant to her property. In the Madras case quoted there was competition between the degraded and undegraded descendants of a degraded woman, and in that case it was held that the degraded descendants

(1) I.L.R., 12 Mad., 277. (2) I.L.R., 21 Calc., 697.

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had superior claims to the undegraded. The Calcutta decision declared the severance of the tie of kindred between the degraded and undegraded members of a Hindu family. It was also held that if this principle is held to apply as between a degraded woman and the members of her own natural family, it would seem to apply with even greater force as between her and the members of her husband's family. In that case a man was held to have no right to succeed to his degraded aunt. Following the Calcutta ruling, which corresponds more nearly to the present case, I hold that the plaintiff is not entitled to succeed to his step-mother's property." He allowed the appeal and dismissed the suit.

Plaintiff preferred this second appeal.

Rama Rao for appellant.

Panchapagesa Sastri for respondent No. 1.

JUDGMENT.—The plaintiff sued for the property in dispute alleging that it belonged to one Virayi, a wife of Sami, and that he and the second defendant as the sons of Sami are entitled to it. The first defendant contended that the property was his own and that even if the property were Virayi's and the plaintiff and the second defendant, the sons of Sami, the suit must fail as Virayi deserted her husband and lived in adultery.

The District Munsif having found that the property belonged to Virayi and that the plaintiff and the second defendant are Sami's sons, directed the first defendant to surrender it to the plaintiff and the second defendant. He, however, expressed no opinion upon the question whether Virayi led an unchaste life as he considered that such a life on her part could not, by itself, put an end, under the Hindu Law, to the relation of husband and wife between Sami and Virayi. The District Judge apparently accepted the Munsif's finding that the property belonged to Virayi and that the plaintiff and the second defendant are Sami's sons. Nevertheless, he reversed the Munsif's decree and dismissed the suit on the authority of *In the goods of Kamineymoney Bewah*(1) where Sale, J., held that when a woman becomes degraded and an outcaste the tie of kindred ceases between her and her natural family and *a fortiori* between her and the members of her husband's family. Even if this view of the law be correct it is clear the District Judge should not have applied the rule in the present

(1) I.L.R., 21 Calc., 697.

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case without arriving at a finding as to whether Virayi was guilty of adultery and on that ground was degraded. But the Judge records no finding on either point. It is, however, unnecessary to call for findings in regard to these questions of fact, since assuming that Virayi was actually degraded for adultery, the plaintiff's right to inherit her property in the absence of nearer heirs, could not, in the view we take of the law, be held to be affected by such degradation.

On appeal before us, it has been argued on behalf of the appellant that whether Virayi deserted Sami and led an unchaste life or her unchastity was followed by her being put out of caste, the tie of kindred existing between him and his step-mother did not cease under the Hindu Law and even if it did cease, Act XXI of 1850 cured the defect and the appellant is entitled to the property. It was, however, urged on behalf of the respondent, relying on *Sivasangu* v. *Minal*(1), *Narasanna* v. *Gangu*(2) and *In the goods of Kamineymoney Bewah*(3) that unchastity caused degradation and put an end to the tie of kindred and that Act XXI of 1850 could not help the appellant as that Act is applicable only to cases of out-castes who are so on account of change of religion.

Before we proceed further it would be convenient to determine to what cases Act XXI of 1850 applies and to what extent that Act has affected Hindu Law. Now, there is no reason to suppose that, in the face of the clear and unmistakable language of the Act, it was intended to prevent the forfeiture of rights of only those who are put out of caste on account of their renouncing, or being excluded from, the Hindu religion. Though in favour of this view there is the solitary opinion of Mitter, J., in *Kery Kolitany* v. *Moneeram Kolita*(4) yet the preponderance of authority is in favour of the conclusion that the Act relieves the forfeiture of rights of those who are deprived of caste on other grounds as well. In *Srimati Matangini Debi* v. *Srimati Jaykali Debi*(5) Sir Barnes Peacock, C.J., with whom Macpherson, J., concurred, went very fully into the question of the construction of the Act and following the decision of Sir Lawrence Peel in *Doe d. Saummoney Dossee* v. *Nemy Churn Doss*(6) but dissenting from *Rajkoonwaree Dassee*

(1) I.L.R., 12 Mad., 277.
(2) I.L.R., 13 Mad., 183.
(3) I.L.R., 21 Calc., 697.
(4) 13 B.L.R., 1.
(5) 5 B.L.R., 466 at p. 493.
(6) 2 T. & B., 300.

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v. *Golabee Dassee*(1) arrived at the conclusion that the Act "was an enactment that in suits between Hindus loss of property by deprivation of caste should not be enforced." In the North-West Provinces the above case was followed in *Bhujjun Lal* v. *Gya Pershad*(2) and in another case also *Taij Singh* v. *Musst. Kousilla*(3) the same construction was put. In the Bombay case, *Parvati* v. *Bhiku*(4), Westropp, J., in consultation with the other Judges of the Court decided that by Act XXI of 1850 deprivation of caste was no longer capable of working a forfeiture of any right or property or affecting any right of inheritance whatever may be the cause. The same view was reiterated in *Honamma* v. *Timannabhat*(5). Turning to our own Presidency, a view as to the meaning of the Act similar to that taken elsewhere has been more or less explicitly adopted. As pointed out by Sir Barnes Peacock in the case already cited, the observation of Sir C. Scotland in *Pandaiya Telaver* v. *Puli Telaver*(6) implies that he was inclined to construe Act XXI of 1850 as Sir Barnes Peacock did. In *Karuthedatta* v. *Mele Pullakkat Vasudavan Nambudri*(7) Holloway and Collett, JJ., held that a Nambudri who had been put out of caste for adultery did not, in consequence of the Act XXI of 1850, lose his right to deal with, hold or inherit property. Nor is there good foundation for the suggestion that the Legislature could not have intended by Act XXI of 1850 to provide for other than degradation on the ground of change of religion if we remember what the kinds of acts were at the time of the passing of the Act for which a person might be put out of caste and which, if strictly enforced, might be made the ground of forfeiture of right though such a result might have been avoided by a counter-balancing and elaborate system of expiation provided by the law. Now the acts which under the Hindu Law would have rendered a person 'pathitha,' 'fallen' or 'degraded,' were by no means few. And even such among these as would exclude the 'pathitha' from inheritance consisted not of heinous offences and sins only, but also of such as would hardly be considered in the present state of society as deserving forfeiture of rights. To take an illustration. Among the 'mahapathakas' on account of which an out-caste may be

(1) (1858) S.D.A., 1891 at p. 1895.
(2) 2 N.W. P.H.C.R., 446.
(3) 1 Agra H.C.R., 90.
(4) 4 Bom. H.C.R., (A.C.), 25.
(5) I.L.R., 1 Bom., 559.
(6) 1 M.H.C.R., 478 at p. 482.
(7) 1 Ind. Jur., N.S., 236.

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excluded is 'surapana' or drinking liquor. Can it be held, will it even be tolerated that, because a person drinks liquor, his property is forfeited to him? Indeed, such a system must be, as a writer observes, "altogether impracticable in any conceivable state of society." No wonder, therefore, that even before the advent of the British rule, Hindu society was silently freeing itself from the trammels of this peculiar branch of the law as will be seen from Sri Krishna Tarkalankara's observations on the term 'fallen' quoted in page 426 of the Tagore Lectures of 1884–85. These observations clearly suggest, as pointed out by the learned author of the lectures, that the loss of proprietary rights had become almost obsolete even in the days of that commentator on the Dayabhaga.

Having thus determined to what persons the Act is applicable, we have to consider how and to what extent the Act has affected the Hindu Law applicable to those persons. Now, under the Hindu Law a person who lost caste by being expelled therefrom for specified reasons, forfeited whatever rights he might have had if he had remained in caste. That loss of caste created in him a disability to enjoy the rights incident to his relationship with those who remain within the caste. But it never broke that relationship. Whether the relationship be one of husband and wife or any other, it was too sacred to be dissolved, be the disabilities imposed on the outcaste few or many as may be inferred from *Bisheshur* v. *Mata Gholam*(1), *Queen-Empress* v. *Marimuttu*(2) and *Administrator-General of Madras* v. *Anandachari*(3) which show that the degradation of either spouse does not dissolve the marriage. And the circumstance that in general it is open to an outcaste, on his undergoing expiation, to resume his former position strongly points to the view that degradation had the effect of rendering the tie of kindred but dormant. It is almost impossible to construct out of the smritis and commentaries a consistent doctrine of 'civil death' or as it has been called fiction of death. Now, turning to the language of the Act itself, it clearly indicates that all that the Legislature intended to do was only to remove some of the disabilities which pre-existed under Hindu Law. Here we must not be understood as laying down that the Act places the outcaste in every respect in the position which he would occupy if he had not been put out of caste or restores to him all the rights which he

(1) 2 N.W.P. H.C.R., 300. (2) I.L.R., 4 Mad., 248. (3) I.L.R., 9 Mad., 466.

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as a casteman could have civilly enforced. It does not contemplate the restoration of privileges, the granting of which would amount to an interference with the autonomy of caste. Nor does it interfere with the forfeiture of rights such as were in question in *Venkatachalapati* v. *Subbarayadu*(1) and in *Krishnasami* v. *Virasami*(2). As was pointed out by Muttusami Aiyar, J., in the former case "a right consisting in the participation along with other members of a caste in the benefits of a religious institution appropriated to the members of the caste is not within their (Acts XXI of 1850 and XV of 1856) purview."

Such being the construction of the Act it is obvious that the Act is inapplicable to cases like the present where, instead of a degraded person's right being in question, we have to ascertain who is entitled to the property of a degraded person. As to the Hindu Law itself that does not, so far as we are aware, prescribe any special rule of succession to the property of an outcaste; nor does it expressly assert or deny the right of an undegraded person to succeed to the property of a degraded person to whom the former might have been unquestionably the heir but for the degradation of the latter. In these circumstances, where there is no usage regulating the devolution of the property of a degraded person who is within the pale of Hinduism as in the case of dancing girls, the only rules of inheritance that the Courts can with propriety fall back upon are those of the Hindu Law. And in applying so much thereof as without incongruity could be applied either with reference to those connected with the degraded person after his degradation or in their absence to those remaining undegraded, the Courts would at all events be administering those rules as rules of equity and good conscience which are the guide in cases not otherwise provided for.

Let us now turn to the case on hand where we have supposed a married woman to have been degraded on the particular ground of adultery. Under the Hindu Law, adultery unexpiated by penance formed a valid ground for expelling the married woman from caste. But the loss of caste, as may be seen from the cases already referred to, did not dissolve the matrimonial tie. No doubt in *Sivasangu* v. *Minal*(3), *Narasanna* v. *Gangu*(4) and *In*

(1) I.L.R., 13 Mad., 293 at p. 299. (2) I.L.R., 10 Mad., 183.
(3) I.L.R., 12 Mad., 277. (4) I.L.R., 13 Mad., 133.

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the goods of Kamineymoney Bewah(1) which is more to the point, it was said that prostitution severed the legal relation. But we are unable to agree in this statement, though we think that the decision itself, that when there is a competition between a degraded person and an undegraded person to the property of a degraded person, the degraded person has the preferential right, may be supported on equitable principles referred to above.

Therefore the broad proposition that degradation of a woman in consequence of her unchastity entails in the eye of the law cessation of the tie of kindred between her and the members of her natural family and also between her and the members of her husband's family does not appear to be sustainable. Equally unsustainable is the contention that a wife's adultery unattended by degradation does, by itself, dissolve the marriage, for that contention is not only unsupported by any authority but also opposed to the well-recognized principle of Hindu Law that so long as both parties remain Hindus there is no dissolution of the marriage tie except where divorce as distinguished from desertion or abandonment is permitted by usage which is not alleged to be the case here.

It is scarcely necessary to add that the argument, if such be raised, that because an adulterous wife is also put out of caste her right of inheritance is preserved to her by Act XXI of 1850, is manifestly unsustainable. For adultery, though it may form also a ground for expulsion from caste is, under the Hindu Law, sufficient by itself to prevent the right of inheritance vesting in her and if loss of caste also supervenes, then the Act cannot help her, though it may, if the cause of expulsion be different.

It follows, therefore, that the appellant together with the second respondent became on Virayi's death, entitled to inherit her property as the sapindas of her husband in the absence of nearer heirs. He can, however, recover his share only. In reversal of the District Judge's decree and in modification of that of the District Munsif, there will be a decree for the appellant for a moiety of the property sued for with profits for three years before the date of the plaint and with profits from the date of the plaint till date of delivery of possession or three years from this date, whichever event occurs first, the amount of the profits being determinable in execution. The first respondent must pay the appellant's costs in this and in the lower Appellate Court.

(1) I.L.R., 21 Calc., 697.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice O'Farrell.

MUSTAPHA SAHEB AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SANTHA PILLAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1899. September 12, 26.

Specific Relief Act—Act I of 1877, s. 9.—Suit for possession by person evicted brought more than six months from date of dispossession against one having better title than himself.

Certain land belonging to two brothers was mortgaged by one of them and leased to plaintiffs by the mortgagee. The heirs of the other brother, declining to accept the mortgage or the lease which had been granted under it as binding on them, evicted plaintiffs from the land. Plaintiffs now brought this suit against the defendants to recover the possession of which the defendants had deprived them by such eviction. The defendants' title was found to be good:

Held, that plaintiffs could not succeed.

Per SUBRAHMANIA AYYAR, J.—That it is an undoubted rule of law that a person who has been ousted by another who has no better right, is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title. *Asher* v. *Whitlock* (L.R., 1 Q.B., 1), *Mussammat Sundar* v. *Mussammat Parbati* (L.R., 16 I.A., 186; I.L.R., 12 All., 51), *Ismail Ariff* v. *Mahomed Ghouse* (L.R., 20 I.A., 99; I.L.R., 20 Calc., 834), referred to; *Nisa Chand Gaita* v. *Kanchiram Bagani* (I.L.R., 26 Calc., 579), distinguished. Also, that section 9 of the Specific Relief Act cannot be held to take away any remedy available with reference to the well-recognised doctrine that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. But that the above propositions were inapplicable to the facts of the present case, where the defendants were found to have good title.

Per O'FARRELL, J.—The rule is that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can only do so under the provisions of section 9 of the Specific Relief Act, and not otherwise. Here the defendants held under a lease granted by a person who was found to have title, and a suit to recover possession would only lie under the provisions of section 9 of the Specific Relief Act, and this was clearly not such a suit.

SUIT for possession of lands with profits. Plaintiffs' case was that the land in question had belonged to one Varisai Ravuthan, and that his daughter Peer Ammal, as mother and guardian of his

* Second Appeal No. 1155 of 1898 against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Appeal Suit No. 62 of 1895, reversing the decree of K. Ramachandra Ayyar, District Munsif of Trichinopoly, in Original Suit No. 159 of 1893.

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grandsons, with the sanction of the District Court, had usufructuarily mortgaged it, with other land, to one Pampaya Ravuthan, and satisfied a decree debt due in Original Suit No. 3 of 1884, by the said grandsons, with the money so raised. Plaintiffs Nos. 1 to 6 were the representatives of the mortgagee, and plaintiffs Nos. 7 and 8 were lessees of the land under the mortgagee and plaintiffs Nos. 1 to 6. It was complained that while the said plaintiffs Nos. 7 and 8 were in enjoyment of the lands as lessees, they were evicted by defendants Nos. 1 and 2, who asserted a lease to them of the said land by third defendant, and obtained an order under section 145 of the Code of Criminal Procedure in favour of their possession, though they had never had any enjoyment or right. Defendants contended that the land had belonged jointly to Varisai Ravuthan and his undivided cousin, Khadir Saheb, whose sons were defendants Nos. 3 and 4, and that they had been enjoying the land on lease from defendant No. 3, the manager of the family for over twelve years, and that the mortgage was not a valid one, nor binding on them. Defendants Nos. 1 and 2 were in possession when the suit was filed, which was more than six months after the intervention of the Magistrate under section 145 of the Code of Criminal Procedure. The District Munsif found that the mortgaged land had belonged jointly to Peer Ammal and her children and to defendants Nos. 3 to 6; that the mortgage by Peer Ammal to Pampaya Ravuthan, the ancestor of plaintiffs Nos. 1 to 6 was for a valid debt binding on defendants Nos. 3 to 6; that the leases to plaintiffs Nos. 7 and 8 were correct and that the said plaintiffs Nos. 7 and 8 had been cultivating the land and their eviction was unauthorised and unsustainable. He ordered plaintiffs Nos. 7 and 8 to be restored to possession, and gave them the damages claimed.

The District Judge, on appeal, reversed this decree. He said:—"The suit arose out of a mortgage executed by one Peer Ammal in favour of the husband of her husband's sister. The plaintiffs are lessees of the mortgagee, Pampaya Ravuthan, and the first and second defendants lessees of the third and other defendants who claimed the right to disregard the mortgage as not binding upon them. The disputes culminating in a threatened breach of the peace, the Magistrate intervened and directed first and second defendants to retain possession of the suit land until evicted in due course of law. The suit was thereupon instituted. In Original Suit No. 3 of 1884 a decree was obtained against Peer Ammal and

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third defendant, and in order to save the sale of land in execution of this decree, Peer Ammal executed the mortgage to Pampaya Ravuthan, with the permission of the Court. The chief question for consideration is therefore whether the third, fourth, fifth and sixth defendants are bound to recognize the mortgage and respect the claim of the mortgagees-lessees."

He upheld the finding that defendants Nos. 3 to 6 had an interest in the mortgaged land; and that the mortgage was *bonâ fide*; but considered that the security given was unnecessarily large, and in consequence that the mortgage was only binding on the share of Peer Ammal, and the sons for whom she executed it. He concluded:—"It may be that, in a suit properly framed for the purpose, the mortgagee can obtain possession of a defined portion of the mortgaged property. In this suit it has not been shown that he has better title to the suit land than have the occupants, and the ejectment must fail unless this Court can go behind the Magistrate's order and declare that seventh and eighth plaintiffs were wrongfully ejected by that order. This cannot be done; the defendants Nos. 1 and 2 were in the possession at date of suit and that date was more than six months after the intervention of the Magistrate; the suit is in ejectment based on title and is not a summary suit for possession, and it is necessary for the plaintiffs to show a better title than defendant. They have failed and their suit must be dismissed with costs throughout."

Plaintiffs preferred this second appeal.

Sundara Ayyar for appellant.—Section 9 of the Specific Relief Act applies only where the plaintiff seeks to recover possession even if the defendant should be able to prove a better title. Here plaintiffs are entitled to recover on proving their previous possession unless the defendant can show a better title. The Act should not be held to deprive a plaintiff of his general right to be replaced in his possession because it provides an additional or special remedy in his favour. Moreover, possession is *primâ facie* title, and plaintiffs having been in possession, it lay on defendants to prove a title otherwise. He referred to section 110 of the Evidence Act and also to the following cases:—*Asher* v. *Whitlock*(1), *Mussammat Sundar* v. *Mussammat Parbati*(2), *Ismail Ariff* v. *Mahomed Ghouse*(3) and *Wise* v. *Ameerunnissa Khatoon*(4).

(1) L.R., 1 Q.B., 1. (2) L.R., 16 I.A., 186; I.L.R., 12 All., 51 at p. 56.
(3) L.R., 20 I.A., 99; I.L.R., 20 Calc., 834. (4) L.R., 7 I.A., 73.

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Seshagiri Ayyar for respondent No. 2.

Kuppusami Ayyar for respondents Nos. 3 to 6.—Plaintiffs having been dispossessed more than six months before suit, they cannot succeed by merely proving their previous possession. They must prove their title as in an ordinary suit. If the Specific Relief Act is relied upon, the remedy must be enforced according to its provisions. He referred to section 9, Specific Relief Act, and *Nisa Chand Gaita* v. *Kanchiram Bagani*(1).

SUBRAHMANIA AYYAR, J.—The courts below having, upon the evidence, arrived at the conclusion that the land in dispute was not the exclusive property of the late Varisai Ravuthan but the common property of that man and his deceased brother Muhammad Ravuthan, it follows that the mortgage granted by one of the heirs of Varisai and the lease granted by the holder of that mortgage to the seventh and eighth plaintiffs are not binding upon the defendants Nos. 3 to 6 who are the heirs of Muhammad Ravuthan, and the first and the second defendants, who claim through the third defendant.

It was, however, contended on behalf of the seventh and eighth plaintiffs that, assuming they were not entitled to the land under the lease referred to, a finding should be called for as to the question whether they were dispossessed by the first and second defendants, inasmuch as if that question be found in their favour they should get a decree against the said defendants according to the rule that a party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title.

That the rule of law is as urged on behalf of the seventh and eighth plaintiffs cannot be doubted, notwithstanding *Nisa Chand Gaita* v. *Kanchiram Bagani*(1) cited for the respondents. The rule in question is so firmly established as to render a lengthened discussion about it quite superfluous. *Asher* v. *Whitlock*(2) and the rulings of the Judicial Committee in *Mussammat Sundar* v. *Mussammat Parbati*(3) and *Ismail Ariff* v. *Mahomed Ghouse*(4) not to mention numerous other decisions here and in England to

(1) I.L.R., 26 Calc., 579.
(2) L.R., 1 Q.B., 1.
(3) L.R., 16 I.A., 186; I.L.R., 12 All., 51 at p. 56.
(4) L.R., 20 I.A., 99; I.L.R., 20 Calc., 884.

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the same effect, are clear authorities in support of the view stated above. And with reference to the grounds on which the decision in *Nisa Chand Gaita* v. *Kanchiram Bagani*(1) seems to rest, it is necessary to make but two observations. The first is that section 9 of the Specific Relief Act cannot possibly be held to take away any remedy available with reference to the well-recognized doctrine expressed in Pollock and Wright on Possession thus:—Possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title, (at page 19). The second observation is that in *Wise* v. *Ameerunnissa Khatoon*(2) relied on in *Nisa Chand Gaita* v. *Kanchiram Bagani*(1) the defendant had a better right than the plaintiff, since the possession of the former was authorised by the Government whose property the land in dispute was and consequently nothing said by their Lordships in a case wherein such were the facts can rightly be construed as intended to lay down the law differently from what it had been all along understood to be.

Though, therefore, the proposition of law, relied on on behalf of the seventh and eighth plaintiffs, is perfectly sound, yet it seems to be clearly inapplicable here having regard to the allegations of the plaintiffs. For as I take those allegations, the ouster complained of was one by the first and the second defendants as tenants of the third defendant under a lease which had been executed by him to them before the ouster. The circumstance that mesne profits were claimed and awarded by the Court of First Instance against the third defendant also tends to show that he was treated as in possession through his tenants. Therefore the seventh and the eighth plaintiffs, who, according to the supposition under consideration, possess but the inferior right arising from mere legal possession, cannot have a decree that would have the effect of depriving the third defendant, who is a true owner, of his possession through the first and second defendants. I would, therefore, dismiss the second appeal with costs.

O'FARRELL, J.—I concur in the order proposed. All the dictum of the Privy Council in *Wise* v. *Ameerunnissa Khatoon*(2) appears to amount to is this, that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can only

(1) I.L.R., 26 Calc., 579.
(2) L.R., 7 I.A., 73.

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do so under the provisions of section 9 of the Specific Relief Act and not otherwise.

Here the first and second defendants held under a lease granted by the third defendant, who is found to have title. Following the observations of the Privy Council referred to, it must be held that a suit to recover possession will only lie under the provisions of section 9, Specific Relief Act, and this is clearly not such a suit. I would add that, in any view, the plaintiffs having denied that the property belonged at all to the third defendant, and asserted that it was the sole property of their mortgagor, are not entitled when this contention has been found against them, to set up a new case founded upon mere possession.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice O'Farrell.

1899. September 11, 12. October 20.

NARAYANA PATTAR AND OTHERS (DEFENDANTS NOS. 4 AND 6 TO 20), APPELLANTS,

v.

VIRARAGHAVAN PATTAR AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 TO 3 AND LEGAL REPRESENTATIVES OF PLAINTIFF NO. 1), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *s.* 53—*Debtor and creditor—Intent to delay and defeat creditors—Statute* 13 *Eliz., cap. V.*

A mere preference by a debtor of one creditor to another, and *a fortiori* a mere *bonâ fide* security given to a creditor to the extent of his debt, is not within section 53 of the Transfer of Property Act, 1882, -- as it is not within the English Statute of 13 Eliz., cap. V. But where a document given by way of security goes further and secures debts that are not due, the effect is, *quoad* such fictitious debts, to defeat or delay the creditors.

Where a party intends to rely upon a document as not within section 53 of the Transfer of Property Act because it merely creates a preference in favour of certain creditors over the rest, he must show strictly that the document is such and nothing more.

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* Second Appeal No. 972 of 1898 against the decree of W. H. Welsh, District Judge of South Malabar, in Appeal Suit No. 669 of 1897, affirming the decree of O. Chandu Menon, Acting Subordinate Judge of South Malabar at Calicut, in Original Suit No. 26 of 1896.

NARAYANA PATTAR v. VIRA-RAGHAVAN PATTAR.

SUIT to set aside an order passed on a claim petition preferred by defendants Nos. 4 to 20 against the attachment before judgment of certain properties in a suit filed by plaintiffs against defendants Nos. 1 to 3, and for a declaration that the said properties were liable to be sold for the decree in the aforesaid suit free of a mortgage created by first defendant in favour of defendants Nos. 4 to 20. The Subordinate Judge found that the parties were all trading in proximity to each other; that one creditor had sued first defendant for money due, whereupon plaintiff and the other creditors assembled in first defendant's shop and agreed to take the assets of first defendant rateably amongst them all. First defendant, however, executed a mortgage deed by which he assigned all his property to defendants Nos. 4 to 20 to the full extent of their debts, omitting plaintiffs and other creditors from participation in the transaction. The Subordinate Judge referred to section 53 of the Transfer of Property Act, and to *Sankarappa* v. *Kamayya*(1), *Motilal Ravichand* v. *Utam Jagjivandas*(2), *Gopal* v. *Bank of Madras*(3), and found that defendants Nos. 4 to 20 knew that first defendant was indebted to plaintiffs and that the document in their favour was intended to defeat plaintiffs' claims. He set aside the order passed on the claim petition of defendants Nos. 4 to 20, and declared the property liable to be sold for plaintiffs' decree as prayed.

Defendants Nos. 4 and 6 to 20 appealed to the District Judge, who upheld the decree. The same defendants preferred this second appeal.

Sundara Ayyar for appellants.—The mortgage is a valid one, and is not rendered invalid by reason of the agreement, even if that agreement was in fact entered into by all the creditors and was to the effect that all should participate in the distribution of assets. The case is not one of insolvency; if it were, no doubt the official assignee could claim on behalf of all the creditors, free from the encumbrance in favour of defendants Nos. 4 to 20. Knowledge that the mortgage would absorb all the assets of the debtor is not enough to invalidate that mortgage. Section 91 of the Indian Trusts Act provides that a subsequent transferee holds subject to the interests of a prior transferee; but that does not occur here. So in the Specific Relief Act. Section 53 of the Transfer of

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(1) 3 M.H.C.R., 231. (2) I.L.R., 13 Bom., 434. (3) I.L.R., 16 Mad., 397.

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Property Act does not apply where the sale is to a creditor. It only renders a sale void when a purchaser, other than a creditor, buys, knowing of the fraud which the purchase constitutes as against the other creditors, or when a creditor buys not in discharge of his debts solely but for an additional sum which he knows the debtor means to apply in such a way as to cheat his creditors. The present is not such a case the document being merely a security for debt due. The mortgage in itself contains no evidence of fraud. That can only be drawn from the agreement which is said to have been made for rateable distribution among all the creditors: but supposing plaintiff to have a cause of action on the breach of that agreement, the suit is not so framed. The agreement was separate and forms no new element in the mortgage so as to affect the validity of the latter under section 53. See *Alton* v. *Harrison*(1); *Ex parte Elliot*(2); *Ex parte Games*(3); *Ex parte Cooper*(4); Kerr on Fraud, page 214; May on Fraudulent Conveyances, page 101. It is submitted (i) that a mere preference of one creditor over another is not fraud; (ii) that the proviso to section 53 of the Transfer of Property Act protects the assignee if he is a creditor, that fact showing his *bona fides*—*Ramasamia Pillai* v. *Adinarayana Pillai*(5) following *Ex parte Games*(3) already cited; *Suba Bibi* v. *Balgobind Das*(6); *Sankarappa* v. *Kamayya*(7). In *Gopal* v. *Bank of Madras*(8) and *Motilal Ravichand* v. *Utam Jagjivandas*(9), the consideration consisted of a debt as well as a further payment of money. See also *Doorga Tewaree* v. *Naipal Aheer*(10) where a debtor was held entitled to prefer one creditor to another; and *Rajan Harji* v. *Ardeshir Hormusji Wadia*(11) which decides, (though not a decision on section 53), that section 53 of the Transfer of Property Act has not altered the law as it stood under the 13 Eliz., cap. v. See section 1 of the last-mentioned statute. It is submitted that the suit ought to have been dismissed.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), with him *V. Krishnasami Ayyar* and *Ananthakrishna Ayyar*, for

(1) L.R., 4 Ch. App., 622.
(2) L.R., 2 Ch. D., 104.
(3) L.R., 12 Ch. D., 314.
(4) L.R., 10 Ch. App., 510.
(5) I.L.R., 20 Mad., 465.
(6) I.L.R., 8 All., 178.
(7) 3 M.H.C.R., 231.
(8) I.L.R., 16 Mad., 397.
(9) I.L.R., 13 Bom., 434.
(10) 2 N.W.P.H.C.R., 224.
(11) I.L.R., 4 Bom., 70.

NARAYANA PATTAR v. VIRA-RAGHAVAN PATTAR.

respondents Nos. 2, 3 and 7:—The suit is under section 283 of the Code of Civil Procedure to get rid of the conclusive effect of a summary order passed by the Judge. The question is if under section 53 of the Transfer of Property Act this mortgage is voidable as against plaintiffs. I do not deny that some defendants are creditors. The terms of the mortgage are:—"the amount borrowed from you, &c." None of the English cases apply; but it is submitted that section 53 has a wider scope than the English law under 13 Eliz. Unless defendants come within the exception, the transfer to them by mortgage will be voidable, *i.e.*, their mortgage right or mortgage will be voidable at the instance of plaintiff, a simple creditor. In every transfer made with intent to defeat the creditor the defeating may be entire or partial. So far as consideration is concerned it is applicable to a creditor transferee as well as to a purchaser. The fact of being a creditor is the consideration, if he takes the transfer for his debt. Therefore it all depends on whether defendants have brought themselves within the exception. It is not a question of "defrauding" but of "defeating." The decisions cited show that the fact of a transferee being a creditor makes the transfer one of good faith, because there is no duty on a creditor to look after the interests of other creditors; and he may take the transfer though he knows that by so taking it he will deprive other creditors of their payments. This case does come within the first part of the section because here the object was to defeat. The intent to defeat refers only to the transferor and not to the intent of both parties. But for the proviso, a transfer by a person in insolvent circumstances with intent to defeat his creditors would be voidable even if the transferee did not know of the transferor's circumstances. The ignorance of the transferee would be no answer. [O'FARRELL, J.—The proviso prevents the fraud of the transferor from prevailing over the innocence of the transferee.] Yes: and the decisions cited only decide that a creditor who obtains a transfer equal to his debt may retain it notwithstanding that the intention of the transferor was to defeat or delay his creditors, and that the transfer did so defeat. The argument has been put forward on the footing that the mortgage transfer was only for a consideration equal to the debt due. The cases cited do not touch the point. There was no question of a prior agreement in any of them. Nor do they decide that a transfer to a creditor is conclusive

evidence of good faith. The intent would be more readily presumed where the transferee is a stranger. The words of the section apply to the whole body of creditors if the transfer is to a stranger, and only to the remaining creditors if the transfer is to a creditor. There are three paragraphs:—the first is substantive law; the second, a presumption; and the third, a rule of evidence, and an exception to the section. [He dealt with *Ex parte Elliot*(1).] In *Ishan Chunder Das Sarkar* v. *Bishu Sirdar*(2) the question is clearly explained at page 828—the case of a creditor transferee is distinguished, and it is there said that the Indian law goes much further than the English Statute. [He then dealt with the facts.] The agreement operates in two ways:—(1) it proves the want of *bonâ fides*, and (2) it reduces what plaintiff is entitled to. The mortgage should be declared fraudulent. [SUBRAHMANIA AYYAR, OFFG. C.J.—It must be assumed that there was an agreement that could be enforced.] I rely on the agreement only to show that defendants were transferees in bad faith, and so I claim to have the mortgage set aside. The mortgage is not binding on plaintiff to the extent of such debt as he is entitled to. The Statute of Elizabeth refers to bonds and other moveable property whereas section 53 relates only to immoveables. *McKewan* v. *Sanderson*(3) shows that where a person is in insolvent circumstances and there is an agreement to share and share alike, and one creditor gets assets unknown to others, he will be made to give them up. Altogether apart from bankruptcy law it is a fraud on the other creditors. *Jackman* v. *Mitchell*(4) is to the same effect. In *Cockshott* v. *Bennett*(5), the creditors had agreed to accept a composition, but one creditor refused to execute it unless he was secretly given a promissory note for the difference between it and the full debt. It was held invalid. See also *Leicester* v. *Rose*(6); *Corlett* v. *Radcliffe*(7).

Their lordships passed the following ORDER:— "The Lower Appellate Court has recorded no distinct findings upon the questions at issue. We must call for findings on the following issues:—

(1) Whether there was an agreement, as alleged, between the creditors to accept a rateable proportion of the assets of the debtor in lieu of their claims?

(1) L.R., 2 Ch. D., 104.
(2) I.L.R., 24 Calc., 825.
(3) L.R., 20 Eq., 65 at pp. 72, 75.
(4) 13 Ves., 581; 229 R.R., 29 at p. 233.
(5) 2 T.R., 763; 1 R.R., 617, at p. 618.
(6) 4 East., 372.
(7) 14 Moore's P.C., 121, at p. 135.

(2) Which of the debts, if any, mentioned in exhibit II, were really due."

[In compliance with the above Order, the District Judge submitted findings to the effect that the alleged oral agreement had not been proved; and that all the debts except two were really due.]

This second appeal coming on again for final hearing after the return of the above finding the Court delivered the following

JUDGMENT.—We accept the findings of the District Judge that there was no agreement come to between the creditors to accept a rateable proportion of the debtor's assets in lieu of their claims, and also that the debts Nos. 9 and 10, amounting to Rs. 400, are not proved to be really due.

On the second of these findings we think the decree of the District Court dismissing the appeal should be upheld. No doubt a mere preference of one creditor to another, and, *a fortiori*, a mere *bonâ fide* security given to a creditor to the extent of his debt, is not within the English Statute 13 Eliz., cap. V, and we also think it is not within section 53 of the Transfer of Property Act. But where a document given by way of such security goes further and secures debts not due, the effect is, *quoad* such fictitious debts, to defeat or delay the creditors. We think that the inclusion of such debts in a document which would otherwise not be within the section, is *primâ facie* evidence of an intention to defeat or delay the creditors, and it would lie upon the parties who wish to take advantage of the document to show that there was no such intention. In other words, a party who intends to rely upon a document as not within section 53, Transfer of Property Act, because it merely creates a preference in favour of certain creditors over the rest, must show strictly that the document is such and nothing more.

We therefore dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Charles Arnold White, Chief Justice, and Mr. Justice Benson.

1899. October 24.

ANGAMUTHU PILLAI (DEFENDANT), APPELLANT,

v.

KOLANDAVELU PILLAI (PLAINTIFF), RESPONDENT.*

Hindu Law—Suit by managing member on behalf of his undivided family, other members not being joined—Maintainability of suit.

The managing member of an undivided Hindu family sued in his own name for the recovery of certain land and asked for a declaration that it belonged to the plaintiff's family. Plaintiff had an undivided brother, and there was no evidence that he assented to or acquiesced in the institution of the suit:

Held, that the plaintiff was not entitled to sue without making his brother, the other member of the undivided family, a party to the suit. *Alagappa Chetti* v. *Vellian Chetti*, (I.L.R., 18 Mad., 33), followed; *Mahabala Bhatta* v. *Kunhanna Bhatta*, (I.L.R., 21 Mad., 373), distinguished.

SUIT by the managing member of a Hindu family for the recovery of land and for a declaration that it was the property of the said family and not liable to attachment in execution of a certain decree, and for damages and subsequent profits. The defence was that plaintiff was not competent to sue alone inasmuch as he had an undivided brother, and that his sister (Onthayi Ammal) was the proper person to sue for the land, she being in possession of it at the time at which the suit had been instituted. It did not appear that the plaintiff's brother acquiesced in or assented to the institution of the suit. The District Munsif framed the following among other issues:—"(1) Whether plaintiff is the owner and Onthayi Ammal was in possession under him with his permission; (3) whether plaintiff is not the right person to sue; (4) whether he is not the only person to sue." With regard to the first issue, he found that the land was the property of the plaintiff, but that it was enjoyed by his sister Onthayi Ammal with his permission; with regard to the third and fourth issues, he found

* Second Appeal No. 1495 of 1898 against the decree of S. Subba Ayyar, Subordinate Judge of Trichinopoly, in Appeal Suit No. 181 of 1897, affirming the decree of A. David Pillai, District Munsif of Srirangam, in Original Suit No. 452 of 1895.

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that the plaintiff was the right and only person to sue; and he decreed as prayed. Defendant appealed on the ground among others, that the lower Court was wrong in holding that plaintiff alone could sue. The Subordinate Judge dismissed the appeal. On this point he said:—"The question of non-joinder is raised. It is urged that plaintiff having an undivided brother could not singly maintain the suit; but plaintiff sues as manager of the family and he is entitled to maintain the suit—*vide Arunachala* v. *Vythialinga*(1)."

The defendant preferred this second appeal on the ground that the suit was bad for non-joinder of plaintiff's brother; and that plaintiff's sister was entitled to possession according to plaintiff's case, and that plaintiff was therefore not entitled to maintain the suit.

Ramachandra Ayyar for appellant.—Plaintiff sues as a member of an undivided family and has not joined his brother. All the co-owners should have been joined, *Alagappa Chetti* v. *Vellian Chetti*(2). Though that was a case of partnership no distinction is made in the judgment between partners and members of a family. See also *Balkrishna Moreshwar Kunte* v. *The Municipality of Mahad*(3); *Hari Gopal* v. *Gokaldas Kushabashet*(4); *Kanna Pisharody* v. *Narayanan Somayajipad*(5). The same rule applies to trustees: all should be joined; *Rajendronath Dutt* v. *Shaikh Mahomed Lal*(6). On the next point, the beneficial enjoyment of the lands is found to be with the sister. [BENSON, J.—She had no right of possession, but was allowed to have the enjoyment till further orders.] She is found to have enjoyed them by virtue of her stridhanam; and so would be entitled to the present possession. The proper person to sue is the person entitled to immediate possession—*Ramanadan Chetti* v. *Pulikutti Servai*(7).

Rangachariar for respondent.—The plaintiff here is the managing member of the family: and the suit is based on tort. In *Mahabala Bhatta* v. *Kunhanna Bhatta*(8) and the cases there referred to, it is laid down that one tenant-in-common can sue in tort without joining others. The suit is for the benefit of the family. *Alagappa Chetti* v. *Vellian Chetti*(2) does not apply as in that case

(1) I.L.R., 6 Mad., 27.
(2) I.L.R., 18 Mad., 33, at p. 35.
(3) I.L.R., 10 Bom., 32.
(4) I.L.R., 12 Bom., 158.
(5) I.L.R., 3 Mad., 234.
(6) I.L.R., 8 Calc., 42.
(7) I.L.R., 21 Mad., 288.
(8) I.L.R., 21 Mad., 373 at p. 380.

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the family had a business and plaintiff was not managing member, and it was a partnership suit. They go beyond the subject matter of the suit and are *obiter dicta*. See *Ramayya* v. *Venkataratnam*(1), where Muttusami Ayyar and Best, JJ., held that since the plaint (as amended) showed that the plaintiff sued as managing member of his undivided family, the omission to join his brother was a merely formal error and was not fatal to the suit. *Kunjan Chetti* v. *Sidda Pillai*(2) was a suit against a managing member and the decree was held to be binding on the sons though the latter had not been made parties. In Malabar cases the same principle is recognized,—the whole tarwad being bound by a decree. Every undivided member of a family has an interest in the whole of its property. Each has a cause of action against a trespasser. In *Jagdeo Singh* v. *Padarath Ahir*(3), the distinction between contract and tort is recognised. That principle is well established in the English authorities, which form the basis of the decisions here. In *Kanna Pisharody* v. *Narayanan Somayajipad*(4), some members of a club brought the suit, which is quite different. *Balkrishna Moreshwar Kunte* v. *The Municipality of Mahad*(5) was also not a case of a suit by a managing member; and in *Hari Gopal* v. *Gokaldas Kushabashet*(6), there was a doubt if the plaintiff was managing member or not. The ruling in *Arunachala* v. *Vythialinga*(7), has never been doubted, but for the remark in *Alagappa Chetti* v. *Vellian Chetti*(8), and should not be departed from, though, to succeed, it is admitted that plaintiff must sue as managing member, *Radha Prashad Wasti* v. *Esuf*(9). If it be found necessary I ask that the plaintiff's brother be added instead of the suit being dismissed. See *Hari Gopal* v. *Gokaldas Kushabashet*(6).

Ramachandra Ayyar in reply.—In *Kunjan Chetti* v. *Sidda Pillai*(2), the co-owners had not been joined as defendants and the ruling in that case does not conflict with the proposition that all co-owners should be joined as plaintiffs. *Alagappa Chetti* v. *Vellian Chetti*(8) distinctly departs from *Arunachala* v. *Vythialinga*(7).

(1) I.L.R., 17 Mad., 122.
(2) I.L.R., 22 Mad., 461.
(3) I.L.R., 25 Calc., 285, at p. 289.
(4) I.L.R., 3 Mad., 234.
(5) I.L.R., 10 Bom., 32.
(6) I.L.R., 12 Bom., 159.
(7) I.L.R., 6 Mad., 27.
(8) I.L.R., 18 Mad., 33, at p. 35.
(9) I.L.R., 7 Calc., 414.

ANGAMUT PILLAI v. KOLAND. VELU PILLAI.

JUDGMENT.—In this case two points were relied on on behalf of the defendant. The first point was that the suit was not maintainable on the ground that the plaintiff was a member of an undivided family and could not maintain the suit in his own name without joining the other members of the family as parties to the suit. The second point was that the plaintiff's sister, one Onthayi Ammal, and not the plaintiff, was the proper person to sue, on the ground that at the time of the institution of the suit the sister was in possession of the plaint property. As regards the second point we are clearly of opinion that, as between the plaintiff and his sister, the plaintiff had the right to the immediate possession of the plaint property, and we therefore hold that the suit was properly instituted in the name of the plaintiff.

As regards the first point, it is conceded that the plaintiff has an undivided brother. The plaintiff describes himself in the plaint as family manager and he asks in his prayer that it may be held that the plaint property belongs to the plaintiff's family.

There is no evidence that the plaintiff's brother assented to, or acquiesced in, the bringing of the suit by the plaintiff.

An issue was raised as to whether the plaintiff was the only person to sue, and the District Munsif held that the plaintiff was entitled to sue as the managing member of the family and the Subordinate Judge affirmed this finding. The Courts below appear to have relied upon the authority of a passage in the judgment in *Arunachala* v. *Vythialinga*(1). The passage is as follows :—"It is "admitted apparently that the plaintiff is only one member of a "joint undivided Hindu family, in whom the right claimed, if it "exists, inheres, and it seems to us that as the right is one belonging "to the joint undivided family, and not to any individual member "thereof, the plaintiff was bound to join in the suit, either as "plaintiffs or defendants, the remaining members of the family, and "that unless he was the managing member of the family and "brought the suit in that capacity, which he does not profess to do, "he alone cannot institute the suit, as otherwise, notwithstanding "any decree given the plaintiff herein, the other members of his "family may at some future period bring a suit or suits for the "establishment of some different and possibly much higher right."

(1) I.L.R., 6 Mad., 27.

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The appellant relied on a passage in the judgment of *Alagappa Chetti* v. *Vellian Chetti*(1). "The proposition that the manager of "a Hindu family can sue without joining those interested with "him is one which cannot be supported and no authority was cited "in support of it save a *dictum* in *Arunachala* v. *Vythialinga*(2)."

This proposition, it is true, is in the nature of an *obiter dictum*, but it is an express authority for the contention which is put forward by the appellant.

The respondent sought to draw a distinction between suits founded on contract and suits founded on tort, and contended that the well-established principle of English law that a tenant-in-common is entitled to sue a trespasser in his own name without joining his co-tenants, is applicable to the present case. In the face of an express authority as to the rights of a managing member of a Hindu family we do not think that this principle of English law can be held applicable to the present case. It was conceded by the vakil on behalf of the plaintiff (the respondent) that he could only contend that the plaintiff could sue alone *qua* managing member and not that he could sue alone *qua* member of an undivided family.

The authority relied upon by the respondent (*Mahabala Bhatta* v. *Kunhanna Bhatta*(3)) is clearly distinguishable on the ground that in that case, the plaintiff's family had become divided at the time of the institution of the suit.

We adopt the proposition of law contained in the judgment in *Alagappa Chetti* v. *Vellian Chetti*(1), and we hold that the plaintiff was not entitled to sue without making his brother, the other member of the undivided family, a party to the suit.

We do not think, however, that the suit ought to be dismissed on the ground of non-joinder. Both the lower Courts upheld the plaintiff's contention that he was entitled to sue alone. We think this is a case in which we should give the plaintiff an opportunity to amend his plaint.

We allow this appeal and set aside the decrees of the Courts below. We give the plaintiff leave to amend the plaint and we remand the suit to the Court of First Instance in order that the plaintiff's brother may be made a party to the suit and the case

(1) I.L.R., 18 Mad., 33, at p. 35. (2) I.L.R., 6 Mad., 27.
(3) I.L.R., 21 Mad., 373.

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re-tried. Defendant will have leave to put in a new written statement, if so advised. The costs of the appeal to the lower Appellate Court and to this Court must be paid by the plaintiff. The costs before the Court of First Instance including costs already incurred will be dealt with by that Court.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Boddam, Mr. Justice O'Farrell, and Mr. Justice Michell.

RAMANATHAN CHETTIAR (COUNTER-PETITIONER AND PLAINTIFF), APPELLANT,

v.

LEVVAI MARAKAYAR AND ANOTHER (PETITIONERS—DEFENDANT No. 4 AND SON OF DEFENDANT No. 1), RESPONDENTS.*

1898. Nov. 11. 1899. Oct. 2, 9, 17. Nov. 7.

Civil Procedure Code—Act XIV of 1882, ss. 244, 278 to 283—Party to the suit—Order on claim by trustee for release of trust property attached under personal decree against trustee—Appeal from such order.

A decree-holder having attached certain property in the course of execution, two of the defendants in the suit in which the decree had been passed presented a petition praying that the property might be released from the attachment on the ground that it had been set apart for charitable purposes and that it was held by defendants as trustees. The Subordinate Judge upheld the trust and ordered the properties to be released from the attachment. Plaintiff then appealed to the High Court, when objection was taken that no appeal lay against the order of the Subordinate Judge. The Court referred to a Full Bench the question whether an appeal lies against an order passed with regard to a party to a suit against whom there is a personal decree, in respect of a claim he may set up to hold property, attached in execution of that decree, as a trustee on behalf of third persons not parties to the suit:

Held, that such a claim falls under section 278 and not under section 244 of the Code of Civil Procedure and that no appeal lies against any order passed on it by the Court executing the decree.

The claims of third parties, whether put forward by themselves or by a party to the suit, must be dealt with under sections 278 to 283 of the Code of Civil Procedure, and not under section 244. *Roop Lall Dass* v. *Bekani Meah*, (I.L.R., 15 Calc., 437), referred to.

Section 244 presupposes that the questions with which it deals are such as can be finally determined in the execution proceedings. If they cannot, it has

* Civil Miscellaneous Appeal No. 6 of 1898 against the order of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, on Civil Miscellaneous Petition No. 633 of 1897, in Original Suit No. 43 of 1895.

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no application. The Court should look to the substance of the objection and not to the accident that it is put forward by one person rather than another. *Upendra Bhatta* v. *Ranganatha Bhatta*, (I.L.R., 17 Mad., 399), considered; *Punchanun Bundopadhya* v. *Rabia Bibi*, (I.L.R., 17 Calc., 711), and *Murigeya* v. *Hayat Saheb*, (I.L.R., 23 Bom., 237), referred to.

PETITION by the fourth defendant and by the son of the first defendant in a suit, for the release of certain properties from an attachment effected in the execution of a decree against the petitioners and two other defendants. Plaintiff had obtained a decree against the petitioners in execution of which the attachment referred to had been made. The petition stated that the properties so attached had belonged to the first defendant and another, who had set them apart for charity, appointing the petitioners as trustees by a deed executed in 1893. It alleged that the properties had been delivered to the petitioners and that charities had been conducted with the income arising therefrom. The petitioners claimed that the plaintiff had unlawfully attached the said properties for the decree amount due to him in the suit, and that they could not be made liable in respect of it, and that the attachment was invalid. Plaintiff presented a counter-petition alleging that the claim was false, and that the fourth defendant was not entitled to present the petition, since all disputes arising between him and plaintiff in execution proceedings should be decided under section 244 of the Code of Civil Procedure. The Subordinate Judge, holding that the gift of the properties was for pious and charitable purposes and that it was a valid wakf under Muhammadan Law, ordered the properties to be released from attachment.

Plaintiff preferred this appeal on the ground among others that inasmuch as fourth defendant was a party to the decree he could not apply under section 278 of the Code of Civil Procedure to have the properties released from attachment.

The appeal first coming on for hearing before COLLINS, C.J., and SHEPHARD, J., the preliminary objection was raised on behalf of the respondents, that no appeal lay against the order of the Subordinate Judge. The Court then made the following

ORDER OF REFERENCE TO FULL BENCH.—"We have some doubts as to whether the ruling in *Upendra Bhatta* v. *Ranganatha Bhatta*(1) is correct. The question is one of some importance.

(1) I.L.R., 17 Mad., 399.

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We think it better to refer to a Full Bench the question whether an appeal lies against an order passed with regard to a person who claims attached property on the ground that he holds it as trustee."

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

V. Krishnasami Ayyar for appellant.—Appellant, who was plaintiff, obtained a decree against defendants Nos. 1 and 4. Defendants Nos. 2 and 3 are the representatives of defendant No. 1, who has since died. In execution of the decree, certain properties were attached, whereupon defendant No. 4 and the representatives of defendant No. 1 objected to the attachment on the grounds that it was property in the nature of wakf, and the Subordinate Judge, accepting that view, cancelled the order of attachment. The question is whether an appeal lies against an order passed with regard to a person who claims attached property on the ground that he holds it as a trustee. I rely on *Upendra Bhatta* v. *Ranganatha Bhatta*(1) and submit that that case was correctly decided. The question referred should be considered with regard to claims by a judgment-debtor or his legal representatives. When a party prefers a claim as trustee for another he is still a party to the suit. The difference in capacities makes no difference in his right to proceed under section 244. In *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(2), the Privy Council held that section 244 applied notwithstanding that the purchaser, a stranger, was interested. The words "claim" and "objection" as used in section 278 of the Code of Civil Procedure are the same. A person may either claim property or object to an attachment. He is not the less a party by reason of his representative character. The concluding words of the first paragraph of section 278 of the Code empower the Court to investigate a claim or objection of a claimant or objector as if he were a party to the suit, which indicates that a claimant is not contemplated as being a party. Section 280 presents an apparent difficulty, but not when read with section 278, for whilst in the earlier section the person is referred to as not a party to the suit and the Court is directed to investigate his claim, section 280 deals with the result to be arrived at, namely, whether the judgment-debtor is in possession on his own behalf or on behalf

(1) I.L.R., 17 Mad., 399. (2) L.R., 19 I.A., 166; I.L.R., 19 Calc., 683.

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of another as trustee, and the order to be passed, see *Chowdry Wahed Ali* v. *Mussamut Jumaee*(1); also *Kuriyali* v. *Mayan*(2) approved by Privy Council in *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(3); *Punchanun Bundopadhya* v. *Rabia Bibi*(4), in which section 244 was held to apply. Against these there are mere *obiter dicta* in some other cases: as in *Murigeya* v. *Hayat Saheb*(5), *Seth Chand Mal* v. *Durga Dei*(6), *Roop Lall Dass* v. *Bekani Meah*(7), *Rajrup Singh* v. *Ramgolam Roy*(8), *Ram Ghulam* v. *Hazaru Kuar*(9) following *Shankar Dial* v. *Amir Haidar*(10). The latter case is founded on two Bengal cases (*Haris Chandra Gupto* v. *Srimati Shashi Mala Gupti*(11) and *In the matter of the petition of J. B. Rainey*(12)), which are really not authorities, since they decide that when representatives claim in their own right they come under section 276 of the old Code, corresponding to section 278 of the new Code,—a proposition that cannot be supported after the recent Calcutta cases.

Ramachandra Rao Saheb (with him *Sundara Ayyar*), for respondents, referred to sections 280 and 283 of the Code of Civil Procedure and contended that the procedure under section 244 did not apply. A beneficiary could not be bound because a trustee kept quiet without objecting. The foundation for the decision in *Upendra Bhatta* v. *Ranganatha Bhatta*(13) was the decision of the Privy Council in *Abedoonissa Khatoon* v. *Ameeroonissa Khatoon*(14), which, however, had no application to the present case. *Kuriyali* v. *Mayan*(2) was a case of karnavan, whose position differed from that of a trustee. He also referred to *Vasudevan* v. *Sankaran*(15) and *Varanakot Narayanan Namburi* v. *Varanakot Narayanan Namburi*(16).

O'FARRELL, J.—The question evidently intended to be referred is whether an appeal lies against an order passed with regard to a party to a suit, against whom there is a personal decree, in respect of any claim he may set up to hold property attached in

(1) 11 B.L.R., 140. (2) I.L.R., 7 Mad., 255.
(3) L.R., 19 I.A., 166; I.L.R., 19 Calc., 683.
(4) I.L.R., 17 Calc., 711. (5) I.L.R., 23 Bom., 237.
(6) I.L.R., 12 All., 313. (7) I.L.R., 15 Calc., 437.
(8) I.L.R., 16 Calc., 1. (9) I.L.R., 7 All., 547.
(10) I.L.R., 2 All., 752. (11) 6 B.L.R., 721.
(12) 6 B.L.R., 725—Note. (13) I.L.R., 17 Mad., 399.
(14) L.R., 4 I.A., 66; I.L.R., 2 Calc., 327.
(15) I.L.R., 20 Mad., 129. (16) I.L.R., 2 Mad., 328.

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execution of that decree as a trustee on behalf of third persons not parties to the suit. The answer to the question depends upon whether such a claim falls under section 244, Civil Procedure Code, or under section 278. It is conceded that the Privy Council decision relied on in *Upendra Bhatta* v. *Ranganatha Bhatta*(1) does not touch the point. The addition of the words "or their representatives" to the words "parties to the suit" in section 244 as it originally stood is really beside the point where the claim is put forward by the representative, not as representative of the parties, but on behalf of third persons. A large number of decisions have been cited but a good many of them, in my opinion, throw no light upon the question. They deal with the converse case of a trustee sued in his representative character claiming property attached as his personal property, and follow the principle laid down by the Privy Council in *Chowdry Wahed Ali* v. *Mussamut Jumaee*(2). Although that case was regarded in *Kuriyali* v. *Mayan*(3), (a case which involved both the present question and its converse), as an authority for the wider proposition ultimately laid down in *Upendra Bhatta* v. *Ranganatha Bhatta*(1), I am of opinion that, on examining the reasons given by the Privy Council for its decision, it will be found that they do not support the view taken in the latter case, but rather the reverse. Their Lordships say:—"It is obvious, therefore, that a party in a representative "character is so distinctly a party to the suit, that under certain "conditions his own private property may be attached and sold. "It is true, that to fix him with this liability, it must be shown "that he has received property of the deceased of which he has failed "to prove a proper disposition. But these things are all cognizable, "and proper to be ascertained in the suit in which the decree is "made, during the progress of the execution proceedings founded "upon such decree."

These reasons cannot apply to what I have termed, and shall for brevity's sake continue to term, the "converse case." Property which a judgment-debtor holds as a trustee can never be liable for claims against the judgment-debtor personally. In the Privy Council case just cited the question was whether certain property was the assets of the deceased party or liable as such. This is

(1) I.L.R., 17 Mad., 399. (2) 11 B.L.R., 140 at p. 155.
(3) I.L.R., 7 Mad., 255.

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clearly a question falling under section 244 as between the parties to the suit in the strictest sense of the term—taking it, that is, that the defendant was a party to the suit only in his representative capacity.

I do not think it necessary to refer at length to all the cases cited, as they are not unanimous and the distinction I have pointed out between the present question and its converse is not always clearly borne in mind. I think, however, that there can be no doubt that the balance of authority is in favour of the view that the claims of third parties, whether put forward by themselves or by a party to the suit, must be dealt with under sections 278 to 283 and not under section 244. A considerable number of these decisions are collected and considered in *Roop Lall Dass* v. *Bekani Meah*(1). I agree with the remarks of Norris and Beverly, JJ., that the test whether the order as to the objection falls under section 244 or not, is whether all the necessary parties are before the Court or not. If they are not, those not before the Court are not bound by any order passed and can take separate proceedings, thereby tending to an increase of litigation. It appears to me obvious that in a suit where a person who happens to be a trustee is proceeded against for a mere personal debt, the beneficiaries who could under no circumstances be parties to such a suit, are not in any way before the Court. The trustee in no way represents their interests—to which his own is necessarily adverse in such a suit —and there is no machinery by which they can be added as parties to the suit in execution proceedings.

In other words, section 244 presupposes that the questions with which it deals are such questions as can be finally determined in the execution proceedings. If they cannot, I think it has no application. This view is in accordance with the principle that a Court should look to the substance of the objection, and not to the accident that it is put forward by A rather than by B. If it is, in substance, an objection that falls under section 278, it should be dealt with under that section. This view is in accordance, also, with the dictum in *Ravunni Menon* v. *Kunju Nayar*(2), and a number of authorities, among which may be mentioned *Nath Mal Das* v. *Tajammul Husain*(3), *Ram Ghulam* v. *Hazaru Kuar*(4),

(1) I.L.R., 15 Calc., 437 at p. 444.
(2) I.L.R., 10 Mad., 117 at p. 119.
(3) I.L.R., 7 All., 36.
(4) I.L R., 7 All., 547.

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Seth Chand Mal v. *Durga Dei*(1), *per* Edge, C.J.; *Bahori Lal* v. *Gauri Sahai*(2), as well as the case already referred to, *Roop Lall Dass* v. *Bekani Meah*(3), where the authorities are discussed. See also *Murigeya* v. *Hayat Saheb*(4), where Parsons, J., who took the contrary view, admitted that the balance of authority was against it. In *Rajrup Singh* v. *Ramgolam Roy*(5), the same view is taken and at page 6 the distinction between the two classes of cases is clearly brought out. In *Punchanun Bundopadhya* v. *Rabia Bibi*(6), the question was what I have called "the converse case" and the opinions of the majority as to the construction of sections 278 to 283 must be regarded as merely *obiter*. I think too much stress was laid by the learned Judges who constituted the majority (as well as by Parsons, J., in *Murigeya* v. *Hayat Saheb*(4)) on the words in section 278 "in all other respects as if he was a party to the suit." This is an enabling and not a restricting clause, in my opinion; and if it were a restricting clause, the question would still remain—is a judgment-debtor, raising an objection in the character of representative of third persons not before the Court, 'a party to the suit,' at all? I think he is not. It may be pointed out, in addition to what has been already said, that the view that a *jus tertii* set up by a judgment-debtor must be dealt with under section 244, Civil Procedure Code, leads to this anomaly—that the trustee who has no real interest in the property attached may resort to appeal and second appeal, while the beneficiaries, if they put forward the claim themselves under section 278, have no right of appeal at all, and are driven to a separate suit to establish their claims. It would further tend in practice to lead to great complications, as the trustee might proceed under section 244, while the beneficiaries or some one in their behalf (*e.g.*, a joint trustee who is no party to the suit) might simultaneously conduct proceedings under section 278. This seems to be a sufficient answer to the remarks of Prinsep and O'Kinealy, JJ., in *Punchanun Bundopadhya* v. *Rabia Bibi*(6), that section 244 should be "liberally construed so as to prevent litigation." The view for which I am contending would, I think, be best calculated to have that effect.

My answer to the question proposed is that, when a person against whom there is a personal decree claims attached property

(1) I.L.R., 12 All., 313 at p. 324.
(2) I.L.R., 8 All., 626.
(3) I.L.R., 15 Calc., 437.
(4) I.L.R., 23 Bom., 237.
(5) I.L.R., 16 Calc., 1.
(6) I.L.R., 17 Calc., 711.

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on the ground that he holds it as trustee for persons not parties to the suit, such claim falls under section 278 and not under section 244, Civil Procedure Code, and no appeal lies against any order passed on such claim by the Court executing the decree.

MICHELL, J.—I agree with Mr. Justice O'Farrell in his conclusion as well as his reasons for arriving at it on the question referred. It was contended that the case came within section 244 of the Civil Procedure Code because a trustee represents the beneficiaries. But, though the persons beneficially interested need not, ordinarily, be joined in a suit against a defendant as trustee, executor or administrator (section 437, Civil Procedure Code), he must be impleaded as such, otherwise the suit would not be properly framed, and a decree passed against him simply would not be a decree against him as trustee, executor or administrator. The case referred to us, however, is not a case of a judgment-debtor against whom a decree has been passed as trustee or who was sued as such, but of one against whom a decree has been passed, and the suit brought, in his own personal capacity. The suit not having been brought, nor the decree passed, against him in his *persona* as trustee, he is, as such trustee (in which capacity he makes the claim to the attached property), in my opinion, no party to the suit.

BODDAM, J.—I concur.

This appeal coming on for final hearing after the above decision of the Full Bench, the Court (SHEPHARD and SUBRAMANIA AYYAR, JJ.) delivered the following

JUDGMENT.—The appeal is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Benson.

TANGI JOGHI (ACCUSED),

v.

HALL (COMPLAINANT).*

1899. December 7, 15.

Criminal Breach of Contract Act—Act XIII of 1859, *s.* 2—*Money advanced on account of work to be performed—Loan on condition that the workman should enter into a contract of service.*

A workman agreed in writing to work for the proprietors of an estate for four years and one month, from 1st March 1899 to 31st March 1903, for an initial advance of one rupee, which was not to be repaid till after the expiration of the agreement. The same person subsequently obtained an advance of Rs. 10, to be re-imbursed by a monthly deduction of one rupee from his wages. He worked from 1st March 1899 till 18th September 1899 when he ceased to work, leaving in all a sum of Rs. 5 to be accounted for in the adjustment of the total advance. He was subsequently charged and convicted under section 2 of the Criminal Breach of Contract Act XIII of 1859:

Held, that the initial advance of one rupee was not money advanced on account of work to be performed, but rather a loan made without interest on the condition that the workman would enter into a contract of service for the duration of the loan; and that the Criminal Breach of Contract Act, 1859, was inapplicable to this case;

that, with reference to the ten rupees to be repaid out of wages, the Act applied, and an order should be made directing the workman to work until the expiration of the term of the contract on account of which this sum had been advanced.

BY a written agreement entered into with the proprietors of the Mountain-Glen Estate, the accused, one Tangi Joghi and two others, agreed to work on that estate for a period of four years and one month, commencing from 1st March 1899 to 31st March 1903, for an initial advance of one rupee each in respect of which it was expressly stipulated that it should not be repaid till after the expiration of the agreement. The accused obtained subsequently an advance of Rs. 10, to be re-imbursed by a monthly deduction of one rupee from the wages, which were fixed at Rs. 8 per mensem, and worked on the estate from 1st March 1899 until the 18th September 1899 when he ceased to work, (owing, it was

* Criminal Revision Case No. 466 of 1899 referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by C. J. Weir, District Magistrate of Nilgiris, in letter, dated 30th October 1899.

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said, to family difficulties), leaving in all a sum of Rs. 5 to be accounted for in the adjustment of the total advance. The accused was subsequently charged and convicted by a Stationary Sub-Magistrate under section 2 of the Criminal Breach of Contract Act XIII of 1859—and was ordered to complete the contract until 31st March 1903 and to pay Court costs (Rs. 1-4-0).

The parties were not represented.

JUDGMENT.—We agree with the District Magistrate that the sum of Rupee 1 given to the defendant on the date of the agreement was not "money advanced on account of work to be performed." It was rather a loan made without interest on the condition that the defendant would enter into a contract of service for the duration of the loan, viz., four years and one month.

The provisions of Act XIII of 1859 are therefore inapplicable to this loan (see Proceedings of the Madras High Court, dated 9th January 1880, No. 39(1), and *Queen-Empress* v. *Kandappa Goundan*(2)).

As regards the sum of Rs. 10 advanced on the same date and to be repaid out of wages earned by instalments of one rupee in each month, it is not clear why this sum should not be regarded as "money advanced on account of work to be performed." The case is similar to *The Queen* v. *Tulukanam*(3), in which it was held that the provisions of Act XIII of 1859 were applicable. The term of the contract, on account of which this sum of Rs. 10 was advanced, is not clearly stated in the papers, but apparently it was for ten months, as that was the time required to work off the advance at Rupee 1 per mensem. The order of the Magistrate should, therefore, have directed the defendant to work until the 31st December 1899 instead of until the 31st March 1903. We modify the order accordingly.

(1) Weir's Criminal Rulings, 3rd Ed., p. 455.
(2) Weir's Criminal Rulings, 3rd Ed., p. 456.
(3) I.L.R., 7 Mad., 131.

APPELLATE CRIMINAL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

QUEEN-EMPRESS

v.

ANKANNA AND ANOTHER.*

1899. September 28.

Criminal Procedure Code—Act V of 1898, ss. 195, 476—Order by Deputy Magistrate sanctioning prosecution—Complaint by Deputy Magistrate—Jurisdiction of Sessions Court to interfere.

A Deputy Magistrate having decided that certain witnesses, (who had given evidence before himself and before two other Magistrates on different occasions relating to charges of rioting and causing hurt) had wilfully committed perjury on one occasion or another, ordered them to be prosecuted for perjury and bound them over to take their trial. The Sessions Judge set aside the said order, deeming it undesirable that sanction to prosecute should be given under the circumstances:

Held, that whether the Deputy Magistrate had intended to pass an order under section 476 or to make a complaint under section 195 (1) (*b*) of the Code of Criminal Procedure, the Sessions Judge had no power to interfere: also that the power of revoking given under section 195 (*b*) is only in respect of sanctions, and not of complaints.

PETITION to revise an order of a Sessions Judge setting aside an order of a Deputy Magistrate binding over two persons who had given evidence in a criminal case to appear for trial on a charge of perjury. The Deputy Magistrate in his order said that the two witnesses in question had been examined by himself in a case of rioting and hurt on 25th and 26th March 1898, respectively, when they had deposed to the same facts that they had previously deposed to before another Magistrate on 17th August 1896, relating to the same offences. The evidence last referred to had been given within three months of the occurrence. In July and August 1897 the said witnesses had been examined by a third Magistrate, also with reference to the same occurrence. In the examination in July 1897 they denied all knowledge of the affair: whilst in August 1897, they admitted the correctness of their previous depositions given on 17th August 1896. The Deputy Magistrate held

* Criminal Revision Case No. 238 of 1899, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of V. Srinivasa Charlu, Acting Sessions Judge of Cuddapah, in Criminal Miscellaneous Petition No. 1 of 1899.

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it to be clear from these conflicting and contradictory depositions that the witnesses had wilfully perjured themselves on one occasion or another and ordered them to be prosecuted for perjury under section 195 of the Code of Criminal Procedure. He bound them over to appear to take their trial for an offence under section 193 of the Indian Penal Code. On a petition being presented to the Sessions Court, the order of the Deputy Magistrate was set aside, the Acting Sessions Judge treating it as an order granting sanction to prosecute the said witnesses for statements between which no substantial contradiction existed. He considered it undesirable that sanction to prosecute should be given under the circumstances.

This criminal revision petition was preferred on behalf of Government, on the ground that the Acting Sessions Judge had acted without jurisdiction in setting aside the Deputy Magistrate's order; that there was no order granting sanction under section 195 of the Code of Criminal Procedure, as had been assumed by the Acting Sessions Judge; that the order of the Deputy Magistrate was in fact passed under section 476 of the Code of Criminal Procedure; and that the Acting Sessions Judge had no power to set aside or interfere with proceedings passed under that section.

The Acting Public Prosecutor (*Sankaran Nayar*) for the Crown.

Mr. *John Adam* for accused No. 1.

Accused No. 2 was not represented.

JUDGMENT.—It is not quite clear whether the Deputy Magistrate intended to pass an order under section 476, Criminal Procedure Code, or to make a complaint under section 195 (1) (*b*). In either case the Sessions Judge had no power to interfere with this order. This is conceded as regards section 476, Criminal Procedure Code, by Mr. Adam who appears for the first accused, and it is equally clear, we think, as regards a complaint under section 195 (1) (*b*).

The power of revoking given under section 195 (*b*) is only in respect of sanctions and not in respect of complaints. We set aside the order of the Sessions Judge, dated 21st April 1899, and restore that of the Deputy Magistrate, dated 12th December 1898.

APPELLATE CIVIL.

Before Mr. Justice Boddam, Mr. Justice O'Farrell and Mr. Justice Michell.

REFERENCE UNDER STAMP ACT, 1879, SECTION 46.*

1899. October 2.

Stamp Act—Act I of 1879, *ss.* 3, 46, *sched. I, arts.* 13, 44 (a)—"*Mortgage-deed.*"

By a clause in a document referred to the High Court for an opinion as to the stamp duty payable thereon, the A company agreed that, on execution of the document, they would issue and hand to the B company £8,000, part of the £25,000 second debentures, and that such second debentures, together with the £20,000 first debentures already issued to the B company, and the remaining £5,000 first debentures, subject to the prior charges thereon, should be held by the B company as security for a sum of £32,009-15-10 previously mentioned in the deed:

Held, that the clause constituted the document a "mortgage-deed" within the meaning of the Indian Stamp Act, 1879. The whole debt of £32,009-15-10 being, by the said document, secured not only upon the old security of £20,000 first debentures, but also upon the £8,000 second debentures and the remaining £5,000 of the first debentures, stamp duty was payable on the new security, though a portion of the debt secured was included in the previous document on which duty had been paid;

that the document was not a mere agreement to make a transfer, but an agreement to hand over the debentures on the execution of the document, and was therefore in effect an actual transfer;

that the "mortgage-deed" was one with possession within article 44 (a) of schedule I of the Stamp Act, 1879, by which this document was governed; and

that in respect of the undertaking to make further advances, the document was liable to further duty as an agreement "not otherwise provided for."

THE question referred was as to the stamp duty chargeable on a document, which, among other matters not material to the reference, contained an admission that a sum of £32,009-15-10 was due by the Madras Electric Tramway Company, Limited, to the Electric Construction Company, Limited, and an undertaking, on execution thereof, to issue and hand to the Construction Company second debentures for £8,000, to be held, together with debentures for £25,000 already deposited, by the Construction Company as security for the said sum of £32,009-15-10. The document also contained an agreement on the part of the Construction Company to grant further advances for the purpose of constructing certain new lines, and an agreement by the Tramway Company to give

* Referred Case No. 10 of 1899 stated under section 46 of the Stamp Act,

REFERENCE UNDER STAMP ACT, s. 46.

the Construction Company, in respect of such advances and the interest accruing thereon, a second charge on the undertaking property and assets of the company.

The document was held by the Collector to be an acknowledgment of a debt attested by a witness and not payable to order, and therefore a bond, chargeable under article 13, of schedule I of the Stamp Act I of 1879,—as well as an agreement not otherwise provided for by the Act. It was contended, on the other hand, that the document was merely an acknowledgment of a debt and a promise to provide security. The questions were:—Whether it was merely an acknowledgment of a debt, or a bond, having regard to the definition in section 3 (4), and as such chargeable under article 13; or a mortgage-deed chargeable under article 44 of schedule I of the Stamp Act I of 1879. Further questions were:—Assuming that the document required to be stamped as a mortgage-deed, whether it should be treated as one with or without possession and on what amount the stamp duty should be calculated.

Mr. *N. Subrahmaniam* for the Board of Revenue, Separate Revenue.

Mr. *E. Norton* for the Electric Construction Company, Limited.

JUDGMENT.—We are of opinion that the provisions of the third clause of the operative part of the document under consideration constitute the document a "mortgage-deed" within the meaning of the Indian Stamp Act. By that clause the Madras Electric Tramways Company (Limited) agree that, on execution of the document, they will issue and hand to the Construction Company £8,000, part of the £25,000 second debentures, and that such second debentures, together with the £20,000, first debentures already issued to the latter company, and the remaining £5,000, first debentures, subject to the prior charges thereon, shall be held by them as security for the sum of £32,009-15-10 previously mentioned in the deed.

It is contended that this document is itself a debenture, and Mr. Norton relied for this view on the decision of Mr. Justice Chitty in *Edmonds* v. *Blaina Furnaces Company*(1) and also on *Levy* v. *Abercorris Slate and Slab Company*(2), and he contended

(1) L.R., 36 Ch.D., 215.

(2) L.R., 37 Ch.D., 260.

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that, under the notification of the Government of India of 4th December 1884, No. 1945, the document is exempt from stamp duty. But neither that notification nor those decisions have any application, in our opinion, to the present case. By this present document the whole debt of £32,009-15-10 is secured upon not only the old security of £20,000 first debentures, but also on the £8,000 second debentures and remaining £5,000 of the first debentures. It is clear, therefore, that for the new security the company are liable to pay stamp duty, though a portion of the debt secured was included in the previous document on which duty was paid.

It is also contended that this is not a completed transfer, but only an agreement to make a transfer; but the agreement is to hand over the debentures on the execution of the document, and is, therefore, we think, in effect an actual transfer.

As the debentures are handed over to the transferee company, "the mortgage-deed" is, in our opinion, one with possession, (article 44 (*a*), schedule I of the Stamp Act I of 1879, by which Act this document is governed).

In respect of the undertaking to make further advances, we think the document is liable to further duty as an agreement "not otherwise provided for."

Messrs. *H. C. King & John Josselyn*—Attorneys for the Electric Construction Company, Limited, and for the trustees to the debenture-holders of the Madras Electric Tramways Company, Limited.

APPELLATE CRIMINAL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

1899. September 29. October 5.

PAMPAPATI SASTRI (COUNTER-PETITIONER), PETITIONER,

v.

SUBBA SASTRI (PETITIONER), COUNTER-PETITIONER.*

Criminal Procedure Code—Act V of 1898, s. 195—Sanction for prosecution—Notice to person to prosecute whom sanction is sought—Proceedings before Sessions Court—Proper exercise of discretion.

A Sessions Court when granting sanction to prosecute under section 195 of the Code of Criminal Procedure should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. Although notice is not invariably necessary in cases under the section referred to, the grant of an order sanctioning prosecution is a judicial act, and there may be circumstances—(such as in those cases in which there has been a difference of opinion as to the desirability for granting sanction)—in which a proper discretion cannot be said to have been exercised unless the persons sought to be prosecuted have given an opportunity to be heard.

An order of a Sessions Judge, sanctioning a prosecution, containing nothing from which the High Court could conclude that he had directed his mind to the real question in such cases, namely, whether there was a *primâ facie* case on which a prosecution could be instituted with a fair chance of success, the High Court revoked the sanction.

THE material portions of a petition to a Sessions Judge upon which sanction to prosecute had been granted were as follows:—"In the Sessions Case No. 14 of 1899 the counter-petitioner was the first prosecution witness. He said in his evidence:—'(*a*) We and his sister's husband Timmappa attended on him (Venkatadri Bhat) during his illness. (*b*) A year before his death Venkatadri had lost the top joint of his right thumb from leprosy. He had lost all his nails. He could not hold a pen. (*c*) On the 10th of May 1895 I was attending him from 6 to 10 P.M. (*d*) I heard of this will for the first time when he (Subba Sastrulu) presented it in Court with a petition for probate. (*e*) I was friendly with deceased. (*f*) He (Venkatadri Bhat) had been suffering from leprosy for three years. For a year before his death he was

* Criminal Miscellaneous Petition No. 70 of 1899 praying the High Court to revoke the sanction given by the Acting Sessions Judge of Bellary for the prosecution of the petitioners, under sections 193 and 195 of the Indian Penal Code in Sessions Case No. 14 of 1899.

entirely unable to write. (*g*) During his last illness Hakim Dada Sahib was giving medicine to him. (*h*) Before Dada Sahib, Kunti Kondappa gave medicine to deceased. He has become mad. (*i*) There was never any dispute between me or my father and deceased or his father. (*j*) He (Venkatadri Bhat) got food from us. (*k*) The delirium began on the evening of Wednesday or Thursday. Dada Sahib was treating him at the time. (*l*) She (Pattamma) was not treating him during his illness. (*m*) It (the will) was not shown to me on the second day. (*n*) I first went to the house of Rajeswara Sastri for medicine when I heard of Venkatadri's illness. (*p*) He came and prescribed medicine for Venkatadri during three days. Afterwards Krishna Sastri treated Venkatadri for two days. (*q*) After Krishna Sastri, Kunti Kondappa treated him (Venkatadri Bhat) for three days. (*r*) For eight days after removal of the corpse the house remained in my possession. (*s*) On the 9th while we were absent at a ceremony first defendant put twenty Mussalmans at the door and kept us out.' All these statements are false, proved to be false by the evidence of some of the disinterested prosecution witnesses and many of the defence witnesses and known by the counter-petitioner to be false. The statements are further falsified by the probabilities of the case, and can still further be proved to be false by evidence to be adduced in the case. The petitioner (Subba Sastri) prays that sanction may be accorded to prosecute the counter-petitioner for offences under sections 193 and 195 of the Indian Penal Code."

The Acting Sessions Judge allowed two days for the return of notice to the counter-petitioner, which was, in fact, not served. He then passed the following

ORDER.—"I sanction the prosecution of Pampapati Sastri under sections 193 and 195, Indian Penal Code, with reference to the aforesaid statements made by him on oath in Sessions Case No. 14 of 1899."

Against this above order the counter-petitioner now preferred this criminal miscellaneous petition.

Mr. *Allan Daly* and *Venkataramana Ayyar* for the petitioner.

S. Subrahmania Ayyar for the counter-petitioner.

JUDGMENT.—The Acting Sessions Judge of Bellary has sanctioned the prosecution of the petitioner and three others for offences under sections 193 and 195, Indian Penal Code, in regard to

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statements made before him in Sessions Case No. 14 of 1899. The application for sanction sets out *seriatim* the statements alleged to be false, and avers that they are so and are proved to be so by the evidence of other witnesses, (who are not particularised) and by the probabilities also not specifically set out.

The Judge originally considered notice to the counter-petitioners to be necessary, but he unfortunately only allowed the short space of two days for the return of the notices. They were not served, the counter-petitioners being absent from their usual places of residence, and the Sessions Judge accorded sanction without issuing any further notice.

His order was in these terms:—"I sanction the prosecution of Pampapati Sastri under sections 193 and 195, Indian Penal Code, with reference to the aforesaid statements made by him on oath in Sessions Case No. 14 of 1899."

It was held by the High Court of Calcutta in *Kedarnath Das* v. *Mohesh Chunder Chuckerbutty*(1) that a subordinate Court granting sanction to prosecute under section 195, Criminal Procedure Code, should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not and that if this is not done the High Court will revoke the sanction. It was further held that in the circumstances the lower Court did not exercise a proper discretion in not giving the party against whom sanction was sought notice of the application.

We concur generally in these views of the Calcutta High Court. No doubt it has been held that notice is not invariably necessary in cases under section 195, Criminal Procedure Code (see *Queen-Empress* v. *Sheik Bean*(2)). But it was also held in that case that sanctioning a prosecution was a judicial act, and having regard to the peculiar circumstances of the present case and the fact that a previous District Judge had come to a different conclusion from the Acting Sessions Judge in regard to its main features, we think it was certainly one in which a proper discretion could not be said to be exercised unless the parties sought to be prosecuted were given an opportunity to be heard. That was clearly also the opinion of the Acting Sessions Judge in the first instance. There is nothing in the Acting Sessions Judge's order sanctioning the

(1) I.L.R., 16 Calc., 661. (2) I.L.R., 10 Mad., 232.

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prosecution from which we can come to the conclusion that he ever directed his mind to the real question in such cases, viz., whether there was a *primâ facie* case, on which a prosecution could be instituted with a fair chance of success. We have been referred by the learned Vakil for the counter-petitioner (petitioner in the lower Court) to certain passages in the judgment in the sessions case (which however forms no part of the records in these proceedings) but all they appear to show is that the Judge was not prepared to rely upon the evidence of the counter-petitioners (petitioners here) as a basis for the conviction of the then accused before him. That is not a sufficient ground for sanctioning a prosecution for giving false evidence. In the circumstances we resolve to revoke the sanction accorded by the Acting Sessions Judge, but we do so without prejudice to any further application the counter-petitioner may think proper to make in the matter.

APPELLATE CRIMINAL.

Before Mr. Charles Arnold White, Chief Justice, and Mr. Justice Benson.

PARIMANAM PILLAI (ACCUSED), PETITIONER,

v.

CHAIRMAN, MUNICIPAL COUNCIL, OOTACAMUND (COMPLAINANT), COUNTER-PETITIONER.*

1899. December 21.

District Municipalities Act (Madras)—Act IV of 1884, Bye-law No. 48—District Municipalities Act Amendment Act (Madras)—Act III of 1897—Covering a drain without municipal permission.

A bye-law of a municipality had been framed under the powers conferred by an Act of 1884 as amended by an Act of 1897, and was to the following effect:—"No public drain shall be covered without the permission of the municipal council." It had come into force in 1890. Prior to its coming into operation an earlier bye-law had subsisted, in substantially the same terms. An occupier of premises, who had covered a drain during the subsistence of the earlier bye-law, was charged with having committed an offence under the later bye-law, and contended by way of defence that he could not be convicted inasmuch as the

* Criminal Revision Case No. 477 of 1899, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the Proceedings of the Court of the Bench of Magistrates, Ootacamund, in Summary Case No. 660 of 1899.

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act complained of had been committed before the passing of the Act under which the complaint was laid. He was convicted by a Bench of Magistrates:

Held, that the conviction was right.

Per ARNOLD WHITE, C.J.—The bye-law applies to all drains which existed in a covered state at the time when it came into operation. The word "shall" is used throughout the bye-laws in the imperative, and not with reference to time, and this is the sense in which it is used in the bye-law in question.

Per BENSON, J.—A bye-law similar in terms to that under which the accused had been convicted having been in existence under the then Municipal Act at the time when the accused first covered the drain in question, the liability then incurred by him continued, under the General Clauses Act (Madras) unaffected by the passing of the present Municipal Act. The contention that the accused could not be convicted because the act complained of was committed before the present Municipal Act was passed, therefore, failed.

PARIMANAM PILLAI was charged before a Bench of Magistrates at Ootacamund with covering a drain without permission, in contravention of bye-law No. 48 framed under Madras Act IV of 1884 as amended by Madras Act III of 1897. He pleaded not guilty, and stated that the said drain had been covered with the plank now upon it for thirteen years and that there had been no interference with the drain or its cleansing. He said the plank had been placed where it was for the safety of the people coming to the bazaar, and that the municipality had done the same in several places. The Bench found that the municipal drain in front of the bazaar had been covered with a plank which had been there placed without municipal permission, and that the officials of the municipality had directed its removal. A fine of Rs. 10 was imposed, and the accused was ordered to remove the plank.

The accused preferred this petition.

Mr. *W. Barton* for the petitioner.

Mr. *J. H. M. Ryan* for the complainant.

ARNOLD WHITE, C.J.—The bye-law in question was made under the powers conferred by Act IV of 1884 as amended by Act III of 1897. The bye-law is as follows:—"No public "drain shall be covered without the permission of the Municipal "Council." This bye-law came into force in 1890. The petitioner contends that the bye-law in question has no application where a public drain was in fact covered at the time the bye-law came into operation. It is to be observed that an earlier bye-law made under the law in force prior to the coming into operation of Act IV of 1884 is in the same terms as the existing bye-law with the

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exception that the earlier bye-law required the permission of the municipal council to be a written permission. It would seem therefore that the existence of this covered drain was a contravention of the law as it stood prior to the coming into operation of the bye-law in question.

On the question of the construction of the bye-law of 1890—the bye-law now in question—I am of opinion that it applies to all drains which existed in a covered state at the time the bye-law came into operation. The word "shall" is used throughout the bye-laws as the imperative "shall"—and not with reference to time—and this is the sense, in my view, in which it is used in the bye-law in question. What the bye-law means is:—It is unlawful for a public drain to be covered without the permission of the municipal council.

I think the conviction was right and that the petition ought to be dismissed.

BENSON, J.—A bye-law similar in terms to that under which the petitioner has been convicted was in existence under the then Municipal Act at the time, some 13 years ago, when, according to the petitioner, he first covered the drain in question. The liability then incurred has continued, and is, under the Madras General Clauses Act, unaffected by the passing of the present Municipal Act. The argument therefore that the petitioner cannot be convicted because the action complained of was committed before the present Municipal Act was passed fails.

I would refuse to interfere with the conviction.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

1899. September 14, 15, 26.

SRIRANGAMMAL (PLAINTIFF), APPELLANT,

v.

SANDAMMAL AND OTHERS (DEFENDANTS NOS. 1 TO 8 AND 11 TO 14), RESPONDENTS.*

Succession Act—Act X of 1865, s. 202—Estate of intestate Native Christian—Suit for partition of estate by purchaser of widow's share before completion of administration—Dismissal of suit—Only remedy by way of administration suit.

A person to whom the Indian Succession Act, 1865, applied having died intestate in April 1884, his widow and son were in September of the same year granted letters of administration, which were cancelled for want of stamp duty, a fresh grant being made on 19th January 1885. Plaintiff, alleging that the said widow had executed a promissory note in her favour in September 1884, filed a suit against her on 6th January 1885, and, there being no appearance of the defendant, obtained an *ex parte* decree. In execution of the decree so obtained plaintiff attached portions of the estate of the deceased and brought them to sale, becoming herself the purchaser of the one-third share of the widow in each lot sold. In March 1885 the son was appointed sole administrator; in January 1888 he died and the letters of administration were revoked in consequence, and the amin of the District Court was appointed administrator of the estate until October 1894, when the son's widow was so appointed in his stead. Plaintiff now sued for partition of the property comprised in the estate of the deceased in order that she might obtain delivery of the portions of it which she had purchased in execution of the decree against the widow previously obtained as aforesaid. The estate of the deceased had never been administered or distributed. The defence was that the said previous decree had been obtained by fraud:

Held, that under section 44 of the Indian Evidence Act the defendants were entitled to set up this defence; and that the property of the deceased having become vested in his administrator under the Indian Succession Act, it remained so vested until the administrator had distributed the estate, and that, in consequence, the widow had no saleable interest in any part of the estate until in the course of the administration thereof her share had been determined and allotted to her. Until such allotment (which had not yet taken place) the only process by which plaintiff could legally claim the widow's interest in the estate was by a suit for the administration of the estate, to which suit the widow, if alive, would be a necessary party. If not alive, letters of administration to her estate would be necessary, the administrator being made a party.

Held also, that the suit could not be treated as an administration suit.

SUIT for partition by metes and bounds of certain portions of the estate of one John Arivanandam Pillai deceased, by an alleged

* Appeal No. 187 of 1898 against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Original Suit No. 10 of 1895.

purchaser of that share. The said Pillai was a Native Christian and had died intestate in April 1884 leaving him surviving his widow Sara Ammal, a son Somasundaram Pillai, husband of the first defendant, and a daughter Ratnavati Ammal, now impleaded as fourth defendant. The widow applied under the Succession Act for letters of administration to the estate, which comprised a considerable amount of property, and, the son also applying under section 202 of the said Act, letters were, on September 1884, granted jointly to the widow and the son. These were however cancelled as stamps were not furnished, and on 19th January 1885, a fresh joint grant was made though the son acted as sole administrator in fact. On 6th January 1885 plaintiff, (who, as was afterwards found, had much influence over the widow), filed a suit, (Civil Suit No. 2 of 1885), in the High Court at Madras claiming Rs. 15,000 from the widow, on a promissory note alleged to have been executed by the latter on 5th September 1884 in plaintiff's favour. The suit was not defended, and plaintiff obtained a decree *ex parte* for the amount claimed. In execution of the decree so obtained plaintiff attached various portions of the property of the deceased and brought them to sale, becoming herself the purchaser of the one-third share of the widow in each lot sold. The partition now sued for related to those properties; and plaintiff asked for delivery of the same. In February 1885 the son applied that letters of administration to the estate of the deceased should be granted to him alone, and an order was made to that effect on 6th March 1885. In January 1886 plaintiff caused a warrant to be issued for the arrest of the widow, but she was nowhere to be found; and in October 1887, the son applied unsuccessfully to set aside the attachments obtained by the plaintiff in execution of her decree in Civil Suit No. 2 of 1885; he also in the same month filed a suit in the High Court at Madras to set aside the said decree and for a declaration that the promissory note on which it had been obtained was a forgery. In January 1888 the son died, and the representatives not coming in, the suit abated. In August 1888, the letters of administration were revoked, because of the death of the son and the unfitness of the widow, and the amin of the Court was appointed administrator of the estate. In May 1890 the son's widow (the present first defendant) applied to be appointed interim administratrix of her late father-in-law's estate, and ultimately, on 30th October 1894, she was so appointed,

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the District Judge expressing the belief that a gross fraud had been played upon the Court in connection with the deceased's widow. The appointment of first defendant was confirmed on appeal by the High Court on 4th December 1896. The estate had, at the date of suit, not been administered or distributed. The defence to the present suit was that the promissory note upon which the *ex parte* decree in Civil Suit No. 2 of 1885 had been obtained and in execution of which plaintiff had purchased the properties, of which she now sued for partition, was a forgery. The District Judge held that the proceedings were not *bonâ fide*, that the promissory note sued on in Civil Suit No. 2 of 1885 had been given without consideration and that the decree in that suit had been fraudulently obtained, and that plaintiff had no rights as purchaser under the said decree, the sale having been in pursuance of a decree obtained by her own fraud on the Court. For these and other reasons he dismissed the suit.

The plaintiff preferred this appeal.

Mr. *John Adam* and Mr. *Joseph Satya Nadar* for appellant.

Hon. *Bhashyam Ayyangar*, *Sivasami Ayyar*, *Sundara Ayyar* and *Rangachariar* for respondents.

JUDGMENT.—(After fully setting out the facts their Lordships continued).—We agree with the District Judge and do not believe the plaintiff's story. We go further, however, and say we do not believe that the plaintiff had Rs. 15,000 or that she paid Rs. 15,000 to Sara Ammal in Madras. We do not believe that Sara Ammal executed the promissory note in Madras and we are not satisfied that she ever in fact signed the promissory note or that, if she did, she knew what she was doing. If she did, it is by no means certain that she ever endorsed the plaint or was aware that any action had been brought against her; and we have no hesitation in finding, as a fact, that the decree in Civil Suit No. 2 of 1885 was obtained by fraud and is null and void against the defendants.

We have no doubt that the defendants are entitled to set up this defence under section 44 of the Evidence Act. If authority were wanted for this decision the two cases (*Rajib Panda* v. *Chowdhry Lekhan Sendh Mahapatra*(1) and *Sreemutty Nistariney Dassee* v. *Rai Nundo Lall Bose*(2)) are in point; but apart from authority it is

(1) 3 Calc. W.N., 660.

(2) 3 Calc. W.N., 670.

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clear that by the words of the Act as by the English Law a person not an actual party to the fraud may set up fraud as an answer to a decree either of an English or any foreign Court—see *Cole* v. *Langford*(1).

All these questions are, however, matters which are entirely immaterial in this case, for in no circumstances can the plaintiff succeed in her present action.

The plaintiff's action is for partition by metes and bounds of certain specified portions of the estate of the late John Arivanandam Pillai set forth in the plaint schedule, she having purchased the one-third share of Sara Ammal in each of those portions of the property. All the property, however, of the deceased John Arivanandam Pillai became vested in his administrator under the Succession Act and remained in him until he distributed the estate, and the widow had no saleable interest in any part of the estate until, in the course of the administration thereof, her share was determined and became allotted to her. Until that happened (and it has not yet been done) the only process by which the plaintiff could legally obtain the widow's interest in the estate is by a suit for the administration of the estate of John Arivanandam Pillai, and to such suit the widow, if alive, must be made a party. If she is not alive, letters of administration to her estate must first be taken out and the administrator must be made a party. The plaintiff, in her evidence, says that she saw Sara Ammal a week before she was examined at the house of her pleader. If so, she was alive at the commencement of this suit and even if it were possible to treat this suit as an administration suit (though it clearly is not possible so to treat it) it would necessarily have to be dismissed for want of parties as she is not joined as a party.

The suit is wholly misconceived and should for this reason be dismissed. . . . . .

(1) [1898] 2 Q.B., 36.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar (Officiating Chief Justice).

1899. July 12.

QUEEN-EMPRESS

v.

VENKATASAMI NAIDU.*

Abkári Act (Madras)—Act I of 1886, s. 56(b)—License to keep toddy shop—Failure to keep shop open—Omission not constituting an act.

By section 56(*b*) of the Abkári Act (Madras), 1886, whoever, being the holder of a license or permit granted under the Act, "does any act in breach of any of the conditions of his license or permit not otherwise provided for in this Act" may be punished with fine or imprisonment or with both. The holder of a license to keep a shop for the sale of toddy having been convicted for failing to keep his shop open, in breach of one of the conditions of the license:

Held, that even if the licensee was under an obligation to keep open his shop (which did not appear to be the case), an omission to do so did not amount to an act in breach of the conditions of the license; and that the conviction must in consequence be set aside.

Case referred for the orders of the High Court under section 438 of the Code of Criminal Procedure. The holder of a license to keep a shop for the sale of toddy was convicted by a second-class Magistrate under section 56(*b*) of the Abkári Act I of 1886 (Madras), for having failed to keep his shop open, in breach of one of the conditions of the license granted to him. The Acting District Magistrate being of opinion that the conviction was against the ruling in *Queen-Empress* v. *Karuppan*(1), referred the case to the High Court. Under section 56(*b*) whoever, being the holder of a license or permit granted under the Act, "does any act in breach of any of the conditions of his license or permit not otherwise provided for in this Act," may be punished with fine or imprisonment or with both.

The parties were not represented.

Judgment.—There is nothing, so far as I can see, to show that the licensee was bound to keep a shop. Further, even if he was bound to keep one, an omission to do so does not amount to an act in breach of the conditions of the license. The conviction is therefore set aside. The fine levied should be refunded to the accused.

* Criminal Revision Case No. 220 of 1899, referred for the orders of the High Court under Criminal Procedure Code, section 438, by C. H. Mounsey, Acting District Magistrate of Coimbatore, in letter dated 27th May 1899.

(1) Criminal Revision Case No. 382 of 1895 (unreported). Case referred for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by the Acting District Magistrate of Malabar. By section 26(*a*) of the Abkári Act I of 1886, (Madras), a Collector is empowered to cancel or suspend any license or permit granted under it "if any fee or duty payable by the holder thereof be not duly paid." By section 56(*b*), whoever, being a holder of a license or permit granted under the Act, "does any act in breach of any of the conditions of his license or permit not otherwise provided for in the Act" may be punished, on conviction, with fine or imprisonment or with both." A second-class Magistrate convicted the holder of a license to keep a toddy shop on the ground that he had failed to pay the kist for five months on the dates prescribed by the license for such payments. The conviction purported to be under section 56(*b*) of the Abkári Act I of 1886, (Madras). The form of license granted to the licensee contained provisions for the punctual payment of fees and for the procedure to be followed in case of default, and by it the Collector was further empowered in case of breach of any of the conditions of the license either to impose a fine or to cancel the license. The Court, (Shephard, J.), delivered the following judgment on 27th August 1895:—"There was an omission "or default on the part of the license-holder, but there was no act done by "him in breach of the conditions of his license. The prosecution was a most "improper one. The conviction is set aside and the fine, if paid, must be "refunded."

QUEEN-EMPRESS *v.* VENKATASAMI NAIDU.

APPELLATE CIVIL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

1899. August 14.

RAGHAVA REDDI and others (Plaintiffs), Appellants,

v.

KANNI GRAMANI (Defendant), Respondent.*

Rent Recovery Act (Madras)—Act VIII of 1865—Regulation XXV of 1802, s. 8—Non-registration of landholder—Subsequent registration of undivided brother of landholder—Maintainability of suit.

Suits for exchange of patta and muchalka for fasli 1306 ending June 30th, 1897, were dismissed in the Sub-Collector's Court in August 1897 on the ground that the plaintiffs were not the registered landholders. Patta had been tendered in June 1897. Plaintiffs appealed. Subsequent to the filing of such appeals, namely, in December 1897, the Collector registered the undivided brother of the plaintiffs (who had died in April 1897) and it was contended at the hearing of the appeals that such registration covered all the undivided members of the family:

* Second Appeals Nos. 989 to 1011, &c., of 1898 against the decrees of J. Hewetson, District Judge of Chingleput, in Appeal Suits Nos. 591 to 597, &c., of 1897, affirming the decisions of J. H. Robertson, Acting Sub-Collector of Chingleput, in Summary Suits Nos. 373 to 376, &c., of 1897.

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Held, that in the absence of registration under section 8 of Regulation XXV of 1802, the landholder was not entitled to enforce acceptance of patta under the provisions of the Rent Recovery Act, and that there was no cause of action under that Act.—The original defect of title was not cured by the subsequent registration of the landholder in the name of the plaintiffs' undivided brother.

SUITS for exchange of patta and muchalka for fasli 1306 ending 30th June 1897. The pattas were tendered in June 1897. The suits were dismissed in the Sub-Collector's Court in August 1897 on the ground that the plaintiffs were not the registered zamindars. Appeals were filed in September 1897. In December 1897, the Collector registered the undivided brother of plaintiffs (who had died in April 1897) and on the appeals coming on for hearing before the District Court in January 1898, it was contended that such registration covered all the undivided members of the family. There had been no registration in the plaintiffs' names, nor had the tenants attorned to them or accepted pattas from them in previous faslis. The District Judge, following *Ayyappa* v. *Venkatakrishnamarazu*(1), held that the only zamindar was the registered zamindar and that the plaintiffs for want of such registration were not landholders when they tendered the pattas; and he dismissed the appeals.

Plaintiffs preferred these second appeals.

Seshagiri Ayyar for appellants.

Mr. *N. Subrahmanyam* for respondents.

JUDGMENT.—It was decided so far back as 1882 (see *Valamarama* v. *Virappa*(2) that a purchaser of a portion of a zamindari who had not obtained registration under section 8, Act XXV of 1802, was not entitled to enforce the acceptance of a patta under the provisions of the Rent Recovery Act. This decision has been followed in *Ayyappa* v. *Venkatakrishnamarazu*(1). We are not prepared to dissent from these decisions. The District Judge was right in holding that the plaintiffs had no cause of action under the Rent Recovery Act. We do not think that the subsequent registry of the zamindari in the name of the plaintiffs' undivided brother cured the original defect of title. There has been admittedly no registration in the plaintiffs' names, nor have the tenants attorned to them or accepted patta from them in previous faslis. We dismiss the Second Appeals Nos. 989 to 1011, &c., with costs.

(1) I.L.R., 15 Mad., 484.

(2) I.L.R., 5 Mad., 145.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

QUEEN-EMPRESS

v.

VENKATARAMANNA.*

1899. August 31. September 1.

Criminal Procedure Code—Act V of 1898, *ss.* 195, 476—*Penal Code—Act XLV of* 1860, *s.* 193—*Intentionally giving false evidence at a judicial proceeding—Preliminary enquiry by a Magistrate.*

At a preliminary enquiry held by a Sub-divisional Magistrate, at the direction of the District Magistrate, into the circumstances of a complaint against the police, a witness made a false statement on oath. Notice was subsequently issued calling upon the said witness to show cause why sanction should not be granted for his prosecution. The Magistrate having held that the witness was bound to tell the truth at the said enquiry and having granted sanction for his prosecution under section 193 of the Indian Penal Code:

Held, that the enquiry before the Magistrate in the course of which the alleged offence was committed was not a judicial proceeding within the meaning of section 193 of the Indian Penal Code, and the witness could not be convicted under that section.

PETITION to revise an order of the Sub-divisional Magistrate of Chittoor sanctioning the prosecution of the petitioner for making a false statement before the said Magistrate. A preliminary enquiry was held by the said Sub-divisional Magistrate, at the direction of the District Magistrate, into the circumstances of a complaint of bribery which had been brought against an Inspector of Police and a village Magistrate. At that enquiry petitioner was examined as a witness and made statements on oath on matters connected with the complaint. The said statements being contradictory, petitioner was called upon to explain them, when he said he had not spoken the truth at first, for reasons that he proceeded to give. Notice was then issued to petitioner to show cause why sanction for his prosecution should not be granted for having made on oath the aforesaid contradictory statements at the said enquiry. On cause being shown it was argued on petitioner's behalf that no sanction should be accorded, inasmuch as the enquiry was merely a departmental one, and was not a judicial proceeding within the meaning

* Criminal Miscellaneous Petition No. 81 of 1899, under Criminal Procedure Code, sections 435 and 439, praying the High Court to set aside the order of T. Rama Rao, Sub-divisional Magistrate of Chittoor, dated 12th June 1899.

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of section 193 of the Indian Penal Code. The Sub-divisional Magistrate said:— "I was enquiring into the truth or otherwise of a criminal complaint under the directions of the District Magistrate, with a view to ascertain whether there was a *primâ facie* case, so that if there was one, the District Magistrate might sanction the Police Inspector's prosecution. The witness was bound to state the truth . . . . My opinion is that the statements he made are false. According to his own showing he made false statements touching serious matters. I sanction his prosecution for an offence under section 193 of the Indian Penal Code and resolve to send up the case to the District Magistrate under section 476 of the Code of Criminal Procedure."

The witness preferred this petition.

Mr. *C. Krishnan* for the petitioner.

Mr. *N. Subrahmanyam* for the Crown.

JUDGMENT.—The petitioner made a false statement on oath before the Deputy Magistrate during an enquiry he had been ordered to make for the purpose of ascertaining whether the District Magistrate should grant sanction under section 197, Criminal Procedure Code, and thereupon the Deputy Magistrate sent him before the District Magistrate under section 476, Criminal Procedure Code, for committing an offence under section 193, Indian Penal Code. The present petition is to set aside this order on the ground that the enquiry in the course of which the false statement was made was not a "judicial proceeding," but was merely a departmental enquiry in which there was no authority to administer an oath.

Under section 197, Criminal Procedure Code, the Government or some officer empowered in that behalf by the Government can alone grant the sanction required thereby and for that purpose the Government or the officer to whom the power is delegated must in some way inform his mind as to whether or not he ought to grant sanction, but there is no provision in the Criminal Procedure Code or Indian Penal Code indicating how he is to do so. Unless he is authorised by some provision of law to inform his mind by holding a judicial enquiry himself or by another there is no authority in him or the person acting for him to administer an oath and the enquiry is merely a departmental enquiry. There is no such provision of law, and therefore the enquiry before the Deputy Magistrate in the course of which the alleged offence was committed

was not a judicial proceeding within section 193, Indian Penal Code, and the petitioner cannot be convicted under that section. Whether he has been guilty of an offence under any other section is not a question which we should go into upon this enquiry and we therefore confine ourselves to saying that we think the order complained of is wrong and must be set aside.

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APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

QUEEN-EMPRESS

v.

HANUMANTHA REDDI AND OTHERS.*

1899. August 30.

Criminal Procedure Code—Act V of 1898, s. 436—Fresh inquiry after improper discharge of accused persons—Jurisdiction of Sessions Judge after acquittal.

Charges under sections 304 and 147 of the Indian Penal Code were brought by the police against certain accused in the Court of a Deputy Magistrate, who took all the evidence for the prosecution but went on furlough without passing any order of committal or otherwise. His successor, considering the evidence insufficient to support the charges, altered them to charges under sections 325 and 147 of the Indian Penal Code, and after hearing evidence for the defence acquitted the accused. The Sessions Judge considering the alteration in the charges improper at such a stage ordered a fresh inquiry into the offence:

Held, that the Sessions Judge had exercised a jurisdiction not conferred upon him by law and that his order for a fresh inquiry must be set aside.

SEVEN persons having been charged by the police at the Court of a Deputy Magistrate with culpable homicide and rioting under sections 304 and 147 of the Indian Penal Code, 1860, all the evidence in support of the prosecution was taken. The Deputy Magistrate then went on furlough without passing any order as to committal of the accused or otherwise. On the case being taken up by his successor the accused did not require the prosecution witnesses to be recalled. The charges were then altered to those

* Criminal Revision Case No. 157 of 1899, under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the proceedings of W. M. Thorburn, Acting Sessions Judge of Bellary, in Criminal Revision Case No. 5 of 1899, passed in Calendar Case No. 44 of 1898 on the file of the Deputy Magistrate of Ádóni.

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of grievous hurt and rioting under sections 325 and 147 respectively, on the ground that the evidence was insufficient to support charges under the two first-mentioned sections. Witnesses for the defence were then examined and judgment pronounced, in which the case was held to be extremely suspicious and doubtful, and the accused were acquitted. On the case coming before the Sessions Court in revision, the Judge said :—"This was originally register No. 4 of 1898 on the file of the Deputy Magistrate, the police having charged the accused under section 304 of the Indian Penal Code. All the evidence for the prosecution had been heard, and the case was ready for committal. But the Magistrate went on furlough without passing orders and his successor, evidently at the instance of the accused, changed the charges to sections 325 and 147 of the Indian Penal Code. This was improper at such a stage on his part, and the reasons he gives for the change are very flimsy." The Sessions Judge then dealt with the facts, and concluded by ordering, under section 436, proviso (*b*), of the Criminal Procedure Code, that the Magistrate should hold a fresh inquiry regarding the offence, and that the District Magistrate be asked to transfer the case from the file of the Deputy Magistrate who had decided it, to some other Magistrate—to whom he gave directions as to further evidence that ought to be taken.

The accused preferred this criminal revision petition.

Mr. *R. F. Grant* for petitioners.

The Crown was not represented.

JUDGMENT.—The jurisdiction exercised by the Sessions Judge is a jurisdiction not conferred upon him by law.

The accused had not been discharged when the Sessions Judge interfered and under section 436, Criminal Procedure Code, it is only in such an event that he has jurisdiction to interfere. This has been decided in *Baijanath Pandey* v. *Gauri Kanta Mandal*(1) with which we agree.

We must therefore allow this criminal revision petition and set aside the order of the Sessions Judge.

(1) I.L.R., 20 Calc., 633.

PRIVY COUNCIL.

MAHOMED MIRA RAVUTHAR AND OTH (REPRESENTATIVES OF COUNTER-PETITIONER AND PLAINTIFF) APPELLANTS,

v.

SAVVASI VIJAYA RAGHUNADHA GOPALAR (PETITIONER AND DEFENDANT), RESPONDENT.

P.C.* 1899. November 17, 22. December 9.

[On appeal from the High Court at Madras.]

Civil Procedure Code—Act XIV of 1882, *s.* 311—*Petition to have set aside a sale in execution—Position of decree-holder who has obtained leave to bid—Dissuasion of persons from bidding.*

A decree-holder who has obtained leave to bid at a judicial sale is, in regard to restrictions upon him, in the same position as any other purchaser.

A charge against a bidder that he and those who have acted in concert with him have acted in such a manner as to prevent the best price from being obtained does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale to him.

The judgment of the High Court in *Woopendro Nath Sircar* v. *Brojendronath Mundul*, ((1881) I.L.R., 7 Calc., 316), though a correct decision on the case, was too broadly expressed in comprehending any dissuasion by a bidder at a judicial sale of other persons from bidding, as a ground for setting aside the sale.

The property of a judgment-debtor was sold in execution to the decree-holder, who, having obtained leave to bid, was declared purchaser at the auction sale at a price below its value. This decree-holder had on the day when the sale commenced agreed with a third person that, after it should be over, if he, the decree-holder, should have become the purchaser, he would then sell the property to that person for a specified sum. And these two combined that intending bidders should be dissuaded.

The Judicial Committee affirmed the decision of the High Court that, on a petition for the setting aside of the judicial sale under section 311 of the Code of Civil Procedure, neither the fact of the above agreement, nor the dissuasion of bidders, afforded sufficient ground for making the order.

But the High Court had decided, in favour of the petitioner, another point :—that there had been material irregularity, within that section, in an omission on the part of the decree-holding purchaser when he had applied for leave to bid. This had been that he had withheld information of the agreement from the Court, which had granted the leave to bid not having been made aware of the arrangement. The omission to disclose this fact had, in the opinion of the High Court, amounted to a fraud upon the Court executing the decree, and entitled the petitioner to have the sale set aside on the ground that in point of law no leave to bid had been granted :

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

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Held, by the Judicial Committee, that this ground had not been established by evidence on an issue between the parties, having been taken for the first time in the Court of appeal, with a change of the matter in controversy; and that the fraud on which alone the High Court's order could be sustained had neither been alleged nor proved.

APPEAL from an order (1) (1st April 1896) of the High Court, affirming an order (15th March 1895) of the Subordinate Judge of Tanjore.

The appellants were the representatives of the counter-petitioner Jainilabdin Ravuthar deceased, who was the purchaser of eight villages part of the respondent's estate at a judicial sale held on the 6th April 1892, and five following days. The respondent, zamindar of Singavanam, the son of Machalar Gopalar, the judgment-debtor, who died before 1891, was then a minor, and the estate was in charge of the Court of Wards. The sale was in execution of two decrees charging the land. One of them for more than Rs. 42,400 had been obtained by Jainilabdin in 1882, and the other decree, of 1883, for over Rs. 17,000, was held by another plaintiff. With interest calculated down to the time of the sale, more than Rs. 77,000 in the aggregate were due on them. The amount realized was Rs. 78,000, at the sale.

The respondent having attained majority in 1894 petitioned on the 15th May in that year to have the sale set aside under section 311 of the Code of Civil Procedure. His grounds appear in the report of *Jayinilabdin Ravuttan* v. *Vijia Ragunadha Ayyarappa Maikan Gopalar*(1), the only one now material being, that "as the "counter-petitioner and the zamindar of Papanad had entered "into an agreement and prevented those that came to bid from "making bids, the properties were sold for a very low amount." The counter-petitioner denied the fact. The Subordinate Judge found that an agreement was entered into on the 6th April 1892 between those parties that the decree-holder, if he became the purchaser, should sell to the zamindar for Rs. 85,000; that they had combined that bidders should be dissuaded; that the value of the villages was one and-a-quarter lakhs, at the least; and that the lower price only which had been obtained was due to that arrangement. The sale was set aside.

(1) (1896) I.L.R., 19 Mad., 315.

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The High Court, on appeal, affirmed this order, but not on the ground taken in the Court below. They held that the dissuasion of intending bidders had not been a sufficient reason for setting aside the sale within section 311. No suggestion of misrepresentation at the auction, or of any such attempts to deter, had been made. On the other hand, the omission to disclose the agreement amounted, in their opinion, to a fraud upon the Court, and entitled the petitioner to take the objection that, in point of law, no leave to bid was granted.

The reasons for the order of the High Court, and their order are given at length in I.L.R., 19 Mad., 319 at page 324.

The counter-petitioner obtained leave to appeal.

Mr. *J. D. Mayne*, for the appellants, argued that the order of the High Court was erroneous. A decree-holder having obtained leave to bid was in a position in no way different from that of any other bidder. Section 311 required material irregularity with its resulting loss to be shown for setting aside his purchase, just as in the case of any other purchaser. On the distinction between a cause of nullity and mere irregularity, reference was made to *Tassaduk Rasul Khan* v. *Ahmad Husain*(1). Here, in the first place, there had been no sufficient inquiry, and no evidence, that the alleged agreement of the 6th April 1892 had been entered into before the leave was applied for and granted. Secondly, even if it had been entered into before the application for leave to bid there had been no obligation binding upon Jainilabdin to disclose the agreement to the Court. Thirdly, it could not be rightly laid down that the leave obtained was rendered, by the non-disclosure of the agreement, no leave at all. Moreover it was to be observed that this ground of illegality in the obtaining of the leave to bid was not taken as an objection in the petition. It could not have been taken under section 311, for the omission was not an irregularity in the publishing, or the conducting, the sale. The objection on which the High Court had based their order was taken for the first time in appeal to them, and there had been no issue or inquiry directed as to the fact. [Lord DAVEY referred to *Coaks* v. *Boswell*(2).] That case would support the appellant, showing that when he had obtained leave to bid he was not in a position different

(1) (1893) L.R., 20 I.A., 176; I.L.R., 21 Calc., 66.
(2) (1886) L.R., 11 pp. Cas., 232.

from that of any other purchaser. Section 294 of the Code of Civil Procedure met the case of a decree-holder's purchasing without leave, but that section was not applicable to the case presented in the petition. Neither the grant of the leave to bid, nor the sale to the decree-holder, could be treated as void from the beginning. It had not been established that the leave to bid had been obtained by the suppression of an agreement which the decree-holder was bound to state; and the contention was that the sale, having been confirmed by order of Court under section 312 of the Code of Civil Procedure could only be set aside by regular suit, in which alone the fraud could have been alleged and tried upon an issue as to whether it had been practised. The proceedings taken while the estate was under the Court of Wards could not be set aside without establishing that the minors' interests had not been duly protected, and of this there had been no sufficient evidence.

Mr. *J. H. A. Branson*, for the respondent, argued that the judgment of the High Court was right. The evidence had established the fact of the agreement between the counter-petitioner and the Papanad zamindar, and the fact of the omission to disclose its existence to the Court, which, on being made aware of it, would not have granted the leave to bid. The result had been a fraud upon the Court; and the leave was as if it had not been granted. The obligation upon the decree-holder who obtained leave to bid was to exercise his right in a completely fair manner. Reference was made to *Woopendro Nath Sircar* v. *Brojendronath Mundul*(1), *Doorga Singh* v. *Sheo Pershad Singh*(2), *Sheonath Doss* v. *Janki Prosad Singh*(3), *Saadatmand Khan* v. *Phul Kuar*(4), *Rukhince Bullubh* v. *Brojonath Sircar*(5). The setting aside the sale, as the consequence of a decree-holder's purchasing without having obtained permission, was expressly prescribed as the remedy in section 294 of the Code of Civil Procedure. To bring forward by petition such a case as the present, where there, in effect, had been no permission, a petition under section 311 was not inappropriate. It was competent to the petitioner to take the objection under the latter section in the High Court for the first time.

(1) (1881) I.L.R., 7 Calc., 346. (2) (1889) I.L.R., 16 Calc., 194.
(3) (1888) I.L.R., 16 Calc., 132.
(4) (1898) L.R., 25 I.A., 146; I.L.R., 20 All., 412.
(5) (1879) I.L.R., 5 Calc., 308.

The with-holding the information affected the legality of the sale; and in *Nawab Khaja Ahsanulla Khan Bahadoor* v. *Hurri Churn Mozoomdar*(1), an objection taken before the High Court to a sale upon defective notice was held not to have been taken too late.

Mr. *J. D. Mayne* in reply.

Afterwards, on the 9th December, their Lordships' judgment was delivered by Lord HOBHOUSE:—

JUDGMENT.—The suit in which this appeal is presented was commenced in the year 1882. The appellants whose names are now on the record were substituted for the original appellant, the plaintiff in the suit and appellant below, on his death; but there has been no change of interest, and it will be convenient to use the name of appellant for all. The appellant sought to enforce a charge on the zamindari estate of Singavanam against the then owners, the present respondent who was a minor, and his father, who has since died. Another suit was brought by another person for the same purpose in the year 1883. Both plaintiffs obtained decrees. When the respondent's father died the estate passed into the management of the Court of Wards. In March 1891 the appellant obtained an order in execution of his decree for sale of eight villages parts of the estate. They were sold, apparently in execution of both decrees, in the month of April 1891. There was then due in the suit of 1882 upwards of Rs. 60,000, and in the suit of 1883 upwards of Rs. 17,000. The appellant who held the decree in the suit of 1882 obtained leave to bid at the sale, and he was declared to be the purchaser. He took possession, and was in possession when the present proceedings commenced.

In April 1894 the respondent came of age and the Court of Wards handed over the Singavanam estate to him. On the 15th May 1894 he presented a petition under section 311 of the Code of Civil Procedure for the purpose of annulling the sale of 1891. That is the section which empowers persons whose property has been sold to set the sale aside on the ground of material irregularity in publishing or conducting it. In his petition the respondent alleged a number of irregularities, but as to all except one the Courts below have found either that the allegation was erroneous or that the irregularity had not caused substantial injury.

(1) (1892) L.R., 19 I.A., 191; I.L.R., 20 Calc., 86.

The remaining charge was thus stated:—"That on the date "of sale an agreement was entered into between Papanad zamindar "and Jainilabdin in consequence of which intending purchasers "were dissuaded from bidding at auction."

The Subordinate Judge treats this charge as raising the following points for decision:—"(1) Whether there was any agreement "between the Papanad zamindar and the counter-petitioner on "the date of sale, 6th April 1891, and (2) whether in consequence "thereof, intending purchasers were prevented from bidding at "auction."

There was clearly a written agreement between the Papanad zamindar and the appellant, dated 6th April 1891, by which the appellant agreed that if he should purchase the villages he would resell them to Papanad for Rs. 85,000. The Subordinate Judge found that there was a further verbal agreement between the two to the effect that they would dissuade persons from bidding, and that some persons were so dissuaded. The villages were knocked down to the appellant at the price of Rs. 78,000, and the Subordinate Judge found that with some outgoings he paid Rs. 83,000.

Of the value of the property he says "The highest value may "be between 1¼ and 1½ lac roughly taken." He arrived at the conclusion that owing to the dissuasion of bidders the villages were undersold, causing substantial injury to the respondent, and that he was bound to set aside the sale under sections 311, 312 of the Code.

The Subordinate Judge proceeds on the ground that when a decree-holder obtains leave to bid, he is placed in a position of exceptional delicacy, and becomes subject to restrictions not applying to other people. He quotes a passage from a judgment of the High Court of Calcutta (*Woopendro Nath Sircar* v. *Brojendronath Mundul*(1):—"We think that when liberty is given to a decree-"holder to bid at the sale of the judgment-debtor's property, he is "bound to exercise the most scrupulous fairness in purchasing "that property; and if he or his agent dissuades others from pur-"chasing at the sale, that of itself is a sufficient ground why the "purchase should be set aside."

With the decision of that case no fault is to be found. The decree-holder there was acting in concert with, and partially for

(1) (1881) I.L.R., 7 Calc., 346.

the benefit of, one who stood in a fiduciary relation to the infant debtor; and there was clearly a conflict between their duty and their interest. The passage extracted from the judgment was not necessary for the decision, and in their Lordships' opinion it is too sweeping in its terms. In *Mahabir Pershad Singh* v. *Macnaghten*(1), it is laid down that leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any other purchaser. All purchasers are bound to abstain from breaches of trust and from intimidation or falsehood in keeping off bidders. But nothing of that sort is alleged in the present case.

On appeal, the High Court were in substantial agreement with the Subordinate Judge on the facts of the case. But they do not accept his conclusions of law. They say:—"The order is made "under section 311 of the Code, and it is based on the ground "of irregularity in the conduct of the sale. In our opinion there "has been no irregularity within the meaning of the section. No "charge is made against the person conducting the sale. The "charge is made against the respondent and those who acted in "concert with him, and it amounts to this: that they acted in "such a way as to prevent the best price being obtained and thus "caused loss to the judgment-debtor. So far as this particular "charge is concerned we are further of opinion that it does not "amount to a charge of fraud. Putting aside for the present "the fact that the purchaser was the decree-holder and confining "our attention only to the agreement made before and the conduct "of the parties at the sale, we do not think that any fraud was "established."

They then go on to show by reference to English authorities that an agreement between persons not to bid is no ground for setting aside the sale, or even for opening the biddings. And they conclude thus:—"The means by which competition was "discouraged at the auction were clearly of an innocent character. "In employing them, as in making the agreement with the "zamindar, the purchaser did not go beyond the limit of what he "was entitled to do in order to make a good bargain."

The learned Judges do not comment on the dictum of the Calcutta High Court, but it is clear that their view of the rule of

(1) (1889) L.R., 16 I.A., 107 at p. 114; I.L.R., 16 Calc., 692.

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law is in accord with that which has been pronounced by this Board.

Their Lordships agree in these conclusions. The logical result of them is that the High Court, finding that the matters alleged by the respondent did not amount to irregularity within the meaning of section 311 under which the petition was presented, and were of innocent character so as not to afford ground for setting aside the sale, should have dismissed the petition.

They go on however to take a point which, so far as the record shows, and for anything that Counsel can point out to the contrary, is raised for the first time in their judgment. It is certainly not mentioned in the respondent's petition, and certainly was not in the mind of the Subordinate Judge as one of the issues to be tried. The respondent alleged in his petition that the appellant had never obtained leave to bid at all, an assertion which was found to be erroneous. The appellant was not confronted with the assertion that having obtained leave to bid, he had done so by committing a fraud upon the Court.

The learned Judges held that, inasmuch as the appellant got leave to bid, his omission "to disclose the agreement to the Court "amounted to a fraud upon the Court entitling the judgment-"debtor to say that, in point of law, no leave to bid was granted." They then lay down that "there was a duty incumbent on the "appellant to disclose all the circumstances within his knowl-"edge bearing on the question of the expediency of his being "allowed to bid. Without such disclosure it is impossible for the "Court to exercise its discretion. The with-holding of infor-"mation is, in our judgment, no less a ground for cancelling a "sale than actual misrepresentation on the part of the applicant "who becomes the purchaser." On these grounds they set aside the sale.

It seems to their Lordships that the positions taken by the learned Judges raise serious questions relating to the procedure of the Courts. It is very important that one who seeks to set aside a purchase completed under the sanction of the Court should state the grounds on which he claims to impeach it, and should not be allowed after trial of the case to rely on other grounds which have not been the subject of trial or adjudication in the Court which takes the evidence. It is not easy to formulate a rule which will fit every case, but the principle is clear enough, that a party shall

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not be condemned in Court on allegations which turn on evidence, and which he has not been led to rebut by evidence. Whether fresh issues may be introduced, and how, without injustice, is a question of detail in each case; but their Lordships are led to think that in this case the essential principle has not been kept in sight.

It has been shown that the Subordinate Judge's view of the mortgagee's position is the view expressed in the dictum of the Calcutta High Court above quoted, and it is one which does not require the petitioner to allege or the Court to decide that leave was improperly obtained. Therefore no attention was paid to that question, which is wholly distinct from the questions of irregularity, and from the question whether the conduct of the appellant at the time of sale had the effect of lowering the purchase money.

The High Court however saw that the Subordinate Judge was wrong in law, and that the sale could not be impeached without getting rid of the leave to bid. They did not remand the case for a new issue, but they decided for themselves that the order was obtained by a fraud upon the Court, and therefore the position of the parties was the same as if no leave had been granted at all. The only foundation assigned for this decision that the appellant had committed a fraud not laid to his charge, is a passage to this effect:—"It is admitted that nothing was said about it (viz., the "agreement) when application for leave was granted. That the "agreement was in existence at that time there is no manner of "doubt."

Their Lordships must say that it is very embarrassing to find the case decided in appeal on a new charge which, considered in its bearing in law or on character, is of greater gravity and importance than all the other charges put together, without any reduction to writing of the terms of the admission, which is used to support it, or any record of the mode in which it was made, or any reason assigned why a new issue should not be tried; indeed without any recognition that it is a new issue. As the statement stands it is uncertain what is meant by "the agreement."

There are two agreements; one written and one verbal. The written one was with a nominee of Papanad, who says that it was for the benefit of the respondent, his brother-in-law. What that means is not clear, and though the agreement was re-affirmed six months after the sale, it has not been acted on by either party.

Its effect would, as the High Court observes, be to take away from the appellant himself any motive for bidding above Rs. 85,000 on his own behalf; but the creditor as such never has any motive for bidding higher than to secure his own debt, which is equally for the advantage of himself and his debtor. Why such an agreement should prohibit any other bidder in any but some indirect way it is difficult to see.

The verbal agreement to dissuade bidders is another matter. But if that is the agreement of which the High Court is speaking, it is impossible to say that there is no manner of doubt that it was in existence when the appellant's application was made, or even when the leave was given. On the contrary the evidence relating to this agreement, which indeed is extremely vague on every point, does not state when it was made. Consistently with the record it may have been made at any time during the six days over which the sale extended. There are no findings as to the material dates, and they cannot be collected from the evidence in the record. There is no reason why there should be such findings or evidence because, though very material to the new issue, they are not material to the issues raised by the petition.

The learned Judges below lay down that "there was a duty "incumbent on the appellant to disclose all the circumstances "within his knowledge bearing on the question of the expediency "of his being allowed to bid." There is nothing to show that the position of this appellant differed from that of other judgment-creditors, and taking the remark as a general one it requires qualification. In *Coaks* v. *Boswell*(1) the Court of Appeal stated the rule to be that a person whose position precluded him from purchasing (it was a solicitor in that case) must, when he applied for leave to purchase, either abstain from laying any information before the Court or must lay before it all the material information he possesses. That rule is considerably narrower than the rule laid down by the High Court, and yet it seemed to the House of Lords to be too broadly stated. Lord Selborne held that it is not the duty of the applicant to give information which is not requested, and concerning which there is no implied representation positive or negative, direct or indirect, in what is actually stated. Lord FitzGerald states the rule with nearly equal caution though in an

(1) (1886) L.R., 11 App. Cas., 232.

affirmative instead of a negative form:—"If he professes to give "the Court information on any particular subject with a view to "guide its discretion and obtain its approval of the proposed sale, "he is bound to lay before the Court all the material information "he possesses on that particular subject."

In order to judge whether an applicant has misled the Court, all material circumstances attending the application should be known. It is material to know whether the application was made *ex parte* or on notice. Their Lordships attach great importance to the obligation which rests on all persons seeking *ex parte* orders to be thoroughly open with the Court. But was this order made *ex parte?* When this question was asked during the argument no certain answer could be given. Mr. Branson thought it a matter of general practice to make such orders *ex parte*, and Mr. Mayne thought otherwise. From the observations of the High Court their Lordships infer that the order was made on notice to and with the approval of the Court of Wards, which, if true, is a very important circumstance.

Had the issue of fraud been raised, inquiry must have been made of the officer of the Court of Wards as to the communications made to him, and as to the line which he took about the sale in the Civil Court. He may have known of the written agreement with Papanad. On what grounds did the guardians rest their approval of the plan of which the High Court speak, and in what form was it given? All these matters are left in the dark so completely that we cannot be certain even whether the order was or was not made *ex parte*.

Another case was referred to (*Sheonath Doss* v. *Janki Prosad Singh*(1)). It has only an indirect bearing on the obligations of a decree-holder who asks leave to bid; but it opened another discussion on procedure in an important matter. In this case the Calcutta High Court dwelt on the necessity of great caution in granting leave to bid; indeed it laid down such conditions as would make the granting of leave a very rare thing instead of being, as their Lordships believe it is, a very common thing. These conditions are drawn from English practice, partly from cases in which the applicant was a trustee or solicitor for the debtor, and they are

(1) (1888) I.L.R., 16 Calc., 132.

applicable to a system under which the decree-holder has the conduct of the sale.

Doubtless the conduct of the sale gives opportunities for influencing its course one way or another, which do not follow on the mere leave to bid. The Civil Procedure Code clearly throws on the Court the whole responsibility of conducting the sale. From the observations of the High Court their Lordships infer that this sale was conducted as the law directs; but nothing express is said about it, and the respondent's Counsel contended that the ordinary practice is to allow the decree-holder to conduct the sale; and suggested it as probable that in this instance the appellant conducted the sale.

It is always unsatisfactory to reverse a decree for the reason that the ground on which it rests was not that on which the parties came to issue. But it is obvious that great injustice may be done by shifting the issue in the Court of Appeal, and so deciding without due investigation. There has in this case been a departure from recognised principle, which is calculated to lead to injustice; and though their Lordships cannot say, the case not being tried, that it has led to injustice, they are far from clear that it has not. A controversy raised about the propriety of proceedings during a sale has been treated as if it were a question whether a fraud was committed on the Court prior to the sale. For the decision of that question it is important to know every incident bearing on the application to the Court; the precise dates of the application, of the order, and of the agreements alleged to have been concealed; the proceedings in Court; the parties present; the state of their knowledge, and so forth. None of these things has been sifted nor, so far as appears, has the appellant had any reason for sifting them till the High Court came to decide the case in appeal. Their judgment is founded on an admission very vaguely stated and on a view of the obligations attaching generally to applicants for leave to bid which are unduly onerous at least to decree-holders at arms' length with their debtors. It is of course conceivable that if all relevant matters were ascertained the present appellant would be found to have fallen short of his duty; but in the present state of the case all their Lordships can say is that the respondent has neither alleged nor proved the fraud on which alone he can sustain the present order. Their Lordships will humbly advise Her Majesty to discharge the order and to dismiss the petition with costs in both Courts. The respondent must pay the costs of the appeal.

Appeal allowed.

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

Solicitor for the respondent: Mr. *R. T. Tasker.*

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar, Mr. Justice Boddam and Mr. Justice O'Farrell.

PADMANABHA CHETTIAR (DEFENDANT NO. 6), APPELLANT,

v.

WILLIAMS AND OTHERS (PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS NOS. 1 TO 4 AND REPRESENTATIVE OF PLAINTIFF NO. 1), RESPONDENTS.*

1899. August 29. October 19, 23.

Trusts Act—Act II of 1882, *s.* 56—*Suit by two out of eleven beneficiaries for possession of trust property—Maintainability of suit—Succession Act—Act X of* 1865, *s.* 271.

Two daughters of a testator sued defendants Nos. 1 and 2, the testator's sons and his administrators with the will annexed, and other defendants, for a declaration that certain properties devised by the testator to be held in trust and the rents divided among his eleven children were trust properties, and to recover possession thereof. A decree had been obtained against plaintiff No. 2 and her right, title and interest in the trust property brought to sale. Defendants Nos. 1 and 2 had filed a suit to set aside the sale but afterwards compromised it on the terms that the sale should be cancelled on payment of a certain sum by defendant No. 1, but that in default of such payment the decree should take effect. Default having been made the property was sold:

Held, (by the whole Court,) that the decree of the Court below awarding the plaintiffs possession of the whole property on behalf of themselves and the other beneficiaries must be reversed.

Per BODDAM, J.—That the alienations made in pursuance of the compromise entered into by the administrators were binding upon the plaintiffs and that therefore neither of them had any cause of action.

Per O'FARRELL, J.—That under all the circumstances the suit could not be treated as a suit to recover the plaintiffs' shares of the trust property.

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* Appeal No. 200 of 1898 against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Original Suit No. 7 of 1898.

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Per SUBRAHMANIA AYYAR, J. (*dissentiente*).—The fact that the plaintiffs had asked for a larger relief than they were entitled to did not warrant the dismissal of the suit altogether; and that the suit fell within the class of cases in which the relief against a third party is such as a Court of Equity will administer, and a *cestui que trust* may be entitled to sue the trustees and the third party jointly, but in which he will be bound to confine his suit to that specific matter in respect of which alone the third party is liable, and not to make it part of a suit for the general administration of the trust: and that plaintiff No. 1 was not precluded from recovering her eleventh share.

SUIT for a declaration and for possession of certain property. By his will bearing date the 6th of January 1864 Thomas Edmonds provided, *inter alia*, that certain houses should be kept in trust and the rents realised therefrom divided equally among his eleven children and their heirs, respectively, for their support and maintenance. The testator died in 1866. Of the houses so devised, only one, referred to as item No. 2, was in dispute in this appeal. No trustees were named in the will, but probate was taken out by the executors, who were the husbands of the two plaintiffs. One executor having died, and the other having been convicted for some offence, three of the testator's children were, in 1877, granted letters of administration to the estate, namely, defendants Nos. 1 and 2, and Caroline Edmonds. In 1880, defendant No. 5 obtained a decree against another daughter, plaintiff No. 2, and brought to sale her right, title and interest in the property. In 1889, defendant No. 1, one of the administrators, brought a suit against defendant No. 5, to set aside this sale, which suit was compromised, defendant No. 1 agreeing to pay Rs. 600 to defendant No. 5, and defendant No. 5 agreeing to cancel the sale. In the event of the sum of Rs. 600 not being paid, it was agreed that defendant No. 5 should execute the decree against the houses. The money was not in fact paid, and item No. 2 was brought to sale and purchased by defendant No. 6, the present appellant. Plaintiffs Nos. 1 and 2, daughters of the deceased, alleged that the deceased had left eleven children; that they, the two plaintiffs, were his sole surviving children, and that two of his children, who were dead, had left one child each, who were impleaded as defendants, but whose whereabouts were unknown. They sued for a declaration that the properties were trust properties and for recovery of possession on the ground that the compromise and the sales thereunder were illegal and improper, being contrary to the directions of the will and the trust and therefore

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not binding on the plaintiffs. Defendants Nos. 1 and 2 were children of the deceased and administrators of the estate; defendants Nos. 3 and 4 were grand-children of the deceased; defendant No. 5 was the decree-holder in the suit already referred to; and defendants Nos. 6 and 7 were purchasers of different portions of the trust property, in the execution of that decree. The District Judge decreed in plaintiffs' favour as prayed.

Defendant No. 6 preferred this appeal.

V. Krishnasami Ayyar for appellant.—Plaintiffs cannot succeed because of non-joinder, only two out of eleven children having sued: and they can, at the most, be only entitled to two-elevenths of the property sued for. If all the members of a family must be joined even when the suit is brought by the managing member (see *Alagappa Chetti* v. *Vellian Chetti*(1)) the necessity for all to join must be greater in the case of a family in which no joint interest arises and each is entitled only to his or her share. Another ground is that the beneficiaries in this case are not entitled to sue, under the Trusts Act, section 56; (see also Lewin on Trusts, 9th edition, page 774). Plaintiffs should have sued for the removal of the administrators—for the appointment of others. See the judgment of James, L.J., as to a suit by beneficiaries, in *Sharpe* v. *San Panlo Railway Company*(2); also *Ex parte Kearsley*(3), where Cave, J., said that the creditors should apply to the Court to obtain leave to use the name of the trustee. See also *Kamaraju* v. *Asanali Sheriff*(4). This being a suit for possession of property and not for the execution of a trust, section 59 of the Trusts Act does not apply. Assuming the trust to be a valid one and not offending against the rule against perpetuities, the plaintiffs, being tenants in common, can each sue only for his share and no more: See *Mahabala Bhatta* v. *Kunhanna Bhatta*(5). [He referred to section 159 of the Succession Act, and to *Mannox* v. *Greener*(6), *Shookmoy Chunder Dass* v. *Monohari Dassi*(7) affirmed by Privy Council in *Sookhmoy Chunder Dass* v. *Srimati Monohurri Dasi*(8).] The suit is not maintainable at all, being not for administration but for the recovery of property.

(1) I.L.R., 18 Mad., 33.
(2) L.R., 8 Ch. App., 597 at p. 609.
(3) L.R., 17 Q.B.D., 1 at p. 3.
(4) I.L.R., 23 Mad., 99.
(5) I.L.R., 21 Mad., 373 at p. 380.
(6) L.R., 14 Eq., 456.
(7) I.L.R., 7 Calc., 269.
(8) L.R., 12 I.A., 103; I.L.R., 11 Calc., 684.

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In any case, the share of the second plaintiff has been sold and only the first plaintiff can claim. [He also referred to *Chandu* v. *Kombi*(1) as showing that a suit in ejectment cannot be converted into a suit for redemption.]

Seshagiri Ayyar, with him *Natesa Ayyar*, for respondent No. 2.—The sale under the compromise is invalid and the former sale stands. Beneficiaries, when of one mind, may, under section 56 of the Trusts Act, require a transfer of the trust property. Under section 63, trust property may be followed in the hands of third persons. [He referred to Lewin on Trusts, 8th edition, page 258; and to *Ex parte Griffin*(2) and asked the Court to administer the trust.]

The appeal came on again for hearing in the presence of BODDAM, J., in consequence of a difference of opinion between their lordships, (SUBRAHMANIA AYYAR, OFFG. C.J., and O'FARRELL, J.), and the Court, as above constituted, upon hearing the arguments, (which were substantially the same,) delivered the following judgments:—

SUBRAHMANIA AYYAR, J.—Under the will of the late Thomas Edmonds, the house—plaint item No. 2—which is the only property in dispute in this appeal, should be taken to have been devised by the testator to his children, eleven in number. The plaintiffs, who are two of the eleven children, became, therefore, on their father's death, entitled each to her share. Assuming for the present that the transactions, under which the sixth defendant (the appellant) claims the property in question, are, as contended on behalf of the plaintiffs, not binding on any of the devisees, the plaintiffs cannot get relief beyond the extent of their interest. They have certainly no right to ask for possession of more than their shares, should they seek any possession. It is clear, therefore, that the decree of the lower Court, which awards possession of the whole property to the plaintiffs on behalf of themselves and the other devisees, cannot, as it stands, be sustained.

The question for consideration is whether the plaintiffs cannot recover even their shares. Before proceeding to consider this question, it should be stated that it was assumed in the lower Court that the first defendant, though appointed only as an administrator, had by his conduct constituted himself a trustee. The learned

(1) I.L.R., 9 Mad., 208.

(2) 2 G. & J., 116.

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vakil for the sixth defendant urged here strongly that even on that assumption the frame of the plaint was quite wrong and the proper course for the plaintiffs was to bring a general administration suit.

Now, in the first place, it is scarcely necessary to say that the plaintiffs' asking for larger relief than they are entitled to does not warrant the dismissal of the suit altogether. The wishes of the parties must not be confounded with their rights, and because they fail to prove all they wish there seems no reason for denying them the rights which they establish (per Fulton, J., in *Mohidin* v. *Shivlingappa*(1)), and in the second place it is difficult to see why the plaintiff should be confined to that form of suit. This view is supported by law as laid down in *Lund* v. *Blanshard*(2), which, in principle, is equally applicable to this country. The observations of the Vice-Chancellor, Sir James Wigram, bearing on the point under consideration, are as follow:—"It is difficult to lay down "any general rule as to the frame of a suit by a *cestui que trust* in "respect of claims against strangers, as debtors, or liable to the trust, "by reason of the misconduct of the trustees, or parties to whom the "stranger is primarily liable. There are apparently three forms "of suit applicable to such cases, according to circumstances. First, "the *cestui que trust* may not be entitled, or, at least, not able use-"fully to do more than compel his trustees to allow him to sue the "third party at law, as in the case of a claim for unliquidated "damages, and no collusion between the debtor and the trustee. "Secondly, the relief against the third party may be such as a Court "of Equity will administer, and the *cestui que trust* may be entitled "to sue the trustees and the third party jointly, but be bound to "confine his suit to that specific matter in respect of which alone "the third party is liable, and not at liberty to make it part of a "suit for the general administration of the trust, as in *Salvidge* v. "*Hyde*(3) and *Pearse* v. *Hewitt*(4). Thirdly, there are cases in which "the third party, against whom a limited demand is made, may pro-"perly be made a party to a suit for the general administration of a "trust, with which, except in respect of that limited demand, he has "no concern: *Attorney-General* v. *Cradock*(5)." It will be seen that the present case falls within the second class of forms mentioned in the above extract. And in such a form of suit there does not seem

(1) I.L.R., 23 Bom., 666 at p. 670.
(2) 4 Hare, 9, at p. 28.
(3) Jac., 151.
(4) 7 Sim., 471.
(5) 3 Myl. & Cr., 85.

to be anything to prevent the plaintiffs from suing for possession of their respective shares alone, or the Court from granting a decree for such shares even though they have asked for more, provided their right to relief against the defendant is established and their shares ascertained and complete relief can be given to them without prejudice to the rights of others.

In this view it is necessary, first, to determine whether the first plaintiff is in any way precluded from receiving her share, which must be taken to be one-eleventh, as there is nothing to show that, owing to anything that occurred subsequent to her father's death, she has a right to more. Now, if the decree passed on the compromise, which was entered into in December 1890 in Original Suit No. 21 of 1899 between the first and the fifth defendants in the present suit, and the sale held in execution of that decree were, as urged for the sixth defendant, binding on the first plaintiff, this suit must fail even in regard to her share. But, in the first place, she was not impleaded in the said suit and she had no hand in the compromise. She is, therefore, not affected thereby as a direct party thereto would be. Was she, however, bound in the sense that the charge, which was created by the compromise and on account of which the property was sold, was a charge that the first defendant could make even as an administrator? Of course, an administrator could not bind parties interested in the estate by a charge if the party taking it has notice that it is for a purpose unconnected with the performance of the duties of administrator—Williams on Executors and Administrators, 9th edition, 803 note. How does the matter stand on the facts here? The creditor of the second plaintiff who, in Original Suit No. 204 of 1880 in the Trichinopoly District Munsif's Court, caused that plaintiff's interest in the property in question to be sold for a debt due by her, was undoubtedly entitled to do so. None of the ten devisees other than the said plaintiff or the first defendant as an administrator being responsible for the above-mentioned debt, the sale on account of it did not, in the slightest degree, touch any right in the property possessed by those devisees or the first defendant as an administrator. The first defendant, in the last-mentioned capacity, had thus absolutely no business to take proceedings to set aside the sale of the second plaintiff's interest, and the charge created by the compromise entered into in proceedings taken for that purpose and

in consideration of the sale being set aside must be held to be a charge, to the knowledge of the fifth defendant, foreign to the purposes of the administration and, consequently, not binding on the first plaintiff. Nor can the sixth defendant support the sale, made in pursuance of the compromise, on the ground that he is a *bonâ fide* purchaser. For he was not such a purchaser, having had clear notice of the facts which show that the charge was not created for the purpose of administration. With reference to the mortgage of 1891 set up by the sixth defendant, it is not necessary to consider whether the first plaintiff was bound thereby, inasmuch as, assuming that she was, the whole of the principal and the interest payable under the mortgage have been liquidated by the usufruct received by the mortgagee as found by the District Judge, the correctness of whose finding on the point there is no reason to doubt. It is scarcely necessary to say that any enquiry as to the *bonâ fides* of the plaintiffs is quite immaterial as was pointed out in *Dance* v. *Goldingham*(1) by James, L.J., who observed thus:—"The plaintiff is entitled to have her rights and equities enforced in this "Court, and what may have been the motives inducing the plaintiff "to put the Court in motion we cannot inquire into. We have only "to inquire, in the administration of justice in this Court, whether "the plaintiff has the right claimed, and whether the defendants are "under the liability which is alleged." In other words, in granting or refusing relief to a plaintiff what the Court has to consider is:—(i) Has the plaintiff an interest in the subject matter of the suit? (ii) Has he a title to sue in respect of it? (iii) Has he a right to call upon the defendants to answer his claim? (iv) Can complete relief be given without prejudice to the rights of others? As will be seen from what has been said, all these conditions are satisfied in the present instance. It follows, therefore, that the first plaintiff is not precluded from recovering her eleventh share.

Turning next to the second plaintiff's case it must be held to be different. For her interest was long ago sold in execution of the decree against her and so far as she is concerned the sale was never set aside. It is true that, as between the first defendant and the fifth defendant, it was by the compromise agreed that the sale was to be treated as set aside. But since the second plaintiff was not a party to the compromise, I cannot see how she is

(1) L.R., 8 Ch. App., 902 at p. 912.

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entitled to claim any benefit thereunder. If this opinion is correct, it does not at all follow, as urged on behalf of this plaintiff that the fact that the fifth defendant has not appealed against the District Judge's decree in the present case gives her a right to her share. For, at the date of the institution of this suit in 1897, the said defendant did not possess any interest whatever in the disputed property so as to be bound by the decree therein, inasmuch as, at the sale held in 1890, the property passed as against the fifth defendant to the sixth defendant. The latter was thus the only party against whom a decree in respect of this property could be legally passed in this suit, and therefore the only party who was entitled to appeal about it and who could be affected by failing to do so. But supposing for argument that the second plaintiff is entitled to rely on the compromise as setting aside the sale of her interest, as the District Judge thought she was, she cannot certainly be allowed to take advantage of the arrangement only so far as it related to the renunciation by the fifth defendant of his right under the Court sale which validly transferred to him all her interest in the property but repudiate the remainder of the arrangement which was the consideration for such renunciation. If she can rely on the compromise at all she must take it as a whole and then it must be held that she is bound by the sale which was made in accordance with the terms of the compromise.

In my opinion, possession of one-eleventh share in item No. 2 and in the sum of Rs. 518 should be awarded to the first plaintiff, the first plaintiff receiving from the sixth defendant costs throughout in so far as she has succeeded, she as well as the second plaintiff paying the said defendant costs throughout in so far as he has succeeded, and both the plaintiffs and the property decreed to the first plaintiff being liable for the whole of the Court fees due to the Government. I would modify the lower Court's decree accordingly.

O'FARRELL, J.—The two plaintiffs who bring this suit *in forma pauperis* are daughters of one Thomas Edmonds who died in 1866. He left a will (exhibit A) dated 6th January 1864. One of the provisions of the will directed that his three houses in the Military Cantonment of Trichinopoly and other specified house property "be kept in trust and the rents realized therefrom be "divided equally among the whole of my children and their heirs

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"respectively for their support and maintenance." One of these houses is item No. 2, which is alone in dispute in this appeal. The fifth defendant brought a suit against the second plaintiff, got a decree, and brought to sale her right, title and interest in the property. The first defendant (who with the second defendant it must be taken had succeeded to the position of the original executors under the will) filed a suit against the fifth defendant to set aside the sale. It ended in a compromise, evidenced by exhibit III, whereby the first defendant (who was also a beneficiary under the will) agreed to pay Rs. 600 and the fifth defendant to cancel the sale. In the event of the Rs. 600 not being paid it was agreed that the fifth defendant should execute the decree against "the "plaint-mentioned property" which appears to mean the houses themselves. The money was not paid and item No. 2 (*inter alia*) was brought to sale and purchased by the sixth defendant, who is the appellant in the present appeal. The sale appears to have taken place about 1890.

The present suit was brought by the two plaintiffs for a declaration that the properties are trust properties and for recovery of possession on the ground that the compromise and the sales thereunder are "illegal and improper, being contrary to the direc-"tions of the will and the trust and therefore not binding on the "plaintiffs." (See paragraph 11 of the plaint.) It will be noted here that these plaintiffs do not say that the compromise was effected without their knowledge or consent or that of the other beneficiaries, nor is there any evidence that it was so. They seek to succeed on the bare allegation that the compromise was contrary to the directions of the will and the nature of the trust. The plaintiffs further allege that of the other beneficiaries who seem to have been originally nine in number (though even here there is a doubt whether on the true construction of the will, one of the sons was not entirely disinherited) the whereabouts of one is not known, and the rest have refused to join in the suit, and have therefore been made defendants.

The District Judge has given the plaintiffs a decree as prayed and the sixth defendant appeals. Before entering into the questions arising in the appeal I may briefly dispose of one point. In the Court below a contention was raised by the sixth defendant that the trust was invalid as offending against the law of perpetuities. The District Judge decided against this contention on the

ground that under the principle embodied in section 84, Succession Act, the provision in the will amounted to an absolute bequest of the *corpus* in favour of the children. Neither party—for obvious reasons—now desires to contest this view and it may be adopted for the purposes of this appeal. I may also in passing mention that though the Succession Act does not apply to the present case (the will having been executed in 1864) yet reference has been made to that Act and the Trusts Act as embodying general principles in force prior to the passing of those enactments. It is in this sense that any reference to the acts in this judgment must be understood.

The first question that arises in the appeal is whether the suit, so far as it is a suit for possession of the trust properties and not of the plaintiffs' share therein will lie at all. It is contended, and I think rightly, that the property itself is vested in the trustees who alone can sue for its recovery. The right of the beneficiaries is to have the trust administered and the trustees, if necessary, removed and fresh trustees appointed. The District Judge's view appears to be that the first defendant committed a breach of trust; that the sixth and seventh defendants purchased the property knowing of that breach; and that, therefore, they became trustees themselves. Even if so, that will not give the first and second plaintiffs a right to sue for possession of all the property on behalf of themselves and the other legatees. The District Judge refers to section 56 of the Trusts Act where numerous beneficiaries if all of one mind may require the trustees to transfer the trust property to them. That provision is clearly inapplicable here. The beneficiaries are not all of one mind, and they have not required the defendants to make over the property to them. At the most the beneficiaries other than the plaintiffs and the first defendant are indifferent. Why should the plaintiffs benefit by such indifference rather than the purchasers? The plaintiffs may be entitled to sue for possession of their shares of the property. I do not think they are entitled to that relief in this suit (even if the second plaintiff be not bound by the sale, a point I shall afterwards consider). In *Lund* v. *Blanshard*(1), the Vice-Chancellor no doubt observed that a *cestui que trust* may be entitled to sue the trustees and the third party jointly; but he added—what is in point here—

(1) 4 Hare, 9.

that he was bound to confine his suit to the specific matter in respect of which the third party was liable—liable, I take it, to the plaintiff. He would scarcely be competent to sue in respect of the shares of other *cestuis que trustent* who did not desire to join. Much less would he be entitled to sue on behalf of a trustee who also a *cestui que trust* (as is the first defendant here) and was a party to the alleged breach of trust on which the suit was founded. See *Parnell* v. *Hingston*(1). To put it shortly, no relief is sought in the present suit against the first defendant; on the contrary, it is sought to recover the whole property on his behalf as well as on behalf of the other beneficiaries; the case is therefore not within the observations in *Lund* v. *Blanshard*(2). I do not see how the present suit can be treated now as a suit to recover the plaintiffs' share of the property—whatever that may be—from the defendants including the first defendant. That, it appears to me, is to change the character of the suit altogether. The plaintiffs have not asked for any such relief nor can their vakil tell us what share they are entitled to. It was perhaps originally, according to the allegations in the plaint, two-elevenths, but at the present day may be more. Another reason why they are not entitled to any indulgence is that, if (as I shall afterwards show) the second plaintiff has no right to object to the compromise, the suit when confined to the first plaintiff's one-eleventh (or even one-tenth) share would be within the cognizance of a District Munsif. Again, it is suggested by the respondent's vakil that this suit may be treated as an administration suit and the plaintiffs themselves or any persons whom the Court thinks fit appointed as trustees. I do not think this would be a proper course. There is no prayer for the removal of the first defendant and he is, I think, evidently colluding with the plaintiffs. Nor would the plaintiffs themselves, being paupers, be proper persons to be appointed trustees.

Again, I am by no means satisfied that the compromise was either illegal or a breach of trust. The first defendant was entitled to act independently of the second (see section 271, Succession Act, 1 Williams on Duty of Executors, 9th edition, p. 816) and one objection taken to the compromise therefore fails. Next, I think it clear that the second plaintiff cannot dispute the validity of the

(1) 3 Sm. & G., 337 at p. 341. (2) 4 Hare, 9.

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compromise. Although she was no party to the suit (nor could she be, as the administrator alone was entitled to sue) she could hardly have been unaware of it. She has carefully abstained from alleging that she was not aware of her brother's acts. Nor has the first defendant alleged it either in his written statement or in his evidence as plaintiffs' second witness. All this is very significant. The second plaintiff has been benefited by the compromise, the decree against her having become inoperative. I do not think it lies in her mouth now to repudiate the acts of the first defendant. Her share, at any rate, is clearly bound. As for the other beneficiaries the case is not so clear. But if they were competent to sanction the compromise and did agree to it or subsequently ratify it there would be no breach of trust at all. There is no direct evidence, but it is significant that none of them except the plaintiffs have thought fit to raise any objections to the sales. The plaintiffs' suit was only brought eight years after the sales and there is no explanation for the delay. This apparent acquiescence for so long a period might fairly raise a presumption (which is not in any way rebutted) that the beneficiaries were all assenting parties to the acts of the first defendant. There is nothing to show that the debt on which the second defendant was sued was not contracted for the benefit of the family. If it were for her sole benefit, why did the first defendant agree that his share of the property should be bound? We know nothing of these transactions. It has not been either alleged or proved—as I have before pointed out—that the first defendant effected the compromise behind the back of the beneficiaries. Why should we, when so little is known of the transactions and where the *mala fides* of the suit is manifest, go out of our way to presume a breach of trust, and grant the first plaintiff relief that she has not asked for and the exact extent of which she cannot even now define. If she had gone into the witness-box and sworn that the first defendant defrauded her, it might be a different matter. In the absence of positive evidence of this character, fraud should not, I think, be presumed, especially where there is so much apparent acquiescence on the part of those alleged to have been defrauded. I have already indicated my opinion that the first defendant is colluding with the plaintiffs; and that is the reason why no exception is made by the latter which would be prejudicial to his interests, and why no evidence is forthcoming as to the nature of the transactions which resulted in the

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compromised decree. Bad faith is, of course, no reason why a plaintiff should be deprived of any right he may be entitled to claim in a suit properly instituted—but it is I think an element in determining whether he shall be allowed (if that can be done) to alter the character of his suit, or be awarded reliefs he has not merely not claimed but—as it appears to me—designedly abstained from claiming.

I would, therefore, hold that the suit in its present form is unsustainable, the plaintiffs not being entitled to possession of the entire property, or to a mere declaration when they can get no substantial relief. The second plaintiff, in my opinion, is absolutely estopped from questioning the validity of the sales. The first plaintiff may possibly be entitled to relief as regards her share, in a suit properly framed for the purpose, if she can explain her long inaction and show that she did not assent to the compromise entered into by the first defendant. In the view I take, it is not necessary to consider the question arising as to the mortgage. I would allow the appeal and dismiss the plaintiffs' suit with costs throughout so far as regards the sixth defendant, and item No. 2 in the plaint.

BODDAM, J.—I am of opinion that this appeal should be allowed.

In 1866, one Thomas Edmonds died leaving by his will certain properties in trust for his eleven children. No trustees were named in the will but probate was taken out by the executors appointed by the will. The executors were the husbands of the two plaintiffs. Of the executors one died and the other was convicted and sent to jail for some offence. Afterwards in 1877, the first and second defendants and Caroline Edmonds, three of the children of Thomas Edmonds deceased, were granted letters of administration to the estate of Thomas Edmonds deceased with the will annexed. In 1880 a suit was brought by the fifth defendant against the second plaintiff and a money decree obtained against her in Original Suit No. 204 of 1880 on the file of the District Munsif of Trichinopoly. In execution of that decree, either the trust property, or the interest of the second defendant in the trust property, was sold; and the fifth defendant became the purchaser and interfered with the trust property. In 1889 the first defendant (who was apparently the only administrator who acted) brought a suit against the fifth defendant and the second plaintiff to establish his right as administrator to the plaint-mentioned property (apparently

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the whole of the trust property) and to set aside the auction sale thereof; and on the 8th December 1890 a decree was passed in pursuance of a razinamah entered into between the first defendant and the fifth defendant, the second plaintiff's name being struck out of the suit at the request of the first defendant. The razinamah decree provided that the first defendant should pay the fifth defendant Rs. 600 through the Court within the 31st March 1891 and in default the fifth defendant should be at liberty to execute the decree against the plaint-mentioned property and collect the said sum of Rs. 600 with interest at half per cent. per mensem, and that all the rights that had accrued to the fifth defendant by virtue of the execution proceedings and the sale held in Original Suit No. 204 of 1880 on the file of the Trichinopoly District Munsif should thereby be cancelled.

The first defendant made default in payment of the Rs. 600 and the fifth defendant in execution of the decree brought the whole of the trust property to sale. Part of it was purchased by the sixth defendant and the rest by the seventh defendant. As, however, the sixth defendant is the only appellant we have only to consider the rights of the parties with respect to the part purchased by him, viz., item No. 2 in the plaint schedule. In 1897 the two plaintiffs brought this suit against two of the administrators, sons of Thomas Edmonds deceased (the third apparently being dead though nothing is said about her in the plaint), two grand-children of Thomas Edmonds deceased, the fifth defendant (who was plaintiff in Original Suit No. 204 of 1880 on the file of the Trichinopoly District Munsif and defendant in Original Suit No. 21 of 1889 and who in execution of the decree therein brought to sale the trust property) and against the sixth and seventh defendants who were purchasers of the trust property in execution of that suit. They claim a declaration that the plaint property is trust property and that the alienations are not valid and binding upon the plaintiffs and ask for a decree for possession on behalf of themselves and other legatees. They alleged in their plaint that Thomas Edmonds left eleven children: that they (the two plaintiffs) and the first and second defendants are his sole surviving children and that two of his children who are dead left one child each respectively whose names are put in as defendants but of whom they say their whereabouts are unknown. They say nothing about any other children of Thomas Edmonds. They make no

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allegation of breach of trust by the defendants Nos. 1 and 2 and make no claim for their discharge from the trust or for the appointment of any trustees, and beyond the general statement in the plaint as to the surviving children and the fact that two deceased children left each a child, make no attempt to trace or join the representatives of any of the remaining children of Thomas Edmonds.

Now, the first question I have thought it proper to consider is one that goes to the root of the case, apart from any question of the form of action, viz., whether the alienations are binding upon the plaintiffs, and I am of opinion that they are binding and therefore that neither of the plaintiffs has any cause of action.

Whatever may have been the exact legal rights obtained by the fifth defendant in execution of his decree in Original Suit No. 204 of 1880 on the file of the Trichinopoly District Munsif's Court, it is not disputed that the first and second defendants (and possibly Catherine Caroline Edmonds if she was then alive—though it is probable that she was not then alive) as administrators, were the trustees and as such the trust property was vested in them alone (see paragraph 6 of the plaint). They, therefore, were the proper persons to take legal steps against any one who interfered with the execution of the trusts or with the trust property. The second defendant was, as he says in his written statement, a young man and engaged elsewhere and did not interfere in the management of the trust estate but left it to the first defendant, and, as I have said above, Catherine Caroline Edmonds was apparently dead. The first defendant therefore was—both in law (section 271, Succession Act and 1 Williams on Executors, 816) and with the sanction, tacit it may be, but nevertheless with the sanction of the other trustee or trustees as well as of the *cestui que trusten's*, one of whom was made a party defendant and raised no objection on the score of parties—not only justified but legally bound in pursuance of his duty as trustee to sue the fifth defendant when the right of the trustees to administer the trust property was called into question. His action, therefore, Original Suit No. 21 of 1889, cannot be impugned, for it is obvious that the trust properties were the "plaint-mentioned properties" as the right to execution under the decree was confined to the "plaint-mentioned properties" and it is not suggested that execution of that decree went against any

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properties other than the plaint-mentioned properties, with the result that the sixth and seventh defendants became purchasers of the whole of the trust property.

It appears clear, therefore, to me that rightly or wrongly the fifth defendant had obtained possession of the whole of the trust properties and that the action of the first defendant in suing him in Original Suit No. 21 of 1889 was proper and bound all the *cestui que trustents* who were interested as legatees in that property and not only the second plaintiff who was a party to it.

Again, just as a trustee can sue for the trust property so also he has power to compromise his suit and thereby bind the *cestui que trustents* provided that he does not thereby become a party to a fraud but acts for the interests of the beneficiaries. Nothing of the kind is suggested here; but on the other hand, having regard to the fact that the second plaintiff was obviously a consenting party to the decree (as evidenced by her consenting without complaint to having her name removed from the suit at the time the compromise was entered into) and is now a co-plaintiff, ten years afterwards with the only other surviving child of the testator except the trustees, defendants Nos. 1 and 2, and that the plaintiffs do not complain of any breach of trust or devastavit by the trustees, it must be assumed that at that time it was considered by all that the compromise was for the benefit of the trust estate. That being so, the alienations that have taken place under the decree, passed in pursuance of that compromise, are binding upon the estate and upon all the beneficiaries, though it may be that the beneficiaries might perhaps in certain events have a cause of action against the trustee first defendant for not paying the Rs. 600. That, however, is not the case of the plaintiffs. The plaintiffs are not entitled, therefore, in my opinion to the declaration they seek, much less to the remedy they ask for.

I am, moreover, of opinion that the suit in its present form cannot be sustained. The plaintiffs are two out of eleven beneficiaries. They are not entitled to possession either of the whole or of any part of the property unless all the beneficiaries are before the Court and are of one mind. They can only be entitled to have the trusts carried out and this the suit does not ask for: and moreover, in such a suit all the beneficiaries must be before the Court in order that the shares of each may be determined. [redacted] trustees are removed the property vests in them and

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they alone are entitled to possession on behalf of the beneficiaries unless all the beneficiaries are of one mind and present before the Court. It cannot be assumed that all the beneficiaries are before the Court when the plaintiffs allege that they were eleven in number and the representatives of five of those eleven are not even named and it is not asserted that the two grand-children who are before the Court are the sole legal personal representatives of their parents. In my opinion the District Judge, in paragraph 11 of his judgment, has misunderstood the contention. The plaintiffs in their plaint say that Thomas Edmonds left eleven children and it lies upon the plaintiffs to show that all the parties are before the Court, particularly where the question is whether the suit can be considered to be a suit of a nature different to that which it bears upon the face of it. The property is vested in the trustees until they are removed and there is a proper suit by all the beneficiaries for possession to be transferred to them. In the absence of any of the beneficiaries or in the absence of proof that they are all of one mind the suit cannot be successful. Moreover, the plaintiffs' allegations in paragraph 14 of the plaint show that the beneficiaries are not all of one mind.

I am therefore of opinion that the suit in its present form is unsustainable. I would therefore allow the appeal of the sixth defendant with costs throughout. The plaintiffs must pay the institution fee in respect of item No. 2 in the plaint schedule and the property in this appeal throughout.

APPELLATE CIVIL.

Before Mr. Charles Arnold White, Chief Justice, and Mr. Justice O'Farrell.

1899. October 16.

PERIYA AYAL (PLAINTIFF), APPELLANT,

v.

NARAYANA PADAYACHI (DEFENDANTS NOS. 1 TO 7, REPRESENTATIVE OF DEFENDANT NO. 8, DEFENDANTS NOS. 9 TO 11 AND REPRESENTATIVE OF DEFENDANT NO. 5), RESPONDENTS.*

Hindu Law—Will—Construction—Devise of lands to brother to be enjoyed jointly with the testator's widow—Power of alienation during widow's lifetime.

A testator, by his will, directed that his lands should be enjoyed by his brother from generation to generation and for ever, with power to alienate the same by sale, gift or otherwise, but that he should enjoy them jointly with the testator's wife. Upon its being contended that the provision in favour of the wife merely conferred upon her, or recognised, a right to maintenance and that the power of the brother to alienate was as extensive during the life of the widow as after her death:

Held, that on the true construction of the will the testator did not intend the brother to have any power of alienation during the widow's lifetime.

DORAIKANNU PADAYACHI died in 1891, having first executed a will which contained the following clause amongst others:—"These lands . . . . shall be enjoyed by my senior younger brother Narayanasami Padayachi from generation to generation and for ever with power to alienate the same by sale, gift or otherwise, but he should enjoy the same jointly with my wife Periya Ayal, paying away at the same time the debts that are due by me to those individuals whom I have described here below. Further he (my senior younger brother—Narayanasami Padayachi), besides performing the obsequies for me, shall also perform the obsequies for my wife the afore-mentioned Periya Ayal when she shall have departed this world."

The said senior younger brother, Narayanasami Padayachi, having alienated the lands and thereby deprived the widow Periya

* Second Appeal No. 1426 of 1898 against the decree of W. F. Grahame, District Judge of South Arcot, in Appeal Suit No. 156 of 1896, modifying the decree of S. Mahadeva Sastri, District Munsif of Chidambaram, in Original Suit No. 885 of 1895.

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Ayal from jointly enjoying them during her lifetime the said widow brought this suit against him and others to recover the lands, with mesne profits. The District Munsif tried, as issues, whether, by the terms of the will, the testator had given away all his property to defendant No. 1 with a direction to maintain the plaintiff; or whether the property was bequeathed to plaintiff for her life, with remainder over to defendant No. 1, after plaintiff's death. He found that plaintiff was given a life interest in the property; and that the provision relating to joint enjoyment had been inserted by mistake. He gave plaintiff possession with mesne profits, as prayed. Defendants Nos. 3 to 12 claimed to be entitled as *bonâ fide* purchasers, from defendant No. 1 through defendant No. 2; and nine of them appealed to the District Court.

The District Judge said:—"Plaintiff has come into Court claiming the whole of her deceased husband's property and Rs. 651 mesne profits, on the ground that it was her husband's intention to leave the property exclusively to her during her lifetime, and claims that the terms of the will are not unambiguous, either from the ignorance of those who drew up the will or because of fraud on the part of first defendant and his friend. She contended also that at the date of her husband's death there was money enough belonging to him to discharge his debts and that there was no necessity to alienate any of the property to discharge debts. First defendant contended that the will gave the property of the deceased exclusively to first defendant, who, being pressed by creditors alienated it to second defendant for Rs. 3,000, which is all it is worth. Defendants Nos. 2, 4, 9, 10 and 11 contended that by the will the property became exclusively the property of first defendant, that plaintiff has exaggerated the value of the property and mesne profits and that if she has any interest in the property she is entitled only to hold it jointly with defendants. Defendants Nos. 3, 5, 6, 7, 8 and 12 added that Doraikannu Padayachi owed more than was stated in the will. From the contentions of the defendants, it is clear that they contend that the property was sold partly to clear off debts due by Doraikannu Padayachi. In paragraph 7 of his judgment, the District Munsif found that none of the debts due by Doraikannu Padayachi were paid off and that there was no consideration for any of the sale deeds under which the various alienations were made. On the evidence I am led to agree with the District Munsif that not one of the debts

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which may have been due by Doraikannu Padayachi was paid either by first defendant or by second defendant or by any other defendant. I am not however prepared on that finding to say that the alienation by first defendant is, therefore, absolutely invalid and void as the District Munsif has found . . . . The view that I take of the will is that it gives joint management and ownership to first defendant and to plaintiff during plaintiff's lifetime and that after plaintiff's death, first defendant is to become absolute owner of the property. As to plaintiff's contention that Doraikannu Padayachi intended to give to plaintiff exclusive ownership during her lifetime, it cannot be acceded to. It has been ruled by authority that the intentions of a testator are to be gathered from the language in which he may see fit to set them forth. The language of this will is clear and unambiguous, and it gives a joint ownership. That being so, it follows that if first defendant chooses to alienate his own share of such ownership, he is at liberty to do so, but he cannot by any means alienate the share which belongs to plaintiff. Therefore, first defendant had the power and right to alienate his joint ownership and managership if he should see fit to do so. He did see fit, and he has done so. The result is that persons other than first defendant became joint owners with plaintiff. I am, therefore, constrained to modify the decree of the Lower Court and to decree that plaintiff is entitled to joint possession of the plaint property with the various alienees, and she is entitled to half the mesne profits on the plaint property to be ascertained in execution. Plaintiff and the defendants Nos. 2 to 12 will receive and pay proportional costs on what is decreed and on what is disallowed."

Plaintiff preferred this second appeal.

Ranga Ramanujachariar for appellant.

Mr. *N. Subrahmaniam* for respondents.

JUDGMENT.—We overrule the stamp objection (referred to in the fourth ground of appeal) which has been raised in this case. The objection was not taken in the Court below and consequently it is not open to the appellant to take it before us.

In the view we take as to the construction of the will it is not necessary for us to deal with the point raised by the appellant that the eighth defendant did not appeal to the lower Appellate Court.

The case turns entirely upon what is the construction of the will. It is not easy to say with certainty what were really the

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intentions of the testator. His predominant motive would seem to have been a desire to benefit the first defendant. He describes the disposition of his property which he intended to effect by the will as "arrangements in favour of" the first defendant. He then proceeds to specify his property and to direct that it shall be enjoyed by the first defendant for ever with power of alienation. This provision, if it stood alone, would of course constitute the first defendant absolute owner. But the will goes on to provide that the first defendant is to enjoy the same, *i.e.*, the properties which the testator intended to dispose of, jointly with the testator's widow. It has been argued on behalf of the respondents that this provision in favour of the wife merely conferred upon her or recognised, a right to maintenance and that the power of the first defendant to alienate was as extensive during the plaintiff's lifetime as after her death. We think that such construction would nullify the words "he should enjoy the same with my wife," and was not in accordance with the intention of the testator. In our judgment the testator did not intend the first defendant to have any power of alienation during the widow's lifetime, and we are consequently unable to adopt the view taken by the District Judge.

We set aside the decree of the District Judge and decree that the plaintiff is entitled to joint possession of the plaint properties together with the first defendant. The respondents must pay the appellant's costs in this Court and in the Court below.

APPELLATE CIVIL.

Before Mr. Charles Arnold White, Chief Justice, and Mr. Justice O'Farrell.

1899. October 16.

CAUSSANEL (PLAINTIFF), APPELLANT,

v.

SOURES AND OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVES OF DEFENDANT No. 3), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 108, 540—*Decree passed* ex parte *through non-attendance of defendants—Appeal—Order for re-trial* de novo *on ground that defendants had insufficient opportunity for being heard—Illegality of such order.*

The defendants in a suit for possession of property and an injunction filed written statements but failed to appear, either in person or by pleader, when the suit came on for hearing in the District Munsif's Court. Evidence adduced by the plaintiff was taken and a decree passed in plaintiff's favour as prayed. Some of the defendants applied to the District Munsif for an order to set aside the *ex parte* decree, which application was refused; and the defendants then appealed against the original *ex parte* decree, when the Subordinate Judge reversed the said decree and remanded the suit for re-trial *de novo* on the ground that the defendants had not had a proper opportunity for being heard:

Held, that t was not competent for the Subordinate Judge to pass such an order: that he could only deal with the case on the materials on the record: and that the decree of the District Munsif must be restored.

SUIT to recover possession of a chapel and appurtenances belonging thereto, of which plaintiff claimed to have been wrongfully dispossessed by the defendants, and for an injunction. The defendants filed written statements, but when the suit was called on for hearing did not appear either by themselves or by pleader. The District Munsif heard the evidence of plaintiff and his witnesses and decreed in his favour, as prayed. Defendants Nos. 2 and 7 applied to the District Munsif under section 108 of the Code of Civil Procedure for an order to set aside the *ex parte* decree, which application was refused. All the defendants then appealed, and the Subordinate Judge called for a report from the District Munsif as to the reasons for the non-appearance of the

* Second Appeal No. 1459 of 1898, against the decree of K. Krishna Rao, Acting Subordinate Judge of Tinnevelly, in Appeal Suit No. 246 of 1897, reversing the decree of V. Malhari Rao, District Munsif of Tuticorin, in Original Suit No. 657 of 1896.

defendants or their pleader: and this report was duly presented, the explanation, apparently, being, that defendant No. 1 had omitted to give the pleader his address. The Subordinate Judge held that the pleader was unaware of the date fixed by the District Munsif's Court for the examination of witnesses, and that under the circumstances defendants must be given an opportunity for having the case enquired into in their presence. He set aside the decree of the District Munsif and remanded the case for trial *de novo*.

The plaintiff preferred this second appeal.

Rangachariar for appellant.

Mr. *Joseph Satya Nadar* for respondents.

JUDGMENT.—In our judgment the order passed by the Subordinate Judge cannot be supported. At the trial, none of the defendants appeared. The District Munsif being satisfied that the requirements of section 100, Civil Procedure Code, had been complied with, proceeded *ex parte* and passed a decree in favour of the plaintiff. Thereupon the defendants Nos. 2 to 7 applied on their own behalf to the District Munsif under section 108 of the Civil Procedure Code for an order to set aside the *ex parte* decree. This application was refused. The defendants Nos. 2 to 7 could have appealed from the order refusing to set aside the *ex parte* decree under section 588 (9) of the Civil Procedure Code, but they did not think fit to do so. Any order made in an appeal under section 588 (9) would have been final.

The course which all the defendants then adopted was to appeal against the original decree passed *ex parte* under the power of appeal given by section 540 of the Civil Procedure Code. On the hearing of this appeal the Subordinate Judge reversed the District Munsif's decision and passed an order remanding the case for re-trial on the ground that the defendants had not had a proper opportunity of being heard. It was not competent for the Subordinate Judge to pass this order.

All that he could do was to deal with the case on the merits on the materials on the record. This being the only point argued before the lower Court, on appeal, the order of the Subordinate Judge must be set aside and that of the District Munsif restored, and the respondents in this Court must pay the costs of this appeal and the costs in the Court below.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

1899. September 12, 13, 26.

NARASAYYA AND OTHERS (DEFENDANTS Nos. 1 to 3, 5 to 15, 22 to 34, 36 to 41, 43 to 47, 49 to 51, 53 to 55, and 57 to 70), APPELLANTS,

v.

VENKATAGIRI RAJAH (PLAINTIFF), RESPONDENT.*

Ejectment suit—Lands held on amaram tenure resumable at will on reasonable notice—What amounts to reasonable notice considered.

A village and its hamlets had been given by a plaintiff's ancestors to the ancestors of the defendants on amaram service. Plaintiff now required the defendants to hand over the land, and had served two notices on them to that effect. The first of such notices had been served less than three months before the end of a fasli; in the second, suit was threatened in default of reply within ten days:

Held, that lands held on amaram tenure are resumable, and that the defendants had no permanent right of tenure.

Held further, that before such resumption of lands can take place reasonable notice must be given: and that the notices which had been served were insufficient.

SUIT to recover possession of a village and its hamlets with profits. Plaintiff alleged that the village in question had been given by plaintiff's ancestors to the defendants' ancestors on amaram service, that among other services defendants collected revenue, guarded the treasury and kept tannahs, or formed watch parties on ghauts. Plaintiff being unwilling now to receive such services from defendants, had required them to hand over the village, which demand had been refused. Plaintiff claimed the right to take back the village at his option. Defendants contended that the suit was not sustainable; that the said villages had been given to their ancestors as inam many centuries ago and had since been in their enjoyment. They denied the alleged grant under amaram tenure, and claimed that the villages had been given for services rendered in times of war with other nations, and that after

* Appeal No. 169 of 1898 against the decree of U. Achutan Nayar, Acting Subordinate Judge of Nellore, in Original Suit No. 45 of 1897.

the advent of the East India Company plaintiff's ancestors had been relieved from lending sepoys, and had thereupon fixed a permanent jodi on the villages and parted with the latter and had no right to recover possession of them now. The Subordinate Judge ordered the village and its hamlets to be surrendered, with profits, to plaintiff, on payment by the latter of compensation for improvements. On the first issue,—as to whether plaintiff was entitled to recover the land, he held as follows:—"From the evidence above set forth I come to the conclusion that the village is held on condition of ordinary amaram service and is resumable at the will of plaintiff. There is no evidence that the defendants or their ancestors did any particular service; and the only document on the point is exhibit BBB which is a takeed by the Rajah to his Tahsildar to tell the Mukku people that they were liable to render service. It was on the supposition that amaram grants are resumable that the income enjoyed by the amaramdars was considered as part of the zamindar's actual resources. The decision of the Privy Council in *Unide Rajaha Raje Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo*(1) is a distinct authority for the proposition that amarams are resumable in Madras (vide *Sitaramarazu* v. *Ramachendrarazu*(2) and *Puran Mal* v. *Padma*(3)). The defendants' pleader relied on *Maharajah Nilmoney Singh Deo* v. *Sheo Tewary*(4), *Chunder Nath Roy* v. *Bheem Sirdar*(5), *Rajah Nilmoney Singh Deo* v. *The Government*(6), *Baboo Koolodup Narain Singh* v. *Mahadeo Singh*(7), and *Forbes* v. *Meer Mahomed Tuquee*(8). These cases do not refer to amarams and show that a grant made for service cannot be resumed when services are dispensed with or when there is no occasion for the service. The first issue is found for plaintiff." The second and third issues related to whether notice was necessary, and, if so, whether the notice which had been given was sufficient. The Subordinate Judge held that notice was not necessary; but agreed that if notice was necessary, insufficient notice had been given. One notice issued in 1883, (filed as exhibit ,) had been served less than three months before the end of the asli. A second notice, (exhibit YY,) served in 1893, threatened uit in default of reply within ten days.

(1) 7 M.I.A., 128. (2) I.L.R., 3 Mad., 367. (3) I.L.R., 2 All., 732.
(4) (1864) W.R., (C.R.), 324. (5) (1864) W.R., (Act X Rul.), 37.
(6) 6 W.R., (C.R.), 121. (7) 6 W.R., (C.R.), 199. (8) 13 M.I.A., 438.

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The defendants preferred this appeal.

Seshagiri Ayyar for appellants.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*), with him *S. Subrahmania Ayyar*, for respondent.

JUDGMENT.—The defendants (appellants) and their ancestors have, it is shown, been in enjoyment as middlemen since about the year 1750 of the lands from which it is now sought to oust them. They appear to have in the first instance held under certain persons who are said to have been members of the Bathsali family and it is shown that the rights of this family were transferred to the ancestors of the plaintiff (the present Rajah of Venkatagiri) towards the close of the last century and that the defendants and their ancestors have, since then, been middlemen under the Rajah of Venkatagiri, paying jodi at varying rates till now. The Subordinate Judge has found (paragraph 18) that the ancestors of the defendants held the lands from about 1753 to 1777 on kattubadi right and that in the latter year the village enjoyed by them was granted to them on amaram service. We cannot find on the record sufficient evidence to justify the finding that any actual change in the nature of the tenure took place at the period mentioned, but we do not attach much importance to this point as Mr. Stratton's report of 1800 (exhibit KKK) shows that there is not in reality any very clearly defined difference between kattubadi and amaram tenure. Far too much importance has, in our opinion, been attached by the Subordinate Judge to the fact that in various documents executed at different times the ancestors of the defendants have been described as holding on amaram tenure. It is quite clear that this term is used very loosely and that different significations are attached to it in the several papers, &c, on the record in which it is to be found. What is plainly shown is that towards the close of the last century the ancestors of the defendants held the lands with respect to which the present suit has been brought on payment of a favourable rate of jodi, reduced from the full rate because the holders were under the obligation of supplying a certain number of peons for military and other similar purposes for the use of the Rajah. In 1802, however, Lord Clive, who was then Governor of Madras, in a letter addressed to the Rajah informed him that it had been decided that he should for the future be relieved from the obligation of supplying peons, &c., for military service, and that in consequence

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of the relief which his "finances would derive from the disbandment of his military peons" the peishcush payable by him would be increased from 21,673 to 1,11,858 star pagodas. Lord Clive went on to inform the Rajah that as he has been relieved from the obligation to render any military service for the future, it was unnecessary that the lands which had been granted for the support of the amaram and kattubadi peons should any longer be held on military tenure and the Rajah was accordingly directed to release the peons "from that condition." There can be no reasonable doubt that on the receipt of these instructions the ancestors of the defendants, together with the other amaram and kattubadi peons holding lands as middlemen on favourable rates of jodi, were relieved from the obligation of military service and that the jodi payable by them was at once increased. In the case of the lands to which the present suit relates it would appear that the increase was from about 90 or 100 to about 170 pagodas. From that time forward the middlemen were no doubt frequently described as holding on amaram tenure, but it is perfectly clear that they ceased to be men holding on a favourable rate of jodi on the understanding that they performed military duties and that therefore the nature of their tenure ceased to be amaram in the proper meaning of the term. The defendants in their written statement (paragraphs 3 and 4) assert that their lands were originally given to them as poligar inams (whatever that may mean) on a small fixed jodi but that when the plaintiff's ancestors were informed in 1802 by the officers of the East India Company that they were relieved from the obligation of lending sepoys for the service of the Company they were also told that they were in consequence at liberty to enhance the rate of jodi payable to them on these inam lands. They then add as follows:—"The plaintiff's ancestors thereupon fixed a permanent jodi of Rs. 840 on the suit villages and arranged with the defendants' ancestors to be in possession of the said villages with powers of alienation by sale, gift or otherwise." Of the existence of this alleged agreement there is not a particle of evidence on the record and we have no hesitation in holding that no such agreement was ever entered into. On the other hand what is shown is that the defendants and their ancestors have never had any fixity of tenure, that no grant acknowledging any such right has ever been conferred on them by the plaintiff or his predecessors, and that the jodi payable by them has been varied

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from time to time and has been raised from 179⅓ pagodas payable up to 1815 (*vide* exhibit M) to about 211 pagodas (paragraph 17 of Subordinate Judge's judgment).

As regards the first issue, the case would, therefore, appear to stand as follows:—The lands were at the close of the last century held on amaram tenure by the ancestors of the defendants. The decision of the Privy Council (*Unide Rajaha Raje Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidoo*(1)) is distinct authority for the proposition that lands held on such tenure are resumable. In 1802 the nature of the tenure was altered, its military character was taken away and the jodi was greatly increased. The defendants' contention that an agreement was then entered into between their predecessors and the ancestors of the Rajah by which they were granted the right of holding the lands permanently has not been established, but on the contrary it has been shown that no grant of any description was ever made in their favour and that they have, ever since they ceased to perform military service, held their villages on a precarious tenure, paying a jodi that has been gradually increased.

On behalf of the appellants our attention has been drawn to the decision of the Judicial Committee of the Privy Council (*Forbes* v. *Meer Mahomed Tuquee*(2)), but a reference to that judgment shows that there is no analogy between the case of the defendants there and the present appellant as the former were holding their lands under sannads granted to them by the zamindar, and as the decision of their Lordships that they were not liable to be ejected is mainly based on a consideration of the terms of those sannads.

For the foregoing reasons we uphold the finding of the Subordinate Judge on the first issue.

The second and third issues are as to whether the respondent (plaintiff) can recover possession of the lands sued for without giving notice to the defendants, and if not whether he has given proper notice. The Subordinate Judge has held (paragraphs 24 and 25) that notice was not necessary and also that there was no sufficient notice. As to this latter question we have no hesitation in holding that exhibits C and YY were not sufficient notices, and Mr. Bhashyam Ayyangar who appears for the respondent (plaintiff) has stated at the hearing that he is not prepared to

(1) 7 M.I.A., 128.

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contend that there was proper notice. We cannot, however, uphold the finding of the Subordinate Judge that notice was unnecessary. In a case very similar to this, to which allusion has already been made, their Lordships of the Privy Council have held that before resumption of the lands can take place there must be reasonable notice (*Unide Rajaha Raje Bommarauze Bahadur* v. *Pemmasamy Venkatadri Naidoo*(1)); *vide* also *Radha Pershad Singh* v. *Budhu Dashad*(2). Mr. Bhashyam Ayyangar urges however, on the part of the respondent that even if it be held that his client is not entitled in the present suit to get a decree for ejectment on the ground that there has not been sufficient notice to the appellants yet that he is entitled to a declaration to the effect that the tenure under which the defendants are holding is not of a permanent character; and he draws attention to the fact that in *Radha Pershad Singh* v. *Budhu Dashad*(2), which is in many respects similar to the present suit, such a declaration was granted. On referring, however, to the plaint we find that it contains no prayer for a declaration and we are not prepared to give the plaintiff a relief not asked for.

To sum up briefly we hold that the appellants have no permanent right of tenure of the lands sued for, but that they cannot be ejected from these lands without sufficient notice, and that, therefore, as there has been no such notice, Appeal Suit No. 169 of 1898 must be allowed with costs, the decision of the Subordinate Judge reversed and the plaintiff's suit dismissed with all costs throughout.

(1) 7 M.I.A., 128. (2) I.L.R., 22 Calc., 938 at p. 942.

APPELLATE CIVIL.

Before Mr. Justice O'Farrell and Mr. Justice Michell.

1899. October, 3.

BHUPATIRAZU (PLAINTIFF), APPELLANT,

v.

RAMASAMI (DEFENDANT), RESPONDENT.*

Local Boards Act (Madras)—Act V of 1884, ss. 64, 73, 155—Tax payable on land—Favourable tenure—Claim by landholder of more than one-half of the tax from tenant—Invalidity of custom for tenant to pay whole tax.

A tenant paid an annual rent of Rs. 64 to the landholder, the tenure being of a nature dealt with by sub-section (iii) of section 64 of the Local Boards Act (Madras), 1884. The landholder distrained on the tenant's property in respect of the whole amount of local cess payable in respect of the land, contending that it should be calculated on the rent value, which was admittedly Rs. 710. It was found that under a custom subsisting in the district the whole amount of the local cess was payable by the tenant:

Held, that having regard to section 73 of the said Act, such a custom must be unreasonable and invalid. The words 'favourable rent' in section 64, sub-section (iii) of the Act, mean rent which at the time of the assessment being fixed is favourable as compared with the ordinary rent of similar lands in the vicinity, and has nothing to do with the question whether the rent, as fixed at the time when the lease was granted, was favourable or unfavourable.

PLAINTIFF held certain land as tenant of defendant, the tenure being of a nature dealt with by sub-section (iii) of section 64 of Madras Act V of 1884. The annual rent paid by plaintiff was Rs. 64, which the Acting Sub-Collector found to be a favourable tenure. Defendant collected local cess, plaintiff paying him on this account a sum of Rs. 4. Defendant, however, claimed Rs. 44-6-0 and distrained for the balance, contending that the local cess should be calculated on the rent value, which was admitted to be Rs. 710. The Acting Sub-Collector held that the amount of local cess due was only Rs. 4, and ordered the defendant to deliver up the property which had been distrained for the balance. On appeal, the District Judge said:—"The question at issue is how the amount of local cess payable is to be calculated. The land is one which was granted on favourable terms and clearly falls under the last part of clause (iii), section 64 of the Madras

* Second Appeal No. 1360 of 1898, against the decree of M. D. Bell, District Judge of Gódávari, reversing the decision of W. W. Phillips, Acting Sub-Collector of Gódávari, in Summary Suit No. 17 of 1896.

Local Boards Act V of 1884. The cess must be calculated on the rent value of lands of similar quality in the neighbourhood. The suit is remanded to the Sub-Collector for a finding to be returned within six weeks on the following issue:—'What is the rent ordinarily payable to the landholder for lands of similar quality leased out by him in the neighbourhood?'"

A finding was returned to the effect that the rent ordinarily payable on such land was Rs. 710 and the local cess Rs. 44-6-0, and (in pursuance of a further order) that notwithstanding section 73 of Local Boards Act (Madras), 1884, the whole amount of local cess was payable by the tenant. On these findings the District Judge reversed the decision and dismissed the plaintiff's suit.

Plaintiff preferred this second appeal.

Venkataramayya Chetti and *Sundara Ayyar* for appellant.

Seshagiri Ayyar for respondent.

JUDGMENT.—The plaintiff (appellant in second appeal) is the tenant of the defendant. The latter is a landholder whose tenure, it is admitted, falls neither under sub-section (i) or (ii) of section 64, Act V of 1884. It is therefore within sub-section (iii). The land is held by the plaintiff from defendant at an annual rent of Rs. 64, but the Collector held that the proper rent for the purposes of section 64 of the Act was Rs. 710 and assessed the defendant at Rs. 44-6-0 on that amount, under the last clause of sub-section (iii) which provides that where land is held by any person free of rent or at a favourable rent, the rent ordinarily payable for lands of similar quality in the neighbourhood is to be taken as the basis for assessment.

It is not disputed that the defendant has been assessed at Rs. 44-6-0 and that this is the amount (less perhaps remission to which he is entitled under section 75) payable by him as tax on the rent value of the land. Under section 73 of the Act the landholder may recover one-half of the amount payable by him (including remission granted under section 75) from the tenant, who is in this case the plaintiff.

He has, however, distrained and recovered the whole; and one question in this appeal is whether he was entitled to do so. The District Judge has found that he was apparently relying on an alleged custom or implied agreement prevailing in the zamindari. The words of section 73 are, however, plain, and any agreement to pay more than is required by law would be without consideration

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and void; or if regarded as based on custom, unreasonable and invalid. On this point we are clearly of opinion that the plaintiff must succeed.

The only other point is whether he is entitled to question the correctness of the assessment made by the Collector.

Section 155(2) of the Act provides that "no action shall be "maintained in any Court to recover money paid in respect of any "tax, toll or fee assessed or levied or any sum collected under "this Act, or to recover money or damages by reason of any "assessment made tax, toll or fee levied or any payment under "this Act. Provided that the provisions of this Act relating to "the assessment and levy of taxes, tolls and fees and to the "collection of payments shall have been in substance complied "with."

It is not contended that the provisions of the Act have not been in substance complied with and the section quoted would appear to bar the suit so far as the one-half of the tax levied for plaintiff is concerned. If, however, the plaintiff were at liberty to question the correctness of the assessment made by the Collector, we should still have to hold that that assessment was correct. The obvious meaning of the words 'favourable rent' in section 64 (iii) is rent which, at the time of the assessment being fixed, is favourable as compared with the ordinary rent of similar lands in the vicinity. It has nothing to do with the question whether the rent, as fixed at the time when the lease was granted (in this case so far back as 1839), was favourable or unfavourable.

We think the adjudication made by the Collector would in any case be at least *primâ facie* evidence that the land was held at a favourable rent; but there is also a finding of fact, which is not open to question in second appeal that the rent of neighbouring lands of similar quality is not less than Rs. 3 per acre, and that the estimate of Rs. 710 for the whole 385 acres, which also appears to have been admitted before the Sub-Collector as the rent which plaintiff got for the land, is therefore well within the mark. As the rent paid by the plaintiff to the defendant is only Rs. 64, it is quite clear that the land was held by him at a favourable rent.

We must therefore hold that the distraint was lawful to the extent of Rs. 22-3-0, and we modify the decrees of the Courts below in accordance with this view. Each party will bear his own costs throughout.

PRIVY COUNCIL.

GNANASAMBANDA PANDARA SANNADHI (DEFENDANT No. 1), APPELLANT,

v.

VELU PANDARAM AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.

P.C.* 1899. November 22, 29. December 19.

[On appeal from the High Court at Madras.]

Religious foundation—Endowed property—Hereditary Managers—Void alienation—Adverse possession—Limitation Act—Act XV of 1877, *s.* 28, *sched. II, arts.* 124, 144.

The hereditary managers of the property with which a religious foundation was endowed had purported to sell and assign the management and lands of the endowment to the representative of another institution, the first defendant's predecessor:

Held, that there not being any custom of the foundation allowing such an assignment, it was beyond their legal competence, conveying no title; *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* ((1876) L.R., 4 I.A., 76; I.L.R., 1 Mad., 235) referred to and followed.

The possession delivered to the purchaser was adverse to the vendors. After the twelve years' period of limitation, which expired in the life time of the vendor, whose son now sued to recover the hereditary managership and possession of the lands of the endowment, the suit was barred under Limitation Act XV of 1877:

Held, that there was no distinction between the claim to the office and the claim for the property, in regard to the application of article 124 of schedule II of the Act, and of section 28. If there were, article 144 would apply to the claim for the property.

In order to fix the starting point for limitation at a date later than that of the transfer, it was contended that the office and title were held in successive life estates. If that contention had been right, the period of limitation would have commenced at the death of the plaintiff's father.

The Judicial Committee were of opinion that it must be assumed that the origin of the endowment was by gift from the founder and that, in accordance with the ruling in *Juttendromohun Tagore* v. *Ganendromohun Tagore* (1872) L.R., I.A., Sup. Vol., 47; 9 Beng. L.R., 377), heritable estates could not be created to take effect as successive life estates, and inconsistently with the general law. This applied to both the office and the property:

Held, that the law of inheritance did not permit the creation of successive life estates in this endowment; the above ruling being also contrary to the judgment in *Trimbak Bawa* v. *Narayan Bawa* ((1882) I.L.R., 7 Bom., 188); and that

* *Present*: Lords HOBHOUSE, MORRIS, DAVEY, and ROBERTSON, and SIR RICHARD COUCH.

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the plaintiff could not claim to have been entitled otherwise than as heir to, and from, and through his father, in whose life time the title had been extinguished by lapse of time and adverse possession of the defendant.

APPEAL from a decree(1) (22nd October 1895) of the High Court, modifying a decree (30th October 1893) of the Subordinate Judge of Kumbakónam.

The plaintiff, now the first respondent, was a mirasidar in the Máyavaram taluk in Kumbakónam. There was at Thirukkadaiyur a temple to which were originally attached the lands and property of the endowment, now in dispute, founded by the ancestors of the plaintiff and of the second defendant, to descend as a family inheritance. The first defendant was Gnanasambanda Pandara Sannadhi who represented the adhinam of Dharmapuram, another institution.

The general history of the foundation, so far as it is known, appears in the report of the appeal to the High Court in I.L.R., 19 Mad., 243, and in their Lordships' judgment.

From 1857 the management and possession were in the hands of Velu Pandaram with whom was associated his nephew Kuppa Pandaram. They were the uralans. Before then the temple property had been under charge of the District officers who, by the order of Government, made it over to those representatives of the family of the founder. Afterwards was passed Act XX of 1863, the "Native Religious Endowments Act." In 1868 both those persons were dead. Velu had adopted a son, Nataraja, father of the present plaintiff, and Kuppa had left a minor son Chockalinga, the second defendant, then under the guardianship of his mother Visalakshi between whom and Nataraja the possession of the property was shared. Chockalinga attained full age in 1880. Nataraja's son Velu, the plaintiff, attained majority in February 1891, and brought this suit on the 17th August 1892.

By registered deed of sale, dated the 17th September 1868, Visalakshi purported to convey the minor's half share in the joint management and in the property of the endowment to the then Pandara Sannadhi of the Dharmapuram mutt, predecessor of the defendant. This was followed by a similar conveyance executed to the latter on the 13th February 1869 by Nataraja, the plaintiff's father, assigning his share. Chokalinga, the second defendant, was

(1) I.L.R., 19 Mad., 243.

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then living. The plaintiff was born four or five years after, about 1873 or 1874. The representative of the Dharmapuram institution obtained possession.

The plaint alleged a provision by the founder that only members of the family should hold the management and the property, charged with the expense of the worship, charities, and other matters connected with the temple: that the transfers of 1868 and 1869 were void and inoperative: that the cause of action arose at the death of Nataraja in August 1884. A declaration was asked that the plaintiff was entitled to be sole manager with possession, and mesne profits; and there was an alternative claim that the second defendant, if the Court should decide that his right had not been lost to him by his non-claim, should be declared entitled to share with the plaintiff in the managership and possession.

There were originally several grounds of defence, and six issues were framed, of which the last raised the question of the second defendant's right. But the only question now material was the question of limitation barring the suit under Act XV of 1877.

The Subordinate Judge decreed the plaintiff entitled to the management and possession jointly with the second defendant, but confined the property to that inherited from Velu, without that which Visalakshi had transferred. He was of opinion that the plaintiff's right to sue had accrued not earlier than the death of Nataraja, his father, in 1884, and that the suit for that part of the property and the management of it was within time. As to the share transferred by the mother of the second defendant, the Judge decided that the right to question that transfer had been barred by lapse of time before the death of Nataraja, and that consequently his son could not claim that share any more than his father could have claimed it. Both parties appealed from this decree, the plaintiff claiming to be entitled to the management and possession of the whole, and the first defendant contending that the plaintiff was out of time in regard to both the shares conveyed by the deeds of 1868 and 1869. The original hereditary right of the plaintiff's family in the property was not contested.

The High Court maintained in part the decree of the Court below, and altered it in part, decreeing the whole claim. They decided that the right of the plaintiff to sue did not accrue till the

death of his father in 1884. Then it was, according to the High Court, that he succeeded to the inheritance which had descended in the form of a series of life estates, as created by the trust. The suit had been brought within eight years from the time when limitation began to run. The cases cited in support of this opinion are mentioned in the judgment of the High Court which is reported at length in the I.L.R., 19 Mad., 246. The following was their reason for awarding the whole property claimed: the fact that the second defendant had lost his right to recover, not having sued within time, did not, in their opinion, preclude the plaintiff from claiming the whole of the trust property. As against a third party, a stranger, either of the uralans had a right to sue for the whole, though as between themselves they each were entitled only to the share of each.

On this appeal by the first defendant, Mr. *J. D. Mayne*, for the appellant, argued that there was error in the judgment of the High Court, and in that of the first Court. The plaintiff's suit for a declaration of his title as manager, and for possession, was barred by limitation. There was no doubt but that the office with the lands attached, which were subject to a trust for religious and charitable purposes, were property extra commercium, and that the transfers of 1868 and 1869 were void. The word "trust" had been applied in India to endowments out of which the managers were not precluded from deriving profits for themselves, as they would be if they held the property in trust under other conditions. The assignments were however void, not having been authorized by the custom of the institution, by the common law of the Hindus as shown by *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*(1). But the purchaser had held exclusive and adverse possession for more than twelve years, and the plaintiff's title had been extinguished in the life time of his predecessor, his father (Act XV of 1877, schedule II, articles 124, 142 and 144, and section 28). The property in the first defendant's possession, to whose predecessor it had been conveyed, giving him no title, was, with the managership, till then held in the plaintiff's family, with a charge for the benefit, and purposes, of the foundation. The whole had devolved by inheritance. Velu and Kuppu had received it as the members then representing the family entitled to property by

(1) (1876) L.R., 4 I.A., 76; I.L.R., 1 Mad., 235.

inheritance. As to the descent of such family property, reference was made to *Rajah of Cherakal Kovilagom* v. *Mootha Rajah*(1), *Gossamee Sree Greedharreejjee* v. *Rumanlolljee Gossamee*(2). This suit was not, with reference to limitation, in the same position as a suit brought under section 14 of Act XX of 1863, on behalf of a trust, to recover property wrongly withheld, nor was it a suit to which section 10 of Act XV of 1877 would be applicable. Reference was made, in regard to the acquirement of title by lapse of time, to the *President and Governors of Magdalen Hospital* v. *Knotts*(3), and to *Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chaube*(4). The office of trust now claimed was not one filled by election or selection, among the members of a religious foundation, but the office devolved by the law of inheritance upon the members of the founder's family. The limitation for claims for such an hereditary office was provided in article 124 of schedule II. *Kannan* v. *Nilakandan*(5) was an instance of the application of article 144 to a claim for the property of a foundation. Reference was also made to *Mahomed* v. *Ganapati*(6) and to *Karimshah* v. *Nattan*(7). The High Court had decided that the claim by the plaintiff as son of Nataraja had a fresh starting point for limitation when he succeeded to title on the death of his father. By this, if it were right, the bar would be avoided. But it was error. For it would be in contravention of the Hindu Law of Inheritance to hold, as the High Court had held, that an endowment of a heritable character should be held in a series of successive life estates by the heritors. The plaintiff could only take by inheritance as the son of his father. The judgment in *Juttendromohun Tagore* v. *Ganendromohun Tagore*(8) showed that heritable estates could not be created to be held in a succession of gifts for life, such a perpetual series of life estates being inconsistent with the Hindu Law of Inheritance. In *Trimbak Bawa* v. *Narayan Bawa*(9), it was said in the judgment that the founders of some institutions had vested their management in members of the family, so that each member succeeded according to the form of the gift, and for life only.

(1) (1873) 7 M.H.C.R., 210.
(2) (1889) L.R., 16 I.A., 137; I.L.R., 17 Calc., 3.
(3) (1879) L.R., 4 App. Cas., 324.
(4) (1883) L.R., 10 I.A., 90; I.L.R., 6 All., 1.
(5) (1884) I.L.R., 7 Mad., 337.
(6) (1889) I.L.R., 13 Mad., 277.
(7) (1883) I.L.R., 7 Mad., 417.
(8) (1872) L.R., I.A., Sup. Vol., 47; 9 Ben. L.R., 377.
(9) (1882) I.L.R., 7 Bom., 188.

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It was questionable whether that would accord with the law of inheritance.

The result was that limitation in the present case having not only commenced to run in the life time of Nataraja, son of Velu, but the period of twelve years of adverse possession having expired in his life time, the plaintiff's right to sue for the office and the land had been extinguished when his father's right and title had been extinguished. That was in 1881. There were many instances of the operation of the law of limitation barring the claim of a reversioner when the period of twelve years had expired during the life of the representative of the estate of inheritance, in the person of a widow, or female holding for her limited interest. Among these were *Aumirtolall Bose* v. *Rajoneekant Mitter*(1), *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami*(2), *Mussummat Lachhan Kunwar* v. *Anant Singh*(3).

Mr. *J. H. A. Branson*, for the first respondent, Velu Pandaram, contended that the suit for the office of manager and the property of the foundation was not barred by time. The right to sue had first accrued to the plaintiff on the death of his father Nataraja. The right to sue was to recover for the purposes of the trust possession of the whole endowment from the defendant, whose predecessor had illegally acquired the possession from the plaintiff's predecessor, and acquired it with knowledge of the breach of trust by him. The judgment of the High Court had been right in result, the claim being one to which article 124, giving a title after twelve years' adverse possession, did not apply. Reference was made to *Vane* v. *Vane*(4). It was true that the case there was that of a purchaser, differing from that of an inheritor. Here the plaintiff had no complete title to sue for the management, and the property, until he had succeeded his predecessor according to the rules of the foundation. Till then he had no right to the possession; a right derived from his belonging to the family, and taking an inheritance transmitted to him on the death of his father. *Mahomed* v. *Ganapati*(5) was a case where limitation commenced, not from the date of a disposition made by a predecessor in title, but from the time when the successor first became

(1) (1875) L.R., 2 I.A., 113; 15 Ben. L.R., 10.
(2) (1893) L.R., 20 I.A., 183; I.L.R., 21 Calc., 8.
(3) (1894) L.R., 22 I.A., 25; I.L.R., 22 Calc., 445.
(4) (1872) L.R., 8 Ch., 383. (5) (1889) I.L.R., 13 Mad., 277.

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entitled to the possession. The judgment in *Trimbak Bawa* v. *Narayan Bawa*(1) proceeded on the principle that, in regard to endowments, resembling the one in the present case, of the nature where the founder has vested in a certain family the right of management, each member succeeded to the management "according to the form of the gift." In that case the manager who succeeded took independently of the estate of the predecessor to an extent so complete that the estate of the one was not affected by the proceedings taken against it during the time of the other. Reference was also made to *Jamal Saheb* v. *Murgaya Swami*(2), *Modho Kooery* v. *Tekait Ram Chunder Singh*(3), *Papaya* v. *Ramana*(4), *Jewun Doss Sahoo* v. *Shah Kubeer-ood-deen*(5), *Mohunt Burm Sarup Das* v. *Kashee Jha*(6), *Vedapuratti* v. *Vallabha*(7), *Babaji* v. *Nana*(8), *Kuria bin Hanmin* v. *Gurunav*(9), *Kannan* v. *Nilakandan*(10), *Karimshah* v. *Nattan*(11), the last showing that the right was a personal one to succeed as manager in that case.

Mr. *J. D. Mayne* in reply.

On the 19th December 1899 their Lordships' judgment was delivered by Sir RICHARD COUCH:

JUDGMENT.—The suit in this case was brought by the respondent Velu Pandaram to establish his right to the management of an endowment connected with a temple in the province of Madras and to the possession of the lands forming the endowment either absolutely or solely with the second respondent Chockalinga; and the only question in this appeal is whether the suit is barred by the law of limitation.

The earliest document relating to the endowment is dated 19th December 1850, at which time the superintendence of it was vested in the Government. It is an agreement executed by Velu Pandaram, the grandfather of the respondent Velu, who is described as claimant to the endowment in question. It is addressed to the East India Company's Government, and states that in accordance with certain Government orders the lands attached to

(1) (1882) I.L.R., 7 Bom., 188.
(2) (1885) I.L.R., 10 Bom., 34.
(3) (1882) I.L.R., 9 Calc., 411.
(4) (1883) I.L.R., 7 Mad., 85.
(5) (1840) 2 M.I.A., 390.
(6) (1873) 20 W.R., 471.
(7) (1890) I.L.R., 13 Mad., 402.
(8) (1876) I.L.R., 1 Bom., 535, Note.
(9) (1872) 9 Bom. H.C.R., 282.
(10) (1884) I.L.R., 7 Mad., 337.
(11) (1883) I.L.R., 7 Mad., 417.

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the endowment—which are specified—"having been delivered to "my possession by Government and taken charge of by me I shall "conduct the cultivation and other affairs of the said lands from "fasli 1260 and use the income derived therefrom solely for the "said temple."

On the 18th August 1857 another agreement was executed by the same Velu Pandaram by which he bound himself and his successors in the management of the endowment to act according to the conditions stated in it, and said that in default of his doing so the Government might remove him.

In 1863 the Government, then the Queen's, was engaged in divesting itself of direct responsibility for the superintendence of these religious institutions, and on the 31st October 1863 an agreement was executed by the same Velu Pandaram and by Kuppa Pandaram, described as son of his elder brother, in which, after saying they are the claimants to the endowment and stating some assessments of lands belonging to it, it continues :—"We shall from "the current fasli 1873 conduct properly the pooja (worship), "naivethiam (offerings), &c., and of the temple with the said "assessment amount and also keep in the temple under our "signatures a detail account of receipt and disbursements in "respect of it and pay in full the kaval revenue of the said lands "to the Circar in every fasli." The former agreements were executed by Velu only, but it would appear from this last that the endowment had been held by the brothers as a joint family and that Kuppa had succeeded as heir to his father's interest in it.

Velu died at some time, not stated, prior to 1868, leaving an adopted son Nataraja, who died in 1884 leaving the respondent Velu his son and heir who attained majority in February 1891. Kuppa died in 1866 leaving a widow Visalakshi and a son, the respondent Chockalinga, who attained majority in 1880.

On the 17th September 1868 Visalakshi executed a deed of sale to the manager of another temple who was predecessor in title to it to the appellant. She is described in the deed as mother and guardian of Chockalinga and of another boy since dead, sons of the late Kuppa Pandaram, one of the two hereditary trustees. The operative part of the deed is "I have conveyed to you by absolute "sale my hereditary right and interest appertaining to the half-"share of the hereditary right of management of the charity "termed (describing this endowment) enjoyed by my husband until

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"his death and afterwards by me for discharging the debts of the "family incurred by my husband and myself in the management "of the said endowment and for the maintenance present and "future of myself and my little children for Rs. 2,000, the price "settled therefor by mutual consent."

On the 13th February 1869 a similar conveyance was executed by Nataraja of the half-share which he possessed of the hereditary right to the endowment for a like sum of Rs. 2,000 for the purpose of discharging the debts incurred in the management of the endowment.

In *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha*(1) this committee held that an assignment by the uralans (managers) of a pagoda of the right of management thereof was beyond their legal competence under the common law of India and that no custom to do so had been established. There is no proof of any custom in this case, and consequently these deeds of sale are void and did not give any title to the purchaser. The title remained in Chockalinga and Nataraja and the possession which was taken by the purchaser was adverse to them.

The law of limitation applicable to the case is article 124 of the second schedule to the Act XV of 1877 which says that in a suit for possession of an hereditary office the period of limitation is twelve years which begins to run when the defendant takes possession of the office adversely to the plaintiff or any person from or through whom he derives his right to sue. Chockalinga attained majority in 1880 and had by article 44 of the Act three years for suing to set aside the sale by his guardian. He did not do so and by section 28 of the Limitation Act his right became extinguished. Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other, but if there is, article 144 of the same schedule is applicable to the property. That bars the suit after twelve years' adverse possession.

Nataraja also was barred and his right was extinguished. The respondent Velu Pandaram is his son and the suit was brought by him against the appellant and Chockalinga who apparently had refused to be a plaintiff. The plaint states that the endowment

(1) (1876) L.R., 4 I.A., 76; I.L.R., 1 Mad., 235.

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was founded by the ancestors of Velu and Chockalinga, and it was arranged by them that only the members of their family should hereditarily hold the properties which were their family property, and from the income thereof conduct the worship and charities connected with the temple, and prayed that his right might be declared to the sole management of the temple, or if he was held not to be entitled to the sole management that he might be held entitled to it jointly with the appellant. The Subordinate Judge held him to be entitled jointly with the appellant; the High Court has held him to be entitled to the sole right of management.

The contention on behalf of Velu before their Lordships has been that he does not derive his right to sue from or through Nataraja; that on his death in 1884 a fresh right accrued to Velu, and the period of limitation then began. Of the many cases cited by Mr. Branson in his argument one only *Trimbak Bawa* v. *Narayan Bawa*(1) is applicable to this contention. In that case a grant for some religious purposes had been made to one Balobha and his descendants. His estate including this grant became divisible among his sons, and the share of Vithoba one of them was taken in execution in 1870 and illegally sold. The sons of another son of Balobha by some process became possessed of this share. Vithoba died in 1876 never having taken any steps to recover the property, and in 1879 his son sued the other descendants of Balobha for one-third share of the management. The defence set up was that by article 12 of the same schedule of the Limitation Act a suit to set aside an execution sale must be brought within a year from the conclusion of the sale. The Court held that where the founder of an endowment has vested in a certain family the management of it "each member of such family succeeds "to the management, to use technical language *per formam doni* "and that therefore on Vithoba's death the plaintiff's right to "succeed to the management in this case was quite unaffected by "any proceedings against Vithoba during his life."

There is no evidence of the origin of the endowment in this suit. It must be assumed that it was by a gift from the founder. The Government appears to have considered it to be hereditary in the family by admitting Kuppa in the agreement in 1863 to share

(1) (1882) I.L.R., 7 Bom., 188.

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in it with his uncle. In *Juttendromohun Tagore* v. *Ganendromohun Tagore*(1) it was held by this committee that all estates of inheritance created by gift or will so far as they are inconsistent with the general law of inheritance are void as such and that by Hindu Law no person can succeed thereunder as heir to estates described in the terms which in English Law would designate estates tail. The Hindu Law of Inheritance did not permit the creation of successive life estates in this endowment and this ruling is decisive against the contention on behalf of Velu and is contrary to the judgment in the Bombay case.

The respondent Velu can only be entitled as heir to his father Nataraja and from and through him and consequently his suit is barred by article 124. In their Lordships' opinion the ruling in *Juttendromohun Tagore* v. *Ganendromohun Tagore*(1) is applicable to an hereditary office and endowment as well as to other immovable property.

The Subordinate Judge following the decision of the Bombay High Court made a decree declaring the plaintiff entitled to joint management with the appellant and ordering delivery of joint possession of the lands to him. From this decree both the plaintiff and the appellant appealed to the High Court. The appellant's appeal was dismissed on the ground that the plaintiff's right accrued on Nataraja's death. On the plaintiff's appeal the High Court varied the decree below and declared the plaintiff entitled to the sole right of management and ordered that the possession of the properties attached to the endowment should be delivered to him. It has been shown that both decrees are erroneous, and their Lordships will humbly advise Her Majesty to reverse them and to order the suit to be dismissed with costs in both Courts. The respondent Velu Pandaram will pay the costs of this appeal.

Appeal allowed.

Solicitor for the appellant: Mr. *R. T. Tasker.*

Solicitors for the respondent (Velu Pandaram): Messrs. *Burton, Yeates & Hart.*

(1) (1872) L.R., I.A., Sup. Vol., 47 at p. 66; 9 Beng. L.R., 377.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1899. November 13, 28.

RAMANARASU (DEFENDANT), APPELLANT,

v.

BUCHAMMA (PLAINTIFF), RESPONDENT.*

Hindu Law—Maintenance—Right of discarded concubine to claim.

A woman who has been kept by a man as his concubine for a number of years continuously and then discarded is not entitled under the Hindu Law to claim maintenance from him.

SUIT for maintenance. Plaintiff had lived with defendant as his concubine for a period of nine years continuously. Defendant then discarded plaintiff who now claimed that by the Hindu Law she was entitled to maintenance from him. The District Munsif held, citing Mayne's 'Hindu Law,' chapter on "Maintenance," that the temporary connection between defendant and plaintiff gave the latter no right to claim maintenance from the former, and dismissed the suit. The District Judge, on appeal, held it to be just and in accordance with Hindu Law that defendant should pay the maintenance, and, reversing the decree of the Court below, made an order for payment of Rs. 4 per month.

The defendant preferred this second appeal.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) and *Gopalasami Ayyangar* for appellant:—Such a claim as this is unprecedented under the Hindu Law. No doubt, in administering the estate of a Hindu, the Hindu Law is humane in providing for women in the family, including concubines. But this is an entirely different case. This claim is put forward in a manner analogous to a claim by a wife for maintenance against her husband personally. The fact that a woman has been kept as a concubine cannot confer upon her the rights of a wife. Under the Hindu Law two classes of persons are entitled to maintenance—one because of relationship, and the other because there is property of a deceased upon which they have claims. The

* Second Appeal No. 1604 of 1898 against the decree of F. Murray, District Judge of Ganjam, in Appeal Suit No. 262 of 1897, reversing the decree of N. Lakshmana Rao, District Munsif of Chicacole, in Original Suit No. 32 of 1896.

latter claim is analogous to that of a creditor of a deceased person. The first class comprises a wife who remains chaste, aged parents and infant children; and liability to maintain them is independent of the possession of property; and arises by virtue of their relationship alone. The plaintiff's case is that she should be included in this class; that in fact, she should be elevated to the position of a wife. Strange's 'Manual of Hindu Law,' chapter VIII, page 54, article 209, mentions, under the first head, only the three classes of persons referred to, and does not include the concubine. Under the second class it mentions the widows of deceased members of an undivided Hindu family. A mother is also entitled to be maintained after the death of the father as a person coming under this head, which also includes a step-mother. The sons, as such, are not bound to maintain her; but on the death of the father, the surviving step-mother is entitled to be maintained if the step-son has inherited property from his father or possesses joint family property. The daughter-in-law also comes in this class. When a son dies leaving a widow, and the father dies afterwards leaving his self-acquisition in the hands of his widow, the daughter-in-law is entitled to be maintained by the mother-in-law possessing the husband's estates, *Rangammal* v. *Echammal*(1). Though the father-in-law himself is only under a moral and not a legal obligation to maintain the daughter-in-law, that moral obligation becomes a legal obligation in the hands of his widow, because of the possession of assets in her hands. The decision referred to is based on a text which lays down that all the women of the family should be maintained.

In *Yamunabai* v. *Manubai*(2), it was held that the widow of a predeceased son, who lived with the father-in-law, is legally entitled to claim maintenance from the mother-in-law in possession of the self-acquired property of the father-in-law, because the property becomes ancestral in her hands. But the Allahabad High Court in *Janki* v. *Nand Ram*(3) rested its judgment on the principle that she took the property for his spiritual benefit. The text of Sankha is cited in *Yamunabai* v. *Manubai*(2), and in paragraph 409, Mayne's 'Hindu Law.' The text of Manu on which the Hindu Law of Maintenance is based is quoted in Colebrooke's

(1) I.L.R., 22 Mad., 305. (2) I.L.R., 23 Bom., 608 at p. 613.
(3) I.L.R., 11 All., 194.

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'Digest of Hindu Law,' volume II, page 538. That text is to the effect that "aged parents, a virtuous wife and an infant son must be maintained even though by doing a hundred times that which ought not to be done." See volume XXV, 'Sacred Books of the East, Manu,' chapter VIII, page 321, sloka 389. The obligation is imperative only in the case of aged parents, minor sons and a virtuous wife. 'Smriti Chandrika,' chapter XI, section I, verse 34, also explains that in regard to other persons the obligation to maintain widows is on the persons who take possession of the property of the deceased. In paragraph 408, Mr. Mayne refers to illegitimate sons, and says that concubines are also entitled to maintenance even though the connection is adulterous, but this liability exists only when the connection is permanent. The wording of the authorities quoted by Mr. Mayne clearly shows that the claim is only as against the paramour—See also 'Mitakshara,' Part II, chapter II, section 1. In paragraph 6 of the latter, it is stated that it is only in a divided family that the widows inherit the husband's estate contrary to Jimutavahana. In undivided families, a sonless widow is entitled to maintenance. He says this at paragraph 7 commenting on the text of Narada. He adds the condition "provided they keep unsullied the bed of their lord." Should the woman not remain chaste they (the undivided coparceners) should cut off the allowance; and there is authority to say that the word "woman" means "wedded wife"—'Mitakshara,' Part II, chapter II, section 1, slokas 12 and 20, where the texts of Narada are quoted and explained. Heirless property is said to go to the king, deducting the charges of the obsequies and leaving sufficient property for the maintenance of the woman of the family. 'Mitakshara,' Part II, chapter II, section I, slokas 12 and 29, says that "woman" means "concubine." Mr. Mayne at paragraph 408 relies on this. Texts of Hindu Law containing similar provisions all relate to property escheated to Government. Jimutavahana also agrees. In passages relating to succession, the word "wife" is mentioned. In passages relating to maintenance, the word woman "Stri" or "spouse" is used—See Stokes' 'Hindu Law Books,' page 435, verses 25 and 28. Stokes' 'Hindu Law Books,' page 85, verse 5, commenting on the text: an heirless property goes to king, deducting subsistence to females, &c., provided these preserve the bed of their lord. 'Smriti Chandrika,' chapter XI, section I, verse 48, has the same text, with the proviso. So in Strange's

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'Hindu Law,' volume I, page 174, quoted by Mr. Mayne:—"The providence of law, not content with providing for the mothers of illegitimate sons among Sudras, in ordinary cases provides for them in cases of succession of the crown to heirless property." W. H. Macnaghten's 'Hindu Law,' volume II, page 119, (quoted by Mr. Mayne) only shows that on the death of a person provision should be made for the woman. West and Bühler on 'Hindu Law,' at page 164, dealing with burdens on inheritance, say that a reasonable charge exists to provide for the maintenance even of a concubine. And so again at page 415, that a concubine has no right to inheritance but only to maintenance on the property. So also at page 582. *Khemkor* v. *Umiashankar*(1) rules that a widow who has remarried in the life-time of her first husband, without his consent, is not the legal wife of the second husband, but is entitled to maintenance as a concubine (the parties there being Sompura Brahmans). In *Vrandavandas Ramdas* v. *Yamunabai*(2), there was an undivided Hindu family and a gift of a share to a concubine. It was held that the gift was invalid. *Sikki* v. *Vencatasamy Gounden*(3) was a suit for maintenance against a paramour in his life-time and was dismissed. It is submitted that that ruling is conclusive. A suit will not lie for continuance of concubinage; so also when the intercourse is incestuous. The woman must depend upon the man's favour, and if he allows her to remain with him till his death it will be incumbent on those that inherit his property to give her maintenance. Her claim, if so recognised, rests on an intelligent footing; a concubine who has lived with her paramour for a few years cannot have a claim for maintenance. The question is: Was she living with him for his life? If the Courts apply the principle of the case of a wife and give the concubine rights against her paramour where is the relief so given to stop? What length of intercourse is to be held sufficient to entitle the woman to such relief? The effect of such a ruling would be that such concubinage would be regarded as a legal relation, entitling the woman to maintenance, though the man would have no right whatever to compel her to continue as his concubine. The text of Katyayana provides for maintenance in the case of a Sudra concubine if she remains with the man till his

(1) 10 Bom. H.C.R. 381. (2) 12 Bom. H.C.R., 229 at p. 231. (3) 8 M.H.C.R., 144.

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death; but that has nothing to do with the present case. In this case the concubinage has lasted from 1883 to 1893. The subject of maintenance is fully discussed in *Savitribai* v. *Luximibai*(1) where the Full Bench lays down the distinction between a virtuous wife and females of the family. The obligation in the case of the former is mandatory; in the case of the latter, it is directory.

Sundara Ayyar for respondent.—A concubine's position is similar to that of the wife. Just as the wife has a right against a husband during his life-time, and, after his death, against persons who have inherited his property, so the concubine has rights against her paramour during his life and after his death against property of the paramour in the hands of others. There are no express provisions by the commentaries for the maintenance of a wife by her husband. The original text writers provide for it. 'Mitakshara,' Part II, chapter II, section 1, treats of the right of the widow to inherit the estate of one who leaves no male issue. The word there used for wife is "Patní." The condition for maintenance is "that the woman leads a virtuous life." The text of Narada is the one relied on by all in support of the proposition that women of the family should be included. I submit that concubines are also included. All females, whether wife or concubine, are treated by the same text. The word "Bháryá" though used colloquially for "wife" is explained by Jimutavahana to be a term having a wider meaning. The word "Yoshit" in Narada is explained by Vijnaneswara as including "all women." [SUBRAHMANIA AYYAR, J.—Does he include wife?] Yes. [SUBRAHMANIA AYYAR, J.—I think he rejects the text of Narada as referring exclusively to the maintenance of women.] He says that here is a text which gives maintenance to all yoshits. Vijnaneswara commenting on Katyayana's text says that when it is said that the king is to take heirless property after giving maintenance to the women of the family, it does not mean that if there is a wife she is not entitled to inherit. The term used is "Yoshit." It includes "wife" and "concubine." The same term is also used in Narada. Manu's text relates only to the maintenance of the wife of a living person. The word occurring there is "Strí." The words "Strí" and "Bháryá" have been interpreted by commentators and those

(1) I.L.R., 2 Bom., 573 at p. 597.

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interpretations have not been disapproved of by judicial decisions. It is open to the other side to show that the word "Strí" in Manu means something else. The drift of the argument in the Mitakshara is this: The text is understood as assigning maintenance both to the wife and to the other women of the family. There is a text which says Patní is entitled to maintenance. Patní means only "wife." But the text of Narada gives maintenance to "women." This includes "wife" also. [SUBRAHMANIA AYYAR, J.—That is so in the case of an undivided family.] The other text of Katyayana also speaks of maintenance to the "women." Mitakshara says that it does not affect the rights of the "wife" to inheritance. Dayabhaga says that the text applies to "women" and not to "wife." In passages relating to inheritance, the texts use the word "Patní." In passages relating to maintenance, the general words "Strí," "Bháryá," "Árí" are used. We have thus the explanation of the terms by one commentator at least. Inasmuch as the wife is allowed by some texts to claim maintenance during the life-time of the husband, the concubine must also be entitled to maintenance during the life-time of the paramour. It would be inconsistent if no right existed as against him during his life-time when a right of maintenance exists after his decease against persons who take his property. I submit that the reason why others are bound to maintain both wife and concubine after the man's decease is because they take his property and must maintain those whom he, in his life-time, was bound to maintain. When there is no joint property the son is entitled to maintenance only during his minority; and parents only when they have reached old age. It has been held that a moral obligation becomes a legal obligation in the hands of a person holding property: [SUBRAHMANIA AYYAR, J.—That is only in regard to females.] The taking of the property is the reason. The text which gives the right of maintenance to the wife and concubine is one and the same. The reason is that the woman lives under the protection of the man. Therefore a man who keeps a woman must maintain her. The reason being similar, why cannot the woman sue the paramour during his life-time: [SUBRAHMANIA AYYAR, J.—The question cannot be argued on these broad principles of morality: you must have substantial authority to support this novel proposition that a paramour is personally liable to maintain the concubine. The matter has not come before Courts till now.] The reasons

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why persons who take the property of a deceased person are bound to maintain a widow apply in the case of a concubine. A concubine being entitled to support after the death of the paramour what is there *wrong in* principle if she is also allowed to claim maintenance during his life? [SUBRAHMANIA AYYAR, J.—The Contract Act sufficiently expresses the attitude of the Legislature.] If it could be shown that there was any text applying to a wife that did not also apply to a concubine, the matter would be different. The question is what is the attitude of Hindu Law towards these women. Regarding the texts of Manu which have been quoted, Manu, chapter VIII, verse 389, says "neither a mother, nor a father, nor a son, nor a wife, shall be cast off, &c." Jimutavahana expressly points out that "Patní" means wife and "Strí" means not only "wife" but more: [SUBRAHMANIA AYYAR, J.—Does he say that in commenting on this text?] No, on a text of Brihaspati. [SUBRAHMANIA AYYAR, J.—The more association of the words in the text shows that the word is used only for "wife."] The 'Smriti Chandrika,' page 175, also points out that the word "Patní" means "wife." He is referring to the text of Katyayana. The translator renders the word "Yoshit" as "widow." [SUBRAHMANIA AYYAR, J.—That cannot apply to concubines.] Brihaspati, chapter XXV, verse 68, page 380, volume XXXIII, 'Sacred Books of the East', is referred to by Jimutavahana. He explains the term "Yoshit" used there. Manu, chapter XI, verse 189 (original edition) says: "Let him follow the same rule in the case of female outcasts." The term used is *Yoshitsupathithasvapi.* This is quoted by the commentator Medhathithi in commenting upon the text "Neither a mother, nor a father, &c."—Manu, chapter VIII, verse 389, says that Yoshit means "Bháryá." [SUBRAHMANIA AYYAR, J.—Bháryá means "wife": unless you show that *Bháryá* here means more than a wife by some authority, I cannot give it an extended meaning.] Jimutavahana gives the extended meaning to the term "*Bháryá*" though not in this connection. The word "Strí" occurs in verse 389 and "Bháryá" in verse 189, and the commentator says that both are the same. All the five commentators give the term "Bháryá" as a synonym for "Strí." It is significant that none of them use the word "Patní," the most common word meaning "wife." The term "Bháriyá" is generic. In the text giving the order of succession to a sonless Hindu, the word "Patní" is used as meaning "wife"

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and not "Strí" or "Bháryá," and I submit that it is a matter of consequence that in construing this text of Manu all of them use the word "Bháryá" and not the term "Patní." *The Mayukha* also quotes the text of Narada and comments on it. The terms "Bháryá," "Nári," "Strí," "Bhogastrí," include concubines. [Hon. *V. Bhashyam Ayyangar.*—Bhogastrí is used in reference to a wife other than the senior wife.] Strange's 'Manual of Hindu Law,' page 52, verse 196, says: "a man is bound to maintain his father, &c., his illegitimate children and their mothers." [Hon. *V. Bhashyam Ayyangar.*—That is the father's illegitimate children.] I submit that Mr. Strange puts in this passage the obligation to maintain a concubine on the same footing as the obligation to maintain father, mother, son, &c. (see Strange's 'Hindu Law,' volume I, page 67).—" . . . . including illegitimate offspring, adulterous wife, &c." See also Colebrooke's 'Dayabhaga of Jimutavahana,' chapter V, verse 11; and Manu, chapter IX, verse 202. These appear to be all the original authorities. See Strange's 'Hindu Law,' volume I, page 174—In the Sudra classes the illegitimate sons inherit: "In the other classes, they are entitled to maintenance. The law extends such protection even when the property goes to the king as heirless property." [SUBRAHMANIA AYYAR, J.—He is evidently referring there to the texts of Katyayana and Brihaspati.] In Mitakshara and Jimutavahana the subject of maintenance is treated with the subject of inheritance. They say that there is a word which means only a "wife," but there are also more generic words which include a wife. There is no decision exactly in point. There are cases where illegitimate children have been given maintenance, and concubines themselves get maintenance after the death of the paramour from those who have taken his property. *Kuppa* v. *Singaravelu*(1) was a case of illegitimate children proceeding against the father himself and *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya*(2) was referred to. Where illegitimate sons are entitled, it is submitted that their mother should be equally entitled. In *Muttusawmy Jagavera Yettappa Naicker* v. *Vencataswara Yettaya*(2) illegitimate sons were held entitled to maintenance and in *Hargobind Kuari* v. *Dharam Singh*(3), though the intercourse was

(1) I.L.R., 8 Mad., 325. (2) 12 M.I.A., 203 at p. 220.
(3) I.L.R., 6 All., 329.

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adulterous, the son was held entitled to maintenance. *Viraramuthi Udayan* v. *Singaravelu*(1) was to the same effect. In *Kuppa* v. *Singaravelu*(2) the suit was against the father himself. I submit that there is no difference between the position of the wife and the concubine as regards maintenance; and the texts, so far as they go, seem to show that she is equally entitled to claim it.

The Acting Advocate-General (Hon. *V. Bhashyam Ayyangar*) in reply.—The fact that an illegitimate son can claim maintenance does not show that his mother can also claim it. The very decisions quoted refute that contention. It is not contended that a woman having a merely adulterous connection would be entitled to maintenance even though her sons might be; so there is no analogy between the rights of the son and of the mother. In the texts of Katyayana, the word "Yoshit" was interpreted to include "Concubines." The recent cases (in Madras and Bombay) have no bearing on the point, dealing as they do with cases of women and not males.

JUDGMENT.—The question in this second appeal is whether a woman who has been kept by a man as his concubine for nine years continuously and then discarded is entitled, under the Hindu Law, to claim maintenance from her paramour. The District Munsif decided in the negative, but the District Judge on appeal reversed the finding and decreed for plaintiff. Against this decree the defendant appeals.

The question has been argued before us very fully on both sides and our attention has been drawn to all the authorities which have or may be supposed to have any bearing on the question. We do not propose to consider these authorities in detail, as almost without exception they refer to the right of a concubine to claim maintenance out of the estate of her deceased paramour. On the authority of certain texts of Hindu Law, the Courts have no doubt allowed this claim in the case of concubines continuously kept by the deceased up to the time of his death. Whether the foundation of this rule was the notion that the man was under a moral obligation to take care that his concubine should not be left destitute after his death and therefore saddled the succession to his property with the liability to maintain her, or whether it was with

(1) I.L.R., 1 Mad., 306. (2) I.L.R., 8 Mad., 325.

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reference to his probable wishes and intention with regard to her, it is not necessary to determine. It is, however, we think, certain that it was not because the law regarded the man as under any legal obligation to provide for his concubine during his life-time; if it were otherwise we should, without doubt, find some traces of the obligation in the texts or commentaries; but we are not aware that any exist. We do not regard the texts in Manu, chapter VIII, verse 389, and chapter XI, verse 189, as opposed to this view. In the former the term "Strí" has been uniformly understood by the commentators to refer to a wife, and the context which enumerates the near relatives who are not to be abandoned renders it unlikely that concubines were intended to be included with the lawful wife. All that the second passage seems to imply is that a female member of the family entitled to maintenance is not to be deprived of it altogether on the ground that she has been put out of caste.

Moreover, it is clear that the case of a wife and of a concubine are not placed on the same footing in regard to maintenance during the life-time of the man, for there are distinct texts recognizing the right of the wife, such as that quoted in section 209 of Strange's 'Manual of Hindu Law' as follows:—"Where there may be no "property but what has been self-acquired, the only parties whose "maintenance out of such property is imperative are aged parents, "wife and minor children." If any such right as that now claimed really existed, or could have been plausibly supported by the authority of the Hindu texts, it is impossible to suppose that it would not up to this time have been claimed in the Courts. The only reported case, so far as we are aware, in which the claim was made was decided against the concubine and in no way supports the plaintiff's case (*Sikki* v. *Vencatasamy Gounden*(1)). In this state of the authorities it is impossible for us to hold that the alleged right exists, and the more so when we bear in mind that the Hindu Law has made provision for the maintenance of concubines in the case already referred to after the paramour's death.

We, therefore, reverse the decree of the District Judge and restore that of the District Munsif. Appellant must have his costs in this and in the lower Appellate Court. Respondent must pay the Court fee due to Government in the lower Appellate Court.

(1) 8 M.H.C.R., 144.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Boddam, Mr. Justice O'Farrell, and Mr. Justice Michell.

1893. July 26, November 21, 22. 1899. October 9, 17. December 4.

MALLESAM NAIDU AND OTHERS (DEFENDANTS NOS. 3 to 5), APPELLANTS,

v.

JUGALA PANDA AND OTHERS (PLAINTIFFS NOS. 1 to 3 AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Limitation—Decree against father for money due, the sons not being joined as defendants—Death of father after original debt barred by limitation, the decree subsisting—Suit against the sons on the decree—Period of limitation how calculated—One cause of action.

Certain creditors having, in 1882, obtained a decree, kept alive that decree until 1893, when the judgment-debtor died. They then sought to make liable the property of the deceased in the hands of the defendants his sons and representatives, stating the cause of action against the said defendants as having arisen in 1893, the date of their father's death. The sons pleaded limitation, and the question was whether the period of limitation against the sons began to run from the date of death of their father or from the date at which the debt originally became due. On a reference being made to a Full Bench as to "whether a creditor in the position of the plaintiff has a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's life-time for such debt:"

Held, that in such a case there are not two causes of action, and such a creditor has not a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's life-time for such debt, and that, in consequence, the suit was barred by limitation.

Arunachata v. *Zamindar of Sivagiri*, (I.L.R., 7 Mad., 328), *Natasayyan* v. *Ponnusami*, (I.L.R., 16 Mad., 99), and *Ramayya* v. *Venkataratnam*, (I.L.R., 17 Mad., 122), considered.

SUIT for the recovery of a sum of money. Plaintiffs sought to make liable the property of the deceased elder brother of defendants Nos. 1 and 2, and of the deceased father of defendants Nos. 3 to 5, under a decree obtained against those deceased persons in 1882, which decree had (as was subsequently found) been duly kept alive until the death of the latter, which occurred in 1893. Plaintiffs alleged that they had obtained the decree in respect of money borrowed by the deceased persons for family expenses;

* Appeal No. 178 of 1896, against the decree of J. P. Fiddian, District Judge of Ganjám, in Original Suit No. 8 of 1895.

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that the defendants were their sole heirs and enjoying all their property; that though execution had been taken out nothing had been realised and that the suit was brought to recover the amount by the sale of property belonging to the deceased persons now in possession of the defendants. The cause of action was stated as having arisen at the date of the deaths of the deceased respectively, both of which occurred in 1893. All the defendants set up, among other defences, the plea of limitation, and the first issue was framed on that question. The District Judge held that the suit was not barred by limitation, and decreed in plaintiff's favour.

The defendants appealed, the present case having to do with the appeal of defendants Nos. 3 to 5.

The case coming on for hearing in the first instance before DAVIES and MOORE, JJ., was referred to the District Judge for a finding as to whether the decree debt sued upon was subsisting in 1893 at the time of the death of the father of the defendants Nos. 3 to 5.

In accordance with the above order the District Judge submitted a finding to the effect that the decree still subsisted.

The case next came before SUBRAHMANIA AYYAR and DAVIES, JJ., who, after accepting the above finding made the following

ORDER OF REFERENCE TO FULL BENCH.—. . . . . "A third point now raised is whether the present suit is barred by limitation, inasmuch as the cause of action against the sons, defendants Nos. 3 to 5, arose at the date of the debt becoming due by the father, and not at the date of the death of the father. It would be unnecessary to decide this question if the suit could be rightly treated as one brought upon the judgment against the father assuming that a suit upon a civil judgment could be brought in this country and as governed by article 122 of the second schedule of the Limitation Act, because under that article the suit was just within time. But we are unable to hold that the sons could be sued upon a judgment obtained against their father in respect of a previous debt, for the reason that they were not parties to the judgment and it was therefore not binding on them. Article 122 is therefore inapplicable to this case. Hence the right of suit here against the sons must depend upon their obligation under Hindu Law to pay their father's debts. According to the recent Full Bench decision, that obligation arises in the life-time of the father, and the sons may be sued before his

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death. It would, therefore, seem to follow that limitation against the sons should begin to run from the date of the debt becoming due by the father, as it is on that date that the sons's liability to pay becomes enforceable. This is inconsistent with the views held in *Natasayyan* v. *Ponnusami*(1) and *Ramayya* v. *Venkataratnam*(2), which had to be considered in the Full Bench case. It was decided in those cases that a right to sue the sons accrued on the father's death presumably apart from any right of suit against them in the father's life-time, and those cases are not expressly overruled by the Full Bench decision. We therefore refer the following point for decision by a Full Bench, namely, whether a creditor in the position of the plaintiff has a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's life-time for such debt."

The appeal was in due course argued before a Full Bench constituted as above.

V. Krishnasami Ayyar and *Raghava Ayyangar* for appellants (defendants Nos. 3 to 5) :—It is submitted that there is only one cause of action. *Natasayyan* v. *Ponnusami*(1) and *Ramayya* v. *Venkataratnam*(2) must be considered as overruled by the Full Bench decision in *Ramasami Nadan* v. *Ulaganatha Goundan*(3), and the latter case is conclusive. [He was stopped.]

Appu Nedungadi for respondents :—The question is what is the nature of the suit that should be brought against the sons of the deceased. If a father sells property to pay a debt or if a decree is passed against him, his son cannot set up his rights acquired by birth in opposition to the father's action. There is a distinction between events happening in the life-time of the father and afterwards. During his life-time his sons, being coparceners, are entitled to be made parties, as persons interested ; and if so joined, cannot afterwards raise questions as to the legality of the debt or proceedings. [He referred to *Ramasami Nadan* v. *Ulaganatha Goundan*(3).] In the case of proceedings in the father's life-time a creditor cannot proceed against the son in respect of property, already alienated ; whereas, after the father's death, if the son alienates property for his own purposes he can be made liable to the extent of the alienations. That shows that a larger liability arises

(1) I.L.R., 16 Mad., 99. (2) I.L.R., 17 Mad., 122. (3) I.L.R., 22 Mad., 49.

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after the father's death. [He referred to *Krishnasami Konan* v. *Ramaswami Ayyar*(1), *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar*(2), and section 234 of the Code of Civil Procedure.] The cases are summarised in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(3) and it is recognized in *Mussamut Nanomi Babuasin* v. *Modun Mohun*(4), that the decisions are not in harmony. See *Arunachala* v. *Zamindar of Sivagiri*(5). [MICHELL, J.—That case was cited to the Full Bench and must be taken to have been dissented from.] Also *Kunhali Beari* v. *Keshava Shambaga*(6).

JUDGMENT.—The question referred in this case is "whether a "creditor in the position of the plaintiff has a further right to sue "the son for his father's debt on the death of the father, apart from "the right to sue him in the father's life-time for such debt."

The plaintiffs recovered a decree for moneys borrowed from them for family purposes by two persons Balakrishnama Chowdari and Appala Naidu, in an action against those two brothers and an undivided brother of Appala Naidu in 1882. Balakrishnama Chowdari and Appala Naidu, who had borrowed the money, died in 1893 and the plaintiffs, having recovered no part of their decree, in 1895 sued the present five defendants for the full amount of the decree and interest. The first two present defendants are the undivided brothers of the first defendant Balakrishnama Chowdari in the suit of 1882 and have succeeded as such to the property of Balakrishnama Chowdari by right of survivorship. The third, fourth and fifth defendants are the sons of Appala Naidu.

The defendants set up the plea of limitation. Hence this reference, which relates only to the defendants Nos. 3 to 5.

It was decided by the Full Bench in *Ramasami Nadan* v. *Ulaganantha Goundan*(7), that a plaintiff can sue the sons with the father in the father's life-time for a debt incurred for family purposes and get a decree against them making their shares in the family property liable for the debt.

It was contended before us that there were two causes of action, one during the father's life-time and another arising on

(1) I.L.R., 22 Mad., 519. (2) L.R., 9 I.A., 128 ; I.L.R., 6 Mad., 1 at p. 16.
(3) L.R., 6 I.A., 88 ; I.L.R., 5 Calc., 148.
(4) L.R., 13 I.A., 1 ; I.L.R., 13 Calc., 21 at p. 35.
(5) I.L.R., 7 Mad., 328. (6) I.L.R., 11 Mad., 64 at p. 75.
(7) I.L.R., 22 Mad., 49.

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the father's death, *Natasayyan* v. *Ponnusami*(1) and *Ramayya* v. *Venkataratnam*(2). The argument appears to be that though the decree would in neither case be a personal decree against the sons, whether the suit was brought in the father's life-time or after his death, there was nevertheless a difference in the relief obtainable, viz., that in the former case an alienation made by the son before decree of his share or interest would not be affected by the decree, whereas in the latter case if the son alienated any part of the property after the father's death but before decree obtained against him, he would be liable to satisfy the decree to the full extent of all the property which came to him irrespective of any alienation he might have made.

Numerous cases were cited in support of this contention (all of which, however, were cited and considered in *Ramasami Nadan* v. *Ulaganatha Goundan*(3)).

We are unable to follow the argument. The cause of action is the same and the decree recoverable is the same. Though the actual relief obtainable in the result may be different, owing to circumstances which may have occurred in the meanwhile and before decree, that alone cannot give a fresh cause of action.

We think the question referred is covered by the Full Bench ruling in *Ramasami Nadan* v. *Ulaganatha Goundan*(3). In that case two actions were brought against a father and his two sons for a debt upon a bond executed by the father for the family debt in 1893 (Suit No. 160 of 1893 and No. 324 of 1893) and a decree was given against the father alone, the two sons being dismissed from the suit. In 1896 the plaintiff brought an action after the father's death against the two sons (the defendants in the suit). In making the reference to the Full Bench the Court, after stating the above facts, proceeds as follows :—"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. . . . . It is certainly desirable that all the

(1) I.L.R., 16 Mad., 99. (2) I.L.R., 17 Mad., 122. (3) I.L.R., 22 Mad., 49.

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"questions between the creditor and his debtor and the debtor's "sons should be raised and determined in one suit. The precise ques- "tion 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?" This question is unanimously answered in the affirmative by the Full Bench.

It is true that the question in that case was one of *res judicata* and not limitation, but we do not see that that can make any difference. The Court decided that the cause of action arose in the father's life-time and, if it arose then and could have been enforced by action, then unless the death of the father gives a fresh cause of action, the time for the purposes of limitation obviously begins to run in the father's life-time at the time when it commenced to run against the father. Throughout the case, moreover, and particularly in the judgments of the Officiating Chief Justice and Subrahmania Ayyar, J., the question discussed and determined is whether the cause of action arose during the father's life-time or after his death only, and the object of the reference was to determine whether that class of cases which held that the cause of action arose only on the death of the father could be sustained, having regard to the decisions that the son's liability existed at an earlier date, viz., during the father's life-time. If there were two causes of action, one commencing during the father's life-time and another at the father's death, it would have been equally important to raise the contention in that case as in the present, but it is observable that such a contention is nowhere suggested.

We are of opinion that there are not two causes of action and therefore answer the question referred that a creditor in the position of the plaintiff has not a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's life-time for such debt.

[This appeal coming on for final hearing after the expression of the above Opinion by the Full Bench, the Court (SUBRAHMANIA AYYAR and DAVIES, JJ.) delivered the following]

JUDGMENT.—With reference to the ruling of the Full Bench on the reference made by us, the suit must be held to be barred by limitation. The decree of the lower Court is reversed and the suit dismissed. In the circumstances, each party will bear his own costs in this and in the lower Court.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1899. October 18, 19. November 6.

ELAYALWAR REDDIAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

NAMBERUMAL CHETTIAR (DEFENDANT), RESPONDENT.*

Religious Endowments Act—Act XX of 1863, s. 14—Suit by persons interested for breach of trust and neglect of duty—Refusal by trustee without adequate reason to accept and utilise offerings for celebration of festivals—Misfeasance and breach of trust in section 14 explained.

In a suit against the trustee of a religious institution under Act XX of 1863 for alleged breaches of trust and neglect of duty by reason of the non-performance of ceremonies, it is not necessary, in order to give jurisdiction to Civil Courts, for the plaintiffs to show that there are any special funds constituting an endowment of the institution. If it be proved that the ceremonies in question have been conducted as a custom for a series of years and that the defendant trustee was not absolutely unable, owing to lack of funds, to carry on those ceremonial observances in the customary manner, he must be held to have been guilty of neglect of duty rendering him liable to a suit under section 14 of the Act.

Where it has been usual for the trustee to celebrate festivals with the aid of voluntary contributions it is a breach of duty on the part of the trustee to refuse to celebrate them without adequate reasons if funds are available, and the trustee ought not, contrary to usage, to refuse to receive such offerings and perform the ceremonies for which they are tendered.

Per SUBRAHMANIA AYYAR, J.—Having regard to the fact that funds voluntarily given to public religious institutions not only enrich the institutions but promote the interests of public worship, it must be regarded as part of the proper functions of the trustee to utilise such income for the purposes of the institution whenever it is available. It is his duty to accept the money and apply it for the specified purpose unless there are proper grounds for its rejection. Though a trustee may exercise a discretion and cannot be charged with misconduct if he acts with an absence of indirect motive, with honesty of intention and a fair consideration of the subject, he may be proceeded against if, from corrupt or improper motives, he refuses to allow voluntary contributions offered for purposes not inconsistent with the principles, rules or usages of the institution to be applied to those purposes. The Courts are bound to restrain a trustee from injuring the interests of the institution under his charge by corruptly, arbitrarily or wantonly departing from the ordinary course of procedure in regard to essential or important matters connected with the institution. The ground upon which the Courts exercise such jurisdiction over him is that such departure on his part amounts to

* Appeal No. 41 of 1899 against the decree of H. H. O'Farrell, District Judge of Chingleput, in Original Suit No. 30 of 1897.

a breach of legal duty incumbent on him. Though the Courts cannot be called upon to decide questions of ritual and worship unconnected with civil rights, it is perfectly competent for them to adjudicate upon such questions also when the adjudication is necessary for the determination of civil rights. *Syed Amin Sahib* v. *Ibram Sahib* (4 M.H.C.R., 112) explained.

SUIT under section 14 of Act XX of 1863, by persons interested in the worship of the deities in a pagoda, against the trustee, charging him with breaches of trust and neglect of duty and praying that he might be compelled to celebrate certain festivals according to usage and otherwise perform the duties connected with the trust, there being certain endowments attached to the temple. The defendant denied the usage alleged by plaintiffs, and contended that there were no funds in his hands specially dedicated to the celebrations referred to. He claimed that it was a matter of purely internal economy and management left to the discretion of the trustee to receive voluntary offerings from worshippers for the celebration of festivals. He also pleaded that the suit related purely to religious ceremonies and processions and as such was not cognizable by Civil Courts. An issue was framed on this plea, the judgment of the District Judge (so far as it is material) being as follows :—" The defendant is an hereditary trustee of the class contemplated by section 4, Act XX of 1863, of a certain pagoda in Striperumbudur and the plaintiffs are vadagalai vaishnavas alleged to be interested in the worship of all the deities in such institution. The suit is brought under section 14 of the Act and is based on certain acts of misfeasance alleged to have been committed by the defendant in respect of the worship of Vedanta Chari one of the aforesaid deities. Sanction to bring a suit of this nature was obtained from my predecessor under section 18 of the Act. The principal reliefs sought are to direct specific performance of the worship in a form the details of which are minutely set forth in an elaborate schedule of 33 pages and to order the defendant to give free access to the shrine to all worshippers of the deity. The defendant admitted the right of all worshippers to free access to the shrine of Vedanta Chari, but denied that such right had been infringed or that he had committed the other acts of misfeasance alleged and set forth certain other pleas . . . . My predecessor in his order granting sanction (see paragraph 7 of his order) has already held that Act XX of 1863 confers a special jurisdiction in relation to such suits

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which is not controlled by the Civil Courts Act or the Code of Civil Procedure. It is not, of course, contended that I am bound by this view of my predecessor, but the same view is pressed upon me now. I am of opinion that it is untenable for several reasons. The reference to the Code of Civil Procedure is to section 12, Act XIV of 1882, and it is no doubt correct to say that that is a later Act than the Act of 1863. But section 12 merely reproduces the provisions of previous Procedure Codes, one of which (Act VIII of 1859) was in force in 1863. Section 1 of that Act is substantially the same as section 12 of the present Act, and if a special jurisdiction in respect of religious ceremonies was conferred by section 14 of the Act of 1863, I should have expected some such words as 'notwithstanding anything contained in Act VIII of 1859, section 1' to have found a place there. The uniform course of decisions in all the High Courts appears to show that mere acts of non-performance of rites and ceremonies unconnected with the wrongful diversion of endowments, are not such acts as will amount to misfeasance under section 14, Act XX of 1863. The Act refers back to the Regulation of 1817 which it superseded and it was observed in *Venkatesa Nayudu* v. *Shri Shatagopa Swami*(1) that the 'scope of the regulation is the prevention of the misapplication of endowments, and all its provisions are to be read with reference to that purpose.' So also in *Syed Amin Sahib* v. *Ibram Sahib*(2) it was observed by the Court:—'We think that misfeasance in this provision was simply used with reference to wilful acts of breach of trust, acts of a criminal nature.' The last words may possibly unduly narrow the scope of the section, as they might seem to exclude such a suit as that of *Dhurrum Singh* v. *Kissen Singh*(3) where the act objected to was the temporary and perfectly *bonâ fide* removal of part of the furniture of the temple. But that case, which is the sole authority cited for the present suit, does not in reality go the length now contended for. The act of removal, though in good faith and for the pecuniary benefit of the temple, was not justified on the ground that it formed part of a religious rite or ceremony and the remark of Maclean, J., that section 14, Act XX of 1863, was probably now unnecessary, as its object was sufficiently effected by section 30 of the Code of Civil Procedure

(1) 7 M.H.C.R., 77 at p. 81. (2) 4 M.H.C.R., 112 at p. 113.
(3) I.L.R., 7 Calc., 767.

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shows that he at any rate did not consider that the suit as framed was in conflict with section 12 of that Code. In the present case it is admitted that there are no special funds constituting an endowment of the deity Vedanta Chari and that the only sufficient source for the processional and other worship which is sought to be carried out would be derived from voluntary contributions which the defendant as a trustee is under no obligation to accept. There can therefore be no pretence of any misfeasance in connection with the application of endowments and I am of opinion that no suit will lie under section 14 of the Act of 1863. Section 14 must, I think, probably be read in connection with section 13 and, so read, it is in complete accordance with section 12 of the present Code of Civil Procedure and section 1 of Act VIII of 1859. It is quite clear on authority that irrespective of the special jurisdiction supposed to be conferred by section 14, Act XX of 1863, no suit will lie to compel a trustee to perform worship in a particular fashion or to do other acts of a purely religious nature. The cases of which, *Vasudev* v. *Vamnaji*(1) is a good example, are quite unanimous on the point, and it is singular, if the provisions of the Code of Civil Procedure and of the Civil Courts Act would be circumvented by means of the Act of 1863, that no case can be cited, during the long period in which the latter Act has been in force, of even an attempt made in that direction. The absence of any citable authority affords a strong presumption against the maintainability of such a suit as the present, the object of which is to compel a trustee of a religious institution to have performed certain ceremonies and to conduct the temple worship in a specified manner. I hold, therefore, on the second issue that the suit is, as a whole, not cognizable by a Civil Court."

The plaintiff presented this appeal on the grounds, among others, that the lower Court had erred in holding that a suit to compel a trustee of a temple to perform the festivals or allow them to be performed in accordance with the customs of the temple would not lie.

Sundara Ayyar and *K. Srinivasa Ayyangar* for appellants.

Rangachariar for respondent.

SUBRAHMANIA AYYAR, J.—The suit, out of which this appeal arises, was brought, under section 14 of the Religious

(1) I.L.R., 5 Bom., 80.

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Endowments Act (XX of 1863), by certain persons interested in the shrine of Vedanta Desikar or Vedanta Chari, attached to the Vishnu temple at Striperumbudur, against the defendant who is the trustee of the shrine. So far as this appeal is concerned the plaintiffs' case appears, in substance, to be that the defendant, from the time he became trustee in 1892, has improperly and completely stopped the celebration of certain periodical festivals which ought to have been celebrated according to the usage of the institution; and the plaintiffs seek to compel the defendant to carry out the trust, in regard to the present matter, duly. The defendant raised various contentions, and several issues were framed with regard to the averments of the parties.

But the second issue, which was whether the suit was cognizable by a Civil Court, was alone dealt with and the suit, in so far as we are here concerned, dismissed on the ground that it was not cognizable by the Courts.

This decision appears to rest entirely upon a statement made on behalf of the plaintiffs in the course of the argument "that there are no special funds constituting an endowment of the deity Vedanta Chari and that the only sufficient source for the processional and other worship which is sought to be carried out would be derived from voluntary contributions" (paragraph 9 of the judgment). Now, the words 'special' and 'sufficient,' which occur in the passage just quoted, would seem to imply that the learned District Judge did not, as suggested before us on behalf of the defendant, take the plaintiffs to have admitted that the shrine in question possessed no endowments whatsoever. It was, moreover, pointed out, on behalf of the plaintiffs, that, if the learned District Judge is to be supposed to have proceeded on the footing that such an admission was made by the plaintiffs, the Judge should be held to have been in error, inasmuch as the plaintiffs' contention has all along been that the shrine does possess some endowments, it being their case that part of the tastik money, paid by the Government in connection with the Vishnu temple, is applicable by the trustee towards the festivals in question, and further that the income, derived from a permanent landed endowment under the management of some of the plaintiffs, is similarly applicable.

The averments in paragraph 6 of the plaint and the fact that the third and the fourth issues, which relate to the question of

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funds, were framed render it improbable that the plaintiffs admitted that no endowment whatever existed. The plaintiffs must have an opportunity to prove whether any endowments exist and whether, with the income thereof, the festivals used to be celebrated before the defendant became trustee, even if it were held that the absence of endowments would have by itself justified the defendant stopping the festivals, though till then they had been carried on with voluntary contributions.

Suppose, however, that no endowments exist and that it had not been the practice to celebrate the festivals before 1892 but that since then voluntary contributions were offered for the festivals or any other act of public worship not inconsistent with the usage of the institution, may not the plaintiffs even then contend that the defendant acted in contravention of his duty as trustee, if it be true that without sufficient grounds he refused to celebrate the festivals, though the requisite funds were forthcoming from voluntary contributions? No doubt, if, under the law, a temple trustee may accept or reject voluntary contributions according to his mere whim and fancy, then no suit would lie in respect of the non-celebration of festivals or ceremonies which depended wholly or even substantially upon his accepting the contributions. Having regard to the fact that in the case of public religious institutions like the present funds voluntarily given have often largely contributed and do still contribute not only to make the institutions richer but also to promote the interest of public worship, it must be regarded as part of the trustee's proper functions to utilize this sort of income for the purposes of the institution, whenever it is available. It is the trustee's duty to accept the money and apply it for the specified purpose, unless there are proper grounds for rejecting the offer. No doubt the trustee has some discretion in the matter. If, in the exercise of that discretion, he acts (borrowing the words employed by Muttusami Ayyar, J., with reference to an analogous matter in *Muruges i Mudaliar* v. *Nagamoney Mudaliar*(1) cited on both the sides) "with an absence of indirect "motives, with honesty of intention and with a fair consideration "of the subject," no misconduct can be imputed to the trustees so acting. But if, on the contrary, the trustee from corrupt or improper motives refuses to allow voluntary contributions offered for purposes

(1) Civil Suit No. 213 of 1879 (unreported).

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not inconsistent with the principles, rules or usages of the institution to be applied for those purposes, in such a case surely persons interested in the institution must be held entitled to proceed against the trustee. And this view of the law is implied by Muttusami Ayyar, J., in the case to which allusion has already been made and on which the learned vakil for the defendant laid much stress. It would follow from the above that the defendant acted contrary to his duty, should it be proved that though the funds required to carry on the festivals were forthcoming during the period in question, yet he refused to celebrate them without any adequate ground for doing so. *A fortiori* would he be guilty had it been usual to celebrate them with the aid of voluntary contributions. And of course the Courts are bound to restrain a trustee from injuring the interests of the institution under his charge by corruptly, arbitrarily or wantonly departing from the ordinary course of procedure in regard to essential or important matters connected with the institution. That such departure on the part of a trustee amounts to a breach of legal duty incumbent on him is the ground on which the Court exercises jurisdiction over him. Therefore, the decisions, cited for the defendant, dealing with the withholding of mere honours and courtesies have no application to cases like this. Still less in point are those cases which were cited and which show that Courts cannot be called upon to decide questions of ritual and worship unconnected with civil rights, since it is perfectly competent to the Courts to adjudicate upon such questions also when the adjudication is necessary for the determination of civil rights.

Nor, as contended for the defendant, does the fact that the present suit is brought under the special provisions of section 14 of the Religious Endowments Act affect the point. There is absolutely no warrant for construing the clause "any misfeasance, breach of trust, or neglect of duty in respect of the trusts vested in, or confided to," in that section otherwise than in its ordinary sense. The comprehensive language employed by the Legislature unquestionably covers every misfeasance, breach of trust or neglect of duty with reference to the trust; and the clause must be held to include the case put forward by the plaintiffs here. As to the decisions cited on behalf of the defendant, none of them seems to have any real bearing on the present question. It is unnecessary to make any comments except perhaps with reference

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to one of them, viz., *Syed Amin Sahib* v. *Ibram Sahib*(1), on which the learned vakil for the defendant repeatedly relied. The only point decided there was that as the members of a committee appointed under the Act who, in the exercise of their power of control, remove on insufficient grounds an officer or servant of a religious establishment, are not necessarily guilty of misfeasance, a person thus removed can sue the members without obtaining the sanction prescribed by the law in respect of a suit charging misfeasance. What such a ruling has to do with the present case, it is not easy to see. The remarks of the learned Judges at page 114 of the report clearly indicate that they understood the section not only to enable interested persons to sue for the protection of the property and funds of religious establishments, but also to enable them to sue the trustee in respect of mismanagement of the affairs of the establishment, even though the mismanagement is not directly connected with any property or funds in his own hands. Before concluding, it may not be superfluous to observe that, in trying the question arising in the case, it would be absolutely unnecessary for the Courts to investigate any of the matters of detail with descriptions of which the plaint schedule seems to be needlessly encumbered.

The lower Court's decree is unsustainable and is reversed. The case will be restored to the file and proceeded with according to law. The costs will abide and follow the result.

MOORE, J.—In paragraph 9 of his judgment, the District Judge finds that there are no special funds constituting an endowment of the deity Vedanta Chari and that the only sufficient source for the processional and other worship which is sought to be carried out would be derived from voluntary contributions which the defendant as a trustee is under no obligation to accept. It does not appear to me that it is necessary for the appellants to show that there are any special funds constituting an endowment of the deity Vedanta Chari. If it is proved that ceremonies connected with Vedanta Chari have been conducted as a custom for a series of years, and that the present trustee is not absolutely unable, owing to lack of funds, to carry on these ceremonial observances in the customary manner, it appears to me that he must be held to have been guilty of neglect of duty rendering him liable to a suit

(1) 4 M.H.C.R., 112.

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under section 14, Act XX of 1863. In paragraph 6 of the plaint, it is alleged that there are certain endowments attached to the temple, and as no evidence was taken it is impossible to say if this allegation is true or not.

I further feel very doubtful if the learned District Judge is right in holding that the trustee is in all cases and under all circumstances under no obligation to accept voluntary contributions made with the view of certain ceremonies being carried out. I should be inclined to hold that, if for a number of years it has been customary for worshippers to tender such voluntary offerings to the trustee and for the latter to use them for the purpose of having certain customary ceremonials carried out, it is not open to the present trustee, contrary to usage, to refuse to receive the offerings and to carry out the ceremonies.

As to whether there is any such custom in the present case, it is, however, impossible to decide till the evidence is taken.

For these reasons, I, without giving any opinion, at present, on the other important questions discussed in the judgment of my learned colleague, agree with him in holding that the decree of the District Judge must be set aside and the suit remanded for hearing on the merits.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Michell.

1899. October 24. November 6.

DORASAMI AYYAR (PETITIONER AND DEFENDANT No. 2), APPELLANT,

v.

ANNASAMI AYYAR AND OTHERS (COUNTER-PETITIONERS AND PLAINTIFFS), RESPONDENTS. *

Civil Procedure Code—Act XIV of 1882, s. 583—Property taken from petitioner by process of Court under decree—Subsequent reversal of decree—Petition for restitution—Custody of third party—Principles on which restitution is ordered.

Two trustees of a temple having been removed from office, a suit was brought against them by the newly-appointed trustees and a decree obtained restraining

* Civil Miscellaneous Appeal No. 36 of 1899 against the decree of L. C. Miller, Acting District Judge of Trichinopoly, on Execution Petition No. 302 of 1898, in the matter of Original Suit No. 15 of 1895.

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them from interfering with the affairs of the temple. In accordance with that decree property of the temple was taken from them by process of the Court and handed to the new trustees. On appeal to the High Court, however, the decree was reversed and restitution was now applied for by the survivor of the late trustees, from whom the property had been taken. In the meanwhile a third party had been appointed an additional trustee to the newly-appointed trustees :

Held, that the principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost; and it is the duty of the Courts to enforce that obligation, unless it be shown that restitution would be clearly contrary to the real justice of the case. That with reference to the position of innocent third parties, the rule that a plaintiff in an action to recover land cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding holding possession on an independent title or claim of title and not in collusion with the defendant, does not apply where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of the Court :

Held, therefore, that the trustee who had been dispossessed must be given an opportunity to prove whether any and which of the temple properties were in his custody as alleged and whether he was deprived of such custody under the decree which was reversed, and whether the newly-appointed trustees acquired the custody of them thereunder; and that, if substantiated, the claim for restitution could not be successfully resisted.

PETITION under section 583 of the Code of Civil Procedure for restitution. Petitioner (appellant), and one Ramasámi Ayyar, since deceased, had been trustees of a certain temple. Counter-petitioners (respondents) had instituted a suit against them alleging that petitioner and his co-trustee had been removed from office which the counter-petitioners now held and praying that petitioner might be restrained from interfering with the affairs of the temple. A decree was passed as prayed; and in accordance therewith, the temple property was taken from petitioner by process of the Court, and handed to counter-petitioners. On appeal to the High Court, however, the said decree was reversed. Petitioner now applied for restitution of the property handed over, and for the recovery of money and costs levied from him by the counter-petitioners. A third party, one Sivasami Ayyar, had since been appointed as an additional trustee with one of the counter-petitioners. The District Judge said :—"There were two defendants in the suit with whom I am concerned; they were temple trustees dismissed by the committee, who refused to give up possession of the temple properties in their hands. This Court granted the other trustees an injunction against them and ordered them to make over the property, which was done. The High

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Court finding the suit wrongly framed dismissed it. The effect of that dismissal, it is contended for the petitioner, (who is the survivor of the two defendants referred to above), is that the parties should be remitted to the position in which they stood before this Court's decree was passed, and that he, the petitioner, should recover the temple property taken from him. The question is whether he is entitled to a benefit by way of restitution under the High Court's decree, and I am clearly of opinion that he is not. He was at the date of the suit a dismissed trustee and, as such, he was *primâ facie*, wrongfully holding temple property which had ceased to vest in him. The committee has power to dismiss trustees for good cause and the dismissal order does not require confirmation by a Court of Justice. This Court's judgment declared the dismissal good, but that judgment no longer stands. The High Court did not however declare the dismissal bad, and therefore what exists now is the committee's order unreversed. The dismissed trustee has, then, no sort of right to recover temple property even though the present trustees may have recovered it in an improperly framed suit. I do not see how the petitioner can recover except by a suit to set aside the dismissal order, and even then he would have to prove himself entitled to exclusive possession as against his co-trustees. So far as the request is for restitution of temple property now in the hands of trustees appointed by committee, I must reject it altogether." He allowed petitioner half of the costs made payable by him on the original decree.

The petitioner preferred this appeal.

J. L. Rosario for appellant.

Sundara Ayyar for respondents Nos. 1 and 3.

SUBRAHMANIA AYYAR, J.—The restitution proceedings to which this appeal relates arose out of a suit brought by the present respondents against one Ramasami Ayyar since deceased and the present appellant. The respondents alleged in the suit that they were the trustees of the temple of Sapta Rishiswaraswami in Lalgudi, that the said Ramasami Ayyar and the appellant, who had also been trustees of the temple, had been removed from their office for good and sufficient cause by the committee exercising control over the temple, and prayed that as notwithstanding their dismissal Ramasami Ayyar and the appellant continued to interfere with the conduct of the temple affairs they both be

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restrained from doing so. The suit ended in the Court of First Instance in favour of the respondent. But on appeal to this Court the decree of the lower Court was reversed and the suit dismissed on the ground that Ramasami Ayyar and the appellant being admittedly in possession of the jewels and other property of the temple, a suit without a prayer for the possession of that property was unsustainable. The appellant thereupon applied to the lower Court alleging that before the said decision in appeal was passed the property referred to had been taken under process of Court purporting to have been issued in accordance with the decree eventually reversed, out of his own possession and handed over to the respondents, and praying for the restitution of the property and the recovery of Rs. 352-5-0 stated to have been levied from him by the respondents for costs made payable to them by the Original Court's decree and Rs. 191-6-0 stated to be due to him as per order of this Court on account of his costs in the Court of First Instance.

The lower Court disallowed the appellant's application wholly in respect of the first two matters and partly in respect of the third and this appeal is in respect of so much of the order as disallow the application.

The question of restitution of the temple property is the important question for determination. The lower Court's view was that the dismissal of the appellant by the committee should be taken to be good until it be adjudged otherwise, and that consequently the appellant had *primâ facie* no right to the possession of the temple property and to the restitution thereof. But that view is obviously erroneous, as the onus is on those who rely on the dismissal to make out that it was for good and sufficient cause and to establish that the appellant's right as trustee has ceased. The conclusion of the lower Court on the point under consideration cannot therefore be supported on the ground on which it is put.

It was however urged before us, on behalf of the respondents, so far as I was able to follow the argument, that the present case did not stand on the footing on which cases connected with the restitution of ordinary property would stand; that assuming the appellant had actual custody of the property and was deprived of such custody under colour of the subsequently reversed decree the Court is not bound to interfere in the case inasmuch as the appellants alleged previous possession was, in law, possession on

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behalf of the respondents also and a change in the actual custody, so long as such custody remains with a trustee or trustees is a matter of too little importance to justify the granting of redress by way of restitution. It was further urged that since the execution proceedings complained of took place, one Sivasami Ayyar having been validly appointed as an additional trustee by the committee has ever since been in possession of the property jointly with the respondents; that as under the law no restitution can be granted against a third party in the position of Sivasami Ayyar, whose title and possession were not derived from the respondents or acquired by means of any collusion between them and him, there can be no restitution against respondents also. Are these contentions supported to any and what extent by the rules governing claims for restitution preferred in consequence of the reversal of a decree?

It is not true, as was in a manner suggested on behalf of the respondents, that the granting of restitution is discretionary. The principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost (*Bank of the United States* v. *Bank of Washington*(1)). That obligation it is the duty of the Courts to enforce unless it is shown that restitution would be clearly contrary to the real justice of the case. The learned vakil for the appellant denied that even the qualification just stated was recognized by the law. But there can be no doubt that the law implies such a qualification. For the very purpose of restitution is to redress injustice. See the forms of writs of restitution which contain the clause:—"And we being willing that what is just in this behalf should be done command you." Tidd's 'Appendix, King's Bench and Common Pleas,' Fifth edition, page 648. It is true that questions as to the justice and propriety of granting restitution will not arise where the decision in consequence of which restitution is claimed determines that the right to the property is vested in the party claiming the restitution as against the party called upon to make it. But where the decision proceeds on technical grounds, leaving the merits undetermined, questions as to the justice and propriety of

(1) 6 Peters, 17.

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granting restitution may well arise. Suppose, for instance, the party wanting the restitution chooses to institute a fresh suit for the purpose, as he is entitled to do in the absence of a statutory prohibition on the point, instead of pursuing the other remedy open to him, viz., the less costly and more expeditious process of applying for restitution in the very suit in which the decision in consequence of which restitution is claimed was passed. Suppose in such fresh suit the defendant pleads that the right to the property claimed has been all along vested in himself and that the plaintiff never had any title to it, there is no authority, that I am aware of, for laying down that he would be estopped from raising such a plea, that he must surrender the property in that suit and then bring an action to recover it. To hold so would of course lead to unnecessary multiplicity of suits. But whether this opinion is correct or not, it must, I think, be conceded that if restitution is claimed in proceedings commenced by an application the party opposing the claim will not be entitled to the same latitude that I think is allowable to a defendant in a suit brought for restitution. A different view will scarcely be consistent with the limited scope of the proceedings which *ex hypothesi* are taken in subordination to the decision in consequence whereof the restitution is claimed and without reference to the actual rights of the parties except so far as they can be gathered from that decision itself.

Passing next to the question of restitution against innocent third parties, it is hardly necessary to say that the well recognized rule that a *bonâ fide* purchaser at a sale held under a Court's decree or order which is subsequently reversed is not affected by the reversal, is based on public policy which has special reference to judicial sales. As regards the law applicable to the case of innocent third parties in the position analogous to that said to be occupied by Sivasami Ayyar, I have not come across any Indian or English authority dealing with the point explicitly. *Quan Wo Chung Co.* v. *Laumeister*(1), an American case, is however in point and the view therein laid down seems to be worthy of being followed, having regard to the sound reasons on which it rests. There the company resisting the claim for restitution was not a party to the decision in consequence of which the restitution was claimed.

(1) 17 American State Reports, 262, 263.

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The company's case was that it held peaceable possession under a title derived from an independent source and adverse to both the parties to the suit and that the company was not in collusion with either. It was held that the rule that a plaintiff in an action to recover land cannot, by his writ of restitution or assistance dispossess, a stranger to the proceeding holding possession on an independent title or claim of title and not in collusion with the defendant does not apply where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of a Court. The observations of the Court on the point were as follows :—In support of this proposition (viz., the company was not liable to be ejected) they cited numerous cases in which it has been held that the plaintiff in an action of ejectment or other suit to recover possession of real property cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding holding the premises under an independent title or claim of title and not in collusion with the defendant. But the cases have no application where the party seeking to be restored to the possession has been wrongfully dispossessed by the agency of the Court. He does not stand in the position of the actor in a suit who seeks the aid of a Court to regain any possession lost by his own negligence or misfortune. On the contrary he is out of possession only because the Court has wrongfully put him out, and whoever is in is there only because the Court has wrongfully made room for him to get in. All that the one has gained and all that the other has lost is due to the agency of the Court and therefore no injustice is done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession. He is in no worse position after his being put out by the Court than he would have been if the Court had never acted, and the Court cannot, without putting him out, undo its own wrong. If he has a superior right to the possession he can, after going out, assert it with the same effect as if he had never been in and he loses nothing but the advantage of holding the premises pending the litigation, —an advantage to which he was never entitled.

The above seem to be some of the main rules governing the subject of restitution claimed in consequence of the reversal of a decree and none of them is in any way inconsistent with the provisions of section 583 of the Code of Civil Procedure.

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Turning now to the present case, it would follow from the principles stated above that if, as alleged by the appellant, he held actual custody of the property and was deprived of it under the colour of the decree which was afterwards reversed, he is entitled to regain that custody, since by doing so it cannot be said any injustice would be inflicted on the respondents, nor is actual custody, from the point of view of the appellant, a matter of small importance having regard specially to the circumstance that the respondents deny the right of the appellant to the office of trustee, while the restoration of the custody to the appellant would leave the respondents precisely in the position which they had occupied before. The objection, based on the alleged right of Sivasami Ayyar, also fails for even supposing that he himself is made a party to the present proceedings, as the respondents contended he should be, he cannot successfully resist the claim for restitution if the facts be as alleged, and the respondents are therefore not entitled to ask that he be made a party or to rely on his alleged right. The appellant is clearly entitled to have an opportunity to prove his allegations in regard to this question.

As to the two sums of money claimed, the case may be dealt with in a few words. The finding of the lower Court that the sum of Rs. 352–5–0 was not paid as alleged by the appellant on his behalf through the first defendant, but that the latter paid it on his own account, is perfectly well supported by the evidence. The appellant not having been in any way a party to the actual payment is not entitled to recover this item of his claim. As to the remaining item, the finding in effect is that the amount awarded is all that can be properly taxed as to the costs payable to him under the direction contained in this Court's decree in appeal, and there is nothing to show that that is wrong and the appeal in respect of these two items of costs fails.

As the District Judge has not gone into the question of fact involved in so far as the application for restitution of the temple property is concerned, I would call upon the lower Court to submit, upon evidence to be adduced by the parties, findings upon the following issues :—(1) whether any and which of the temple properties were in the appellant's actual custody at the time referred to by him ; (2) whether he was deprived of such custody under the decree which was reversed and whether the respondents or any

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of them acquired the custody of the same thereunder. The findings should be submitted within two months from the date on which this order reaches the lower Court, and seven days will be allowed for filing objections after the findings have been posted up in this Court.

MICHELL, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1899. October 12, 17.

KUMARASAMI REDDIAR (PLAINTIFF No. 4), APPELLANT,

v.

SUBBARAYA REDDIAR AND OTHERS (PLAINTIFFS NOS. 1 TO 3 AND DEFENDANTS NOS. 7 TO 18 AND 20 TO 26), RESPONDENTS.*

Civil Courts Act—Act III of 1873, *ss.* 12, 13—*Civil Procedure Code—Act XIV of* 1882, *s.* 566—*Appeal—Transfer to Subordinate Judge of appeal petition heard by and pending before District Judge—Jurisdiction of Subordinate Judge to hear and determine the appeal—Jurisdiction is not conferred by waiver when Court has no inherent jurisdiction.*

An appeal, having been entered in a District Court, against the decision of a District Munsif, was heard in part by the District Judge, who remanded the suit to the District Munsif for findings on fresh issues. Findings having been duly returned, the District Judge transferred the appeal to the Subordinate Judge, who heard and determined it:

Held, that the District Judge had no power to transfer to a Subordinate Judge an appeal which was part heard and pending before him. The only inherent jurisdiction that a Subordinate Judge has is in original suits, under section 12 of the Civil Courts Act. In appeals he only acquires jurisdiction under the last clause of section 13 of the said Act, which enables a District Judge to transfer appeals to him, and unless that section is complied with the Subordinate Judge has no jurisdiction to hear or determine any appeal. Section 13 does not authorise the transfer to a Subordinate Judge of an appeal part heard and pending before the District Judge. The fact that objection was not taken to the jurisdiction of the Subordinate Judge did not confer jurisdiction upon him, the Subordinate Court not having inherent jurisdiction.

SUIT for removal of a bund and for an injunction. The District Munsif having decreed for plaintiffs, as prayed, the defendants

* Second Appeal No. 1417 of 1898 against the decree of N. Sarvothama Rao, Temporary Subordinate Judge of Tinnevelly, in Appeal Suit No. 26 of 1894, reversing the decree of C. Subrahmania Ayyar, Additional District Munsif of Tinnevelly, in Original Suit No. 826 of 1892.

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appealed to the District Court. On the appeal coming on for hearing certain documents were filed, but the District Judge remanded the suit, under section 566 of the Code of Civil Procedure, to the District Munsif for findings upon fresh issues, ordering that fresh evidence might be taken. The findings having been duly returned the District Judge transferred the appeal to the Subordinate Judge who, after hearing the parties, allowed the appeal and dismissed the suit.

Plaintiff No. 4 presented this second appeal, the first ground of appeal being that the Subordinate Judge had no jurisdiction to try the appeal as it had already been heard in part by the District Judge.

Sundara Ayyar and *Balasubrahmania Ayyar* for appellant.

V. Krishnasami Ayyar and *Ramakrishna Ayyar* for respondent No. 18.

JUDGMENT.—The only substantial objection raised in this second appeal by the appellant is that the Subordinate Judge who heard the appeal in the Court below had no jurisdiction.

The case was originally tried in the District Munsif's Court of Tinnevelly and the appeal was entered and came on for hearing before the District Judge and certain documents were put in at the appeal. The District Judge thereupon remanded the suit, under section 566, Civil Procedure Code, to the District Munsif for findings upon fresh issues and ordered that fresh evidence might be taken and the findings returned. When the findings had been returned the District Judge transferred the appeal to the Subordinate Judge who, after hearing the parties, reversed the decree of the District Munsif and dismissed the plaintiffs' suit.

It is contended that the District Judge had no power to transfer an appeal which had been part heard by the District Judge to the Subordinate Judge under section 13 of the Civil Courts Act (Act III of 1873), and that it is only when an appeal has been properly transferred under section 13 of Act III of 1873 that a Subordinate Judge has any jurisdiction.

The only inherent jurisdiction that a Subordinate Judge has is in original suits under section 12 of the Civil Courts Act (Act III of 1873). In appeals he only acquires jurisdiction under the last clause of section 13 of that Act, which enables a District Judge to transfer appeals to him, and unless that section is legally complied with he has no jurisdiction to hear or determine any appeal. The

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question, therefore, is whether when a case has been commenced and part heard by the District Judge he can legally transfer the further hearing of it to a Subordinate Judge.

It has been held under section 6 of Act VIII of 1859, which is an analogous enactment, that a part heard case pending before a District Judge cannot be transferred—see *Moulvie Abdool Hye* v. *Macrae*(1) and *Dumree Sahoo* v. *Jugdharee*(2).

In *Kotayya* v. *Lakshmayya*(3) it was held by this Court that under section 13 of the Civil Courts Act a District Judge, who had himself part heard an appeal, could not thereafter transfer the appeal to the Subordinate Judge and the judgment of the Subordinate Judge was set aside.

On behalf of the respondents it was argued that, at the most, the transfer of the appeal after it had been part heard by the District Judge was a mere irregularity and did not affect the jurisdiction of the Subordinate Judge and *Bandhu Naik* v. *Lakhi Kuar*(4), *Sankumani* v. *Ikoran*(5), and *Ledgard* v. *Bull*(6) were cited.

Bandhu Naik v. *Lakhi Kuar*(4) was a case under section 25, Civil Procedure Code, which is a somewhat analogous section. There the case had been part heard by the Subordinate Judge and was then transferred by the District Judge to his own file. The Court held that, though he had power to transfer and try it, inasmuch as he had not taken the evidence he had not tried the case, and set aside his decree. This case, therefore, does not assist the respondents' contention, for it only decides at most that a District Judge has power to transfer and try under section 25, Civil Procedure Code, a case which was pending in a Court subordinate to itself even though it might have been part heard, but it also decided that it could not act upon what had been already done in the Subordinate Court.

Sankumani v. *Ikoran*(5) was also a case under section 25 of the Civil Procedure Code. This case had been transferred without notice having been given, as the section directed, to the defendants. The defendants did not, however, object to the want

(1) 23 W.R., (C.R.), 1 at p. 4. (2) 13 W.R., (C.R.), 398.
(3) Second Appeal No. 863 of 1898 (unreported).
(4) I.L.R., 7 All., 842. (5) I.L.R., 13 Mad., 211.
(6) L.R., 13 I.A. 134; I.L.R., 9 All., 191 at p. 203.

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of notice but appeared and submitted to the jurisdiction and even appealed without taking any objection to the jurisdiction. The Court held that as the Court had inherent jurisdiction and as notice was intended for the benefit of the parties, they could waive it and so cure any defect in the order conferring jurisdiction. They acted on the principles laid down by the Privy Council in *Ledgard* v. *Bull*(1) and in *Meenakshi Naidoo* v. *Subramaniya Sastri*(2) that where a Court has no inherent jurisdiction waiver will not confer jurisdiction, but in cases where the Court has inherent jurisdiction but there has been some irregularity in the initial proceedings upon which it exercised jurisdiction, the defect is one which can be cured by waiver.

It has already been pointed out that in appeals a Subordinate Judge has no inherent jurisdiction, so that any waiver by the parties would not confer jurisdiction upon him if the transfer was not legal.

We are of opinion that section 13 of the Civil Courts Act does not authorise a District Judge to transfer to a Subordinate Judge an appeal which is part heard and pending before the District Judge, and it would be contrary to public policy to put such an interpretation upon the section; and that the fact that the appellants did not object to the jurisdiction does not confer jurisdiction upon the Subordinate Judge.

We must, therefore, allow the appeal and reverse the decree of the Subordinate Judge and remand the appeal to the District Judge for hearing and disposal according to law. Costs will abide the event.

(1) L.R., 13 I.A. 134; I.L.R., 9 All., 191 at p. 203.
(2) L.R., 14 I.A. 160; I.L.R., 11 Mad., 26.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subrahmania Ayyar.

1899. November 8, 10. December 5.

CHEEKATI ZAMINDAR (PLAINTIFF), APPELLANT,

v.

RANASOORU DHORA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, *ss.* 106, 107—*Duration of tenancy—Presumption of yearly tenancy—Evidence—Burden of proof in action of ejectment by zamindar against tenant as to nature of tenancy.*

Suit for ejectment by a zamindar against two tenants holding under him subject to the payment of an annual cist or assessment. The zamindar was the owner of the kudivaram as well as of the melvaram right, and it was admitted that the tenants' possession was derived from him:

Held, that these facts alone were not enough to raise the presumption of a tenancy from year to year.

Per SHEPHARD, J.—It is not the general rule that the tenants in an ordinary zamindari hold their lands as yearly tenants or as tenants from year to year. Many of the occupants of zamindari lands are not tenants in the proper sense of the word and the fair presumption is that when new occupants are admitted to the enjoyment of waste or abandoned lands the intention is that they should enjoy on the same terms as those under which the prior occupants of zamindari lands held, it being open to the zamindar to rebut that presumption, either by proving that the usual condition of things does not prevail in his estate or that a particular contract was made between him and his tenant.

Per SUBRAHMANIA AYYAR, J.—The presumption of tenancies from year to year which is well known to English law, because of the general prevalence in England of tenancies in the strict legal sense of the term, would also arise in this country if the tenancies here were proved to be similar. But inasmuch as practically the whole of the agricultural land on zamindaris is cultivated by raiyats who are generally entitled to hold them so long as they desire to do so, subject to the performance of obligations incident to the tenure, there is insufficient foundation from which such a presumption may be raised. Nor is the fact that the zamindar is the owner of the kudivaram right as well as the melvaram right sufficient to shift on to the raiyat the burden of proving that the tenancy is not one from year to year. In order to discharge the onus which is on him in a case of ejectment the zamindar must do more than merely show that the land when it passed into the hands of the raiyat was at his disposal as relinquished or as immemorial waste land. He must show that the defendants' possession is inconsistent with the *prima facie* view that it is held under the usual and ordinary form of holding prevalent in the zamindaris.

Achayya v. *Hanumantrayudu*, (I.L.R., 14 Mad., 269), explained.

* Second Appeal No. 1584 of 1898 against the decree of F. Murray, District Judge of Ganjam, in Appeal Suit No. 224 of 1897, reversing the decree of V. Krishnamurti Pantulu, District Munsif of Sompeta, in Original Suit No. 137 of 1896.

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SUIT for ejectment by the zamindar of Cheekati against the occupants of two jeroyati lands in the village of Sompeta. Plaintiff claimed as the owner and landholder of the lands in question, and alleged that for the past twenty-five years the brother of defendant No. 1 and the adoptive father of defendant No. 2 and after him the members of his family, had cultivated the lands, paying a yearly rent to the estate of Rs. 87; that plaintiff having in the previous year signified his intention of claiming a higher rent according to the rates paid for the neighbouring lands of similar description and quality, defendants falsely set up a right of permanent occupancy, and had subsequently failed to quit the land though notice had been given to them. Defendants relied on an alleged permanent lease said to have been granted fifty-two years ago by the plaintiff's predecessor in title. An issue was framed as to whether the defendants were yearly tenants, and if not whether they were liable to be ejected; and the District Munsif held that defendants had failed to prove the alleged grants set up by them; or that plaintiff or his predecessor in title had ever treated them as permanent raiyats; or that they had rights of permanent occupancy. He held, on the evidence, that they were yearly tenants and (referring to *Achayya* v. *Hanumantrayudu*(1)) that plaintiff had a right to eject them after giving them proper notice, as he had done, and ordered plaintiff to be placed in possession of the lands as prayed. The defendants appealed to the District Court, where the Judge said:—"I cannot hold the defendants are yearly tenants. They have not proved how the tenancy originated, but they have proved possession for above thirty years. The plaintiff admits they hold resumed service inam for money rent, and their receipts show that such rent has been occasionally, at least, if not always, over a long term regarded as a 'fixed rent.' I must, I think, therefore follow the principle as laid down in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*(2), and the defendants must, in their case, owing to the above facts, be regarded as raiyats in possession of the kudivaram; they are thus in as good a position as ordinary Government raiyats, and the zamindar cannot eject them as long as they pay a fixed rent." He reversed the decree and dismissed the suit.

(1) I.L.R., 14 Mad., 269.

(2) I.L.R., 20 Mad., 299.

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The plaintiff preferred this second appeal.

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

Sundara Ayyar for respondents.

SHEPHARD, J.—Owing apparently to a misunderstanding of the point decided in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*(1), the District Judge, while observing that the defendants have proved possession for over thirty years, does not discuss the evidence and has recorded no definite findings upon it. When the facts mentioned in the first part of the judgment in that case are taken into account, it is quite clear that the plaintiff's suit must have been dismissed. All that was proved was that the plaintiff was the holder of a permanently-settled estate, and that the lands from which he sought to eject the defendants were lands situated within that estate held subject to an annual assessment paid by the defendants to the plaintiff. On those facts the plaintiff could not succeed unless he could call in aid a presumption that every holder of lands in a zamindari is a tenant of the zamindar and that every such tenant is a tenant-at-will or, at the most, a tenant from year to year. The point decided is that, so far from any such presumption arising, the presumption is the other way; because ordinarily the melvaram right only is vested in the zamindar, and the interest of the occupant of the soil is not an interest derived from the zamindar analogous to the interest which a tenant takes on being admitted into possession by his landlord. Accordingly when the zamindar seeks to eject a defendant who is holding land in his zamindari, it is incumbent on him to start his case by proving that the defendant was let into possession by him as a tenant or, in other words, that the kudivaram having been originally vested in the zamindar, the defendant had been holding by title derived from the zamindar. This was not laid down for the first time in *Venkatanarasimha Naidu* v. *Dandamudi Kotayya*(1) as the judgment in that case itself shows (see page 303), and *Appa Rau* v. *Subbanna*(2), a case similar in its facts—*Venkataramanier* v. *Ananda Chetty*(3). In the present case on the facts admitted by the respondent's vakil a different question arises. The respondent's vakil admits that before the possession of the defendants

(1) I.L.R. 20 Mad., 299. (2) I.L.R., 13 Mad., 60.
(3) 5 M.H.C.R., 120.

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began the land was at the disposal of the zamindar, and that accordingly the defendants' possession was derived from the zamindar, so that the relation of landlord and tenant was created. The question is whether, on the strength of these admissions, the zamindar is without further proof entitled to eject the defendant. It is contended that at any rate in the case of tenants admitted into the occupation of zamindari lands there is no justification for any presumption that the tenant was intended to hold as a tenant from year to year, and that in point of fact it is not on such terms that agricultural tenants in this country ordinarily hold their lands. It is rightly pointed out that the Legislature has been careful to save tenancies for agricultural purposes from the immediate operation of section 106 of the Transfer of Property Act, and reliance is placed on the language used by this Court in *Venkatacharlu* v. *Kandappa*(1). The facts of that case appear to have been similar to those of the present so far as they are at present ascertained. The defendants and their father had been in occupation as tenants for about fifty years—there was no evidence that a permanent right of occupancy had been created in favour of the father, nor, on the other hand, was there any evidence in the plaintiff's favour. There was no evidence as to the terms of the tenancy one way or the other. In that state of facts this Court held that the suit for ejectment was rightly dismissed. The judgment proceeds, not on the ground that the length of the defendant's possession raised any inference favourable to him, but on the ground that the inamdar seeking to eject his tenant was bound to prove the terms of the tenancy.

I had some difficulty in reconciling this decision with *Achayya* v. *Hanumantrayudu*(2) until my attention was called by Mr. Justice Subrahmania Ayyar to the real facts in the latter case as they appear in the printed appeal paper. The question in that case arose between an agraharamdar and his tenants, and evidence had been adduced against the tenant to the effect that the Court had held with respect to other tenants in the same agraharam adversely to the claim of a permanent right of occupancy. On the evidence the claim was negatived by both the lower Courts. The case was not one in which there was no evidence either way as to the terms of the tenancy, and therefore the point decided in

(1) I.L.R., 15 Mad., 95 at p. 96. (2) I.L.R., 14 Mad., 269.

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Venkatacharlu v. *Kandappa*(1) did not arise. In reality it was quite unnecessary to decide any question as to the burden of proof. So far, therefore, as that decision is concerned, it does not in my view detract from the authority of the later decision in *Venkatacharlu* v. *Kandappa*(1). But it was argued on the appellant's behalf that since the presumption of a tenancy from year to year admittedly exists as between Government raiyats and their tenants, it may with equal justice be presumed that the tenant admitted by a zamindar is intended to be admitted on the same terms. If the normal position of the two classes of tenants were the same, the inference would of course be a fair one. But the learned Advocate-General admits, as he cannot avoid admitting, that their circumstances are different, and he allows that the presumption of occupancy right arises far more readily in the case of a zamindari tenant than in that of a tenant holding under a Government raiyat. If the argument prevailed, it would follow that every tenant, admitted by a zamindar after the date of the permanent settlement, would, however long his possession, be liable to eviction unless he could adduce positive proof of an occupancy right. It would avail him nothing to point to his long continued possession, for that, as the cases cited by the Advocate-General show, is not *primâ facie* evidence of occupancy right. With regard to certain lands within a zamindari, *e.g.*, pannai lands and possibly with regard to certain zamindaris, the general rule may be that the tenant holds his lands as a yearly tenant or as a tenant from year to year. But that is certainly not the general rule with regard to the ordinary lands in an ordinary zamindari. Many of the occupants of zamindari lands are not tenants in the proper sense of the word, and the fair presumption is that, when new occupants are admitted to the enjoyment of waste or abandoned lands, the intention is that they should enjoy on the same terms as those under which the prior occupants of zamindari lands held. It is open to the zamindar to rebut the presumption. He may show as was shown in *Achayya* v. *Hanumantrayudu*(2) that the usual condition of things does not prevail in his estate, or he may adduce evidence as to the particular contract made between him and his tenant. In other words, he may show that the terms of the

(1) I.L.R., 15 Mad., 95 at p. 96.

(2) I.L.R., 14 Mad., 269.

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contract were different from those which ordinarily prevail between a zamindar and the occupant of zamindari lands.

As the District Judge has not dealt with the appeal on the evidence, I think the case must go back for a finding on the question whether, in view of the facts admitted before us and the other evidence, the plaintiff is entitled to evict the defendants. Fresh evidence may be received. The finding should be submitted within two months from the date of the receipt of this order. Seven days will be allowed for filing objections after the finding has been posted up in this Court.

SUBRAHMANIA AYYAR, J.—The question raised in this case is whether, when, in a zamindari, land, in which none other than the zamindar himself has the kudivaram or similar right, is taken up by a raiyat for cultivation subject, of course, to the payment of sist, and nothing more appears in regard to the duration of the holding, the presumption is that it is a tenancy from year to year.

In order to see whether a particular presumption, such as we are here concerned with, is applicable to a given case, we must ascertain whether the facts, which generate the presumption, are existent. In doing so we must be careful of the phraseology we employ in the discussion of the question. One of the fruitful sources causing confusion in a discussion like the present is a lax use of terms. Terms which in one system of law embody one set of ideas are sought to be applied to a quite different system having very slight, if any, correspondence. The result is that all the incidents of a relation constituted by the former by means of those terms are insensibly assumed to follow as a matter of course in the latter. In such a case the caution conveyed by Sir Erskine Perry in *Doe dem. Dorabji* v. *Bishop of Bombay*(1), in the following language cannot be too often repeated:—"When states of fact "occur to which analogous conditions in European life may present "themselves to the mind of an English lawyer, the latter should "be cautious in applying the rule of English law applicable "in England, unless he is satisfied that the analogy is complete; "and, in all cases he should be studious to ascertain whether the "phenomena of human life which come before him are not much "more readily to be traced to an Indian origin, and to be explained

(1) Perry's Oriental Cases, 501.

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"by Asiatic notions and habits than by principles of European "civilization."

Bearing this in mind let us enter into a consideration of the subject. Now the presumption of a tenancy from year to year is well known in English law, and if we consider what the condition of agricultural holding is in England, it is not to be wondered how much that presumption is in harmony with the habits of the community there. For in the language of Dr. Ed. Robertson "practically the whole agricultural land of the community is "cultivated by persons who merely hire it for a limited time from "the owners." In fact the English law raises the presumption because of the general prevalence in England of tenancies in the strict legal sense of the term.

No doubt in this country also that presumption holds good if a similar tenancy is proved. But if we turn to zamindari lands, what is the state of things we meet with? Practically the whole of the agricultural land there is not cultivated by persons who merely hire it for a limited time. The raiyats most generally hold by no derivative tenure. And even where the right to cultivate passes to them from zamindars the payment made by them, in the absence of a contract, is regulated by custom in the last resort, as provided in section 11 of the Rent Recovery Act. The raiyats are generally entitled to hold the lands for an unlimited time, that is, as long as they wish to retain it subject to the performance of the obligations incident to the tenure. Nor can it be said that this is true only in regard to so much of the land in the hands of the raiyats as cannot be shown to have been obtained by them from zamindars. For in the case of lands which have been relinquished by the former occupants or which have been lying waste from time immemorial, they too, when taken up by a raiyat, are treated exactly on the same footing as land into the possession of which it is not shown that the raiyat was let in by a zamindar, and the raiyat holds possession of them for an indefinite period. This practice prevails not only in the zamindaris in the southern part of the Presidency, but also in those in the northern part where the rights of raiyats are sometimes erroneously supposed to be inferior to those possessed by raiyats elsewhere. As an illustration of the truth of the above statement I may refer to *Appa Rao* v. *Sriramulu*(1)

(1) Appeal No. 118 of 1898 (unreported).

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which came up before Moore, J., and myself after the argument of this appeal. The dispute in the case under reference related to the apportionment among the zamindar of Nuzvid and certain of the raiyats of the compensation money awarded for lands taken up for the East Coast Railway, part of the land being what had been relinquished by some raiyats and then taken up by those who were in possession at the time of the acquisition by Government. Nor had the lands so taken up been held very long, the earliest case of such occupation being that of 1877, while the others were more recent. Now what is important for the present purpose is, not the actual decision in that case, which was to the effect that the raiyats were not merely tenants from year to year in respect of the lands referred to, but the course of dealing which was shown to prevail in the zamindari, on the one hand with reference to lands relinquished but subsequently taken up and, on the other hand, with reference to the zamindar's home-farm lands. That course of dealing was explained by the two karnams who were called by the zamindar himself and who gave evidence on the point. One of them said "some of the lands have been held for a long time and some were "taken up on relinquishment by others. These accounts show "relinquishments and acceptances by other raiyats in detail for each "fasli. Seri-pattas in the same form are granted in respect of land "held for a long time and in respect of those taken up on relinquish-"ment by others. If the tenants who have taken up lands after "relinquishment die, pattas are granted in the names of their heirs. "If such lands are transferred pattas are granted in the names of "transferees. Such lands are transferred by sale and mortgage in "the same way as lands which have been held from time imme-"morial." The material portion of other witness's evidence on the point was as follows:—"There are lands in our village under "the direct cultivation of the zamindar. The lands of the raiyats "concerned in these cases are seri lands. The pattas for these two "kinds of lands are different. The pattas for home-farm lands are "only for one year. It is provided in those pattas that the tenants "should quit the lands at the end of the year. The pattas now "shown to me are for seri lands . . . . No such provision "is inserted in these pattas. No pattas are granted for home-farm "lands. Khats are taken from the raiyats. The home-farm lands "are leased out to the highest bidder. The rent is never varied "in the case of seri lands, except where dry is converted into wet

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"and the tenant consents . . . . If any pattadar dies the "lands are entered in the names of his heirs. There is no transfer "in respect of home-farm lands, nor are they entered in the names "of heirs when a tenant dies."

This is a fairly correct description of what goes on in most zamindaris of this Presidency, and it shows very clearly that the prevalent permanent form of agricultural holding in zamindari tracts extends not only to lands held by raiyats immemorially, but also to what they take up under zamindars, provided the lands so taken up do not form part of the home-farm lands of the zamindars. Such being the state of things, can it be said that even as regards lands to which the raiyat cannot show an immemorial right there is sufficient foundation from which the presumption of a holding from year to year may be raised—that there is, in fact, a general prevalence of tenancies strictly so called? On the contrary, does not a presumption of a different sort, viz., of an ordinary raiyat's holding, fit in with the normal state of things as shown above? The one fact on which great stress is laid, viz., that the zamindar was the owner of the kudivaram right as also of the melvaram right, cannot be entirely dissociated from the surrounding circumstances and be made the sole basis of the presumption that the holding is of an essentially different character, viz., a tenancy from year to year. No doubt that fact would enable a zamindar, at the time he allows a raiyat to take up such land, to make special arrangements in regard to the duration, &c., of the holding. But it does not necessarily suggest that such a course has been adopted and that the land is held differently from the bulk of the village lands. Consequently the fact in question is in itself insufficient to shift the burden of proof on to the shoulders of the raiyat.

In order to do so the zamindar must go somewhat further than merely show that the land, when it passed into the hands of the raiyat, was at his disposal as relinquished or immemorial waste land. Of course, he is not called upon to prove that when the raiyat took up the land an actual understanding as to the duration of the holding was come to between the parties. Much less is he bound to adopt any specific mode of proving his case. Nor is he required to adduce a prescribed quantity of evidence. To discharge the onus which is on him, all that he has to show is that the defendants' possession is inconsistent with the *primâ facie* view that it is held

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under the usual and ordinary form of holding prevalent in the zamindaris. He may prove this by showing that the land was dealt with as his home-farm lands, or he may show that the practice in the particular estate is not what it usually is in zamindaris generally. If in either of such ways or otherwise he shows that the defendants' possession is inconsistent with the usual form of holding, then, undoubtedly, the presumption will be that the tenancy is from year to year and the defendant must rebut it if he can.

The Advocate-General, however, likened the case under consideration to that of a Government pattadar or a raiyatwari proprietor, as he is sometimes described, letting his lands to a person for cultivation. But the cases differ materially as will be manifest if we consider the ground on which the presumption of tenancy from year to year has been applied to that case. That ground was explained by Collins, C.J., and Muttusami Ayyar, J., in *Chidambara Pillai* v. *Tiruvengadath Ayyangar*(1) thus :— "Admittedly the village in suit is a taraf village of which the temple "is the registered proprietor entitled to both the melvaram and the "mirasvaram as against the appellant. This being so, 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 "incidents of property is bound to establish." The ordinary incidents of such property were described in another passage in the judgment which runs thus :—"Ordinarily the mirasidar or "proprietor in a taraf village has the right of cultivation also and "he is therefore at liberty to arrange for it from time to time "either by granting leases or letting it to purakudies for varam or "under what is usually called the pannai system by means of "labourers who are paid wages in grain." In other words, the view of the learned Judges was that permanent holdings under raiyatwari proprietors being unusual and exceptional, the onus is on the party setting up such a special kind of holding. The ratio decidendi of the case seems to me to be rather in favour of the raiyats in instances like the present for reasons already stated. Consequently decisions in the cases which arose between raiyatwari proprietors and cultivators under them are not in point in disputes

(1) Appeal No. 1 of 1886 (unreported).

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like the present. If it be permissible to seek in what goes on in raiyatwari villages a parallel to cases like the present, it can scarcely be denied that there is much analogy between them and instances where Government waste land is taken up in the ordinary course on darkhast by raiyats there. In the latter instances, though they are of every day occurrence, the occupants are invariably considered to be raiyatwari proprietors but not tenants from year to year. Nor do I understand *Achayya* v. *Hanumantrayudu*(1) to be really inconsistent with my conclusion. For the land in dispute there, situated in an agraharam village owned by a number of sharers, was admitted to belong to the plaintiff—one of the agraharamdars—in the sense that the cultivators had no right of occupancy, the District Munsif having found so on the basis of previous decisions relating to the village and that finding having been accepted by the District Judge—facts, however, which are not referrred to in the report of the case.

It remains to add a few words with reference to the argument founded on section 106 of the Transfer of Property Act. That the Legislature found it necessary by section 117 of that Act to exempt agricultural leases from the operation of the said section 106, among others, furnishes, to my mind, a strong argument against the Courts proceeding to apply the rule of tenancy from year to year to holdings such as we are here concerned with. For it is impossible to doubt that the reason for the exemption is the incompatibility of the presumption with the ordinary local conditions and the consequent inexpediency of applying it except where both the local Government and the Government of India concur in thinking such application to be permissible. It is scarcely necessary to say that when the authorities to whom the decision of the matter has been left by the Legislature have refrained from permitting the application of the presumption to the class of cases to which the present belongs, it is unwarrantable for the Courts to consent to its application on the mere ground that the presumption has found a place in the Statute.

I therefore concur in the order proposed by my learned colleague.

(1) I.L.R., 14 Mad., 269.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Benson.

MAHARAJAH OF JEYPORE (PETITIONER), APPELLANT,

v.

PAPAYYAMMA AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

1900. February 22, 23, 26. March 20.

Letters Patent, s. 15—Ganjám and Vizagapatam Agency Courts Act—Act XXIV of 1839—Validity of Agency Rule No. XXII passed under the Act—Jurisdiction of High Court to transfer suit pending in the Agent's Court to the District Court—Indian Councils Act—24 & 25 Vict., cap. 67, s. 25.

An order was made by a single Judge, by consent of the parties, transferring a case from the Court of an Agent to the Governor, Vizagapatam, to a District Court. A further order was made by a single Judge which, though in form an order dismissing a review petition against the first-mentioned order, was in substance an adjudication upon the question whether the High Court has jurisdiction to order the transfer of a suit from the Court of such an Agent to a District Court:

Held, (1) that both orders were "judgments" within the meaning of section 15 of the Letters Patent and that an appeal lay therefrom;

(2) that the High Court has no jurisdiction to transfer a suit pending in the Court of the Agent to the Governor, Vizagapatam, to the District Court of Vizagapatam;

(3) that Agency Rule No. XXII, made in 1840, under the powers conferred by Act XXIV of 1839, is a valid rule.

BY consent of both the respondents, the petitioner, (the Agent to the Governor, Vizagapatam), not appearing in person or by Counsel, an order was passed on September 30th, 1898, by the High Court, Madras, transferring Original Suit No. 1 of 1898 on the file of the Agent to the Governor, Vizagapatam, to the District Court of Vizagapatam, for disposal.

On September 12th, 1899, the defendant in the said Original Suit No. 1 of 1898 presented an application to the High Court praying that the said order might be reviewed and reversed. Upon this application the Court (BODDAM, J.) passed the following

ORDER.—This is an application for the review and reversal of my order of the 30th September 1898, transferring Original Suit No. 1 of 1898 from the file of the Vizagapatam Agency Court to

* Appeals Nos. 19 and 21 of 1899, under section 15 of the Letters Patent, against the orders of the High Court, passed on Civil Miscellaneous Petitions Nos. 422 of 1899 and 455 of 1898, respectively.

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the District Court of Vizagapatam for disposal. That order was made at the request of the Agent and by consent of the parties, but it is said now that this Court had no jurisdiction to make the order, and I have therefore heard the arguments even though the application for review is very much out of time—the petition having been presented only on the 17th April 1899.

The question turns on the 15th section of the Act for Establishing High Courts in India, 24 and 25 Victoria, cap. 104.

So much of section 15 as is material is as follows :—"Each of the "High Courts established under this Act shall have superintend- "ence 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 from any such Court to any "other Court of equal or superior jurisdiction, and shall have power "to make and issue rules for regulating the practice and proceed- "ings of such Courts," &c.

It is contended that this Court had no jurisdiction to make the order because (1) the Agency Courts are not subject to the appellate jurisdiction of the High Court and (2) the District Court at Vizagapatam is not of equal or superior jurisdiction to the Agency Courts.

It is admitted that the Civil Procedure Code, section 25, does not apply as the Court in question is in a scheduled district within section 1 of the Civil Procedure Code.

The Agency Court is created under Act XXIV of 1839, "an Act for the administration of justice and collection of revenue in certain parts of the districts of Ganjám and Vizagapatam."

By section 4 of this Act it is enacted that "it shall be competent to the Governor in Council of Fort St. George by an order in Council to prescribe such rules as he may deem proper for the guidance of such Agents . . . . and to determine to what extent the decision of the Agents in civil suits shall be final and in what suits an appeal shall lie to the Sadr Adalat," &c.

Rules were passed by the Governor in Council under this section, and rule XXI of such rules provides that from all decrees upon original suits passed by the Agent (with the single exception specified in the next following rule) an appeal shall lie to the Sadr Court, &c., and rule XXII provides that "from decrees of the "Agent in suits wherein the landed possession of a zamindar, &c., "may have formed the subject of litigation an appeal will lie to

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'the Governor in Council alone who may refer any such appeal 'for the decision of Sadr Court," &c.

Now the suit in which this present application is made is within this rule and any appeal would under this rule be to the Governor in Council alone; so that under these rules in this very case the appellate jurisdiction is not in the High Court. It is therefore contended that the Agency Courts are not subject to the appellate jurisdiction of the High Court within section 15 of the Charter Act.

Another reason for this contention is that under the Act establishing the Agency Courts the Governor in Council of Fort St. George is authorised to prescribe such rules as he may deem proper for the guidance of the Agents and therefore the High Court have no power under section 15 of the Charter Act "to make and issue general rules for regulating the practice and proceedings of such Courts . . . . ", and it is the fact that the High Court has not issued any rules for regulating their practice and proceedings. It is further contended that the jurisdiction of the Agency Courts is superior to that of the District Court of Vizagapatam and the order is therefore bad.

The jurisdiction of the Agency Court of Vizagapatam and that of the District Court is equal in all respects except that by rule XVII of the rules made by the Governor in Council under section 4 of the Act under which the Agency Courts are constituted, the Agent is given power to hear second appeals—a power which is said to be in excess of the jurisdiction of the District Court.

The counter-petitioners, however, contend that the order which I am asked now to reverse was not *ultra vires* and should not be set aside. They contend that it is only by reason of the rules that there is any other appellate jurisdiction than that of the High Court, and that the power to hear second appeals is given to the Agency Courts and they submit that these rules are *ultra vires*. This must depend upon the power given by the Act under which they purport to be framed, viz., section 4 of the Act XXIV of 1839.

By section 3 of that Act the Collector is appointed as Agent to the Governor of Fort St. George to administer civil and criminal justice and to collect and superintend the revenues, and section 4 gives the Governor in Council power "to prescribe such rules as he may deem proper for the guidance of such Agents and of all the officers subordinate to their control and authority and to

determine to what extent the decision of the Agents in civil suits shall be final and in what suits on appeal shall lie to the Sadr Adalat and to define the authority to be exercised by the Agents in criminal trials," &c.

The power given to the Governor in Council to make rules under this section is confined to (*a*) prescribing such rules as he may deem proper for the guidance of such Agents, (*b*) to determine to what extent the decision of the Agents in civil suits shall be final and in what suits an appeal shall lie to the Sadr Adalat, and (*c*) to define the authority to be exercised by the Agents in criminal trials, &c. Now, unless the power to prescribe rules for the guidance of Agents contains the necessary authority to create any Court of appeal other than the Sadr Adalat, it is perfectly clear that there is no such power in the words that follow, for they only authorise the Governor in Council to determine to what extent the decision of the Agents in civil suits shall be final and when an appeal is allowed the appeal is directly stated to be to the Sadr Adalat and no power is given to the Governor in Council to create any Court of appeal other than the Sadr Adalat.

I am of opinion that there was no power given by the Act to the Governor in Council to create by rules any Court of appeal from the decision of the Agent in civil suits and consequently the rule relied on by the petitioner, rule XXII, is *ultra vires* and of no effect and that the Agency Courts are subject only to the appellate jurisdiction of the High Court. Moreover, I do not think that the power given to prescribe rules for the guidance of Agents precludes the High Court from making and issuing general rules for regulating the practice and proceedings of such Courts under section 15 of the Charter Act.

The only question that remains is whether the jurisdiction of the Agency Court is superior to that of the District Court. I am of opinion that it is not. The extent, pecuniarily, of the two Courts is equal and the High Court has equal power to review the decrees of both (see rule XX), and the fact that by rule XVII power is given to the Agent to admit a special appeal from a final appellate decision of his divisional assistant (even if that part of the rule which makes an appellate decision of a divisional assistant final is not *ultra vires* as I think it is, for the Act gives no power to the Governor in Council to make any decision of an Assistant of the Agent final) is not sufficient of itself to make the jurisdiction of the Agency Court superior to that of the District Court in the circumstances.

For these reasons I am of opinion that the order of the 30th September 1898 transferring the case from the file of the Agent to that of the District Judge of Vizagapatam was not *ultra vires* and I dismiss this civil miscellaneous petition with costs.

Against these orders the last-mentioned petitioner appealed.

Mr. *N. Subrahmaniam* (Mr. *C. Krishnan* with him), for respondents, took the preliminary objection that no appeal lay against either order, and contended that the order rejecting the application for review being a final order under section 629 of the Civil Procedure Code, and the original order of transfer not being appealable, neither of the orders was a judgment within the meaning of section 15 of the Letters Patent (*Sriramulu* v. *Ramasam*(1)).

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*) and *Tiruvenkatachariar* for appellant:—Section 629 of the Code of Civil Procedure has no application. It says "an order of the Court for rejecting the application for review shall be final." In the present case the application for review had been admitted and the learned Judge really re-heard the original matter. Under section 630 of the Code of Civil Procedure, the case may be re-heard immediately after the application is granted. That was the real nature of the proceedings in the Court below. Further, the decision of the Full Bench in *Chappan* v. *Moidin Kutti*(2) is against the respondent's contention. An appeal will lie under the Letters Patent from any judgment of a single Judge, and the order now appealed against is a judgment. It is an adjudication of the question whether the Court had the power to make the original order or not.

Mr. N. Subrahmaniam in reply.

[Their Lordships overruled the preliminary objection and heard the appeals.]

The Acting Advocate-General:—The original order transferring the suit from the Agent's Court to the District Court of Vizagapatam was made by consent. If the High Court has no

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(1) I.L.R., 22 Mad., 109. (2) I.L.R., 22 Mad., 68.

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jurisdiction to make such an order, consent cannot give jurisdiction. As the Court declared the Agency rules to be *ultra vires*, notice was issued by the High Court to Government, and I appear for Government in support of the validity of the rules; especially of rule XXII, which provides that in a certain class of cases, namely, suits relating to the landed possessions of zamindars and hill chieftains of the Agency tracts, an appeal lies to the Governor in Council. The contention put forward as to the validity of this and other rules is twofold; first, they are not *ultra vires* so far as Act XXIV of 1839 is concerned, and secondly, even if they were, they have been validated by section 25 of the Indian Councils Act, 1861. The distinction between regulation and non-regulation provinces continued to be of considerable importance until the passing of the Indian Councils Act. The regulation provinces were those which were governed by laws passed by the Governor-General of India in Council or the Governor of Madras in Council. In the non-regulation provinces, government was carried on, not under legislative provisions, but by executive orders of the local government. In 1839, certain wild and backward portions of the districts of Ganjám and Vizagapatam were, by the policy of the Legislature, removed from the operation of the ordinary regulations. The Sadr Adalat at first consisted of the Governor in Council—Regulation V of 1802. The constitution was altered by Regulation IV of 1806, and by Regulation III of 1807 the Governor was no longer a Judge of the Sadr Court (1 Morley's 'Digest,' Introduction, pages lxii to lxv). The Governor in Council was for some time the final Court of Appeal for all mufussal cases. There is therefore nothing strange in finding Indian enactments conferring civil appellate jurisdiction on the local government. Act XXIV of 1839 provides for the administration of justice and collection of revenue as branches of the executive government. Section 2 takes these Agency tracts out of the ordinary regulations and the administration of justice was to be carried on only as provided by the Act. The appellate jurisdiction of the Sadr Courts was therefore taken away. Section 3 provides for the administration of justice and for the collection of revenue by the Collectors of Ganjám and Vizagapatam, respectively, as Agents to the Governor of Fort St. George. The words "Agents, &c.," are not words of description or designation as in the corresponding Bengal Regulation XIV of 1833, but define the character of the persons. The administration

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of justice is vested in the Collector as Agent and is to be exercised by him as Agent. The principal, therefore, *i.e.*, the Governor in Council, has absolute control over his Agents in the administration of justice as well as in the collection of revenue. No express enactment was necessary to confer appellate jurisdiction on the Governor in Council, since he exercises it as principal over his agent. Strictly speaking the appeal contemplated by rule XXII is perhaps not an appeal but a power to deal with the decree of the Agents in certain classes of suits as the Governor may deem fit; and the power to make rules conferred by section 4 of Act XXIV of 1839 extends to the making of such a rule as rule XXII. That section empowers the Governor in Council to prescribe, by an order in Council, rules for the guidance of Agents and subordinates, determining to what extent the Agent's decision in civil suits shall be final and in what suits the appeal shall lie to the Sadr Adalat. The words "to what extent" are sharply contrasted with "in what suits." The section clearly contemplates by the words "to what extent the decision of the Agents in suits shall be final" that rules may determine that in certain suits the Agent's decision shall be final, but that in certain others it shall be subject to revision by the Governor in Council, or not final until approved by the Governor in Council. If it were simply meant that in some suits the Agent's decision shall be final and that in others an appeal is to lie to the Sadr Court, the words would have been "in what suits" instead of "to what extent." The Sadr Court is under the duty of hearing the appeal under section 6 only when a rule is made giving such a right of appeal. Sections 3 and 4 should be read together. Rule XXII has been in existence for nearly sixty years and its validity has never been questioned and has been acted upon by the High Court and Privy Council in *Mahadevi* v. *Vikrama*(1). Section 7 of the Scheduled Districts Act, 1874, provides that rules in force prior to the Act are to continue. Such of the Agency Rules as were made prior to 1861, even if they are *ultra vires* with reference to Act XXIV of 1839, are validated by section 25 of the Indian Councils Act, 1861. Rule XXII has been in existence from 1840. The legislative powers of the Governor in Council at Madras were taken away except in cases of urgent necessity by 3 and 4 Will. IV, cap. 85. From 1833 to the passing of the Indian

(1) *I.L.R., 14 Mad., 365.*

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Councils Act, 1861, the Governor in Council had no legislative powers. The effect of section 25 of the Indian Councils Act, 1861, is to validate all rules and regulations passed by the Governor in Council in respect of a non-regulation province, provided that the invalidity is only as being contrary to 3 and 4 Will. IV, cap. 85. But for section 59 of the Statute of 1833 the Governor in Council could have enacted rule XXII. The fact that the Agency Rules are expressed to be made under Act XXIV of 1839 would not prevent the rules, though invalid under that Act, from being valid under other and general powers if such powers existed. The tracts in question are a non-regulation province for the purpose of section 25 of the Statute of 1861.

The next question is whether the High Court has power to order a transfer of a suit of this kind from the Agency Court to the District Court of Vizagapatam. Section 25 of the Civil Procedure Code does not apply, the tracts in question being a scheduled district. (See section 1 of the Code of Civil Procedure.) The only other power to transfer is under section 15 of the High Courts Act, 1861. That section empowers the High Court to transfer a suit from and to Courts subject to its appellate jurisdiction. If Rule XXII is valid then the Agency Court is not subject to its appellate jurisdiction in respect of this class of suits. But even if the rule is invalid, section 15 of the High Courts Act does not contemplate the inclusion of the Agency Court as subject to its appellate jurisdiction. *Generalia specialibus non derogant*—Maxwell on the 'Interpretation of Statutes,' page 243. The policy of the Legislature would be defeated if the Agency Courts were included; moreover, the interpretation relied upon by the respondent would involve the existence of two rule-making authorities for the same matters, viz., the Governor in Council under Act XXIV of 1839 and the High Court. The concluding words of section 15 show that the High Court only has power to issue general rules of practice for Courts subject to its appellate jurisdiction. Even if the High Court has appellate jurisdiction over the Agency Court the transfer under section 15 should be from one Court to another of equal or superior jurisdiction. The District Court is of inferior jurisdiction to the Agency Court, as rules XVI and X (2), XVII, XIX, XX and XXVII clearly show. Among other things, the Agent hears special appeals, has the power of revision and of compulsory reference to arbitration, which

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the District Court in a regulation province has not. In *Niladevi Patta Mahadevigar* v. *Appa Rao Pantulu*(1) the High Court refused to order a transfer.

Mr. *N. Subrahmaniam* for respondent:—The Agency Rules purport to be and are issued under Act XXIV of 1839. That Act does not make the Governor in Council an appellate authority; no new Court or jurisdiction was created. The only appellate authority that existed prior to the Act, namely, the Sadr Adalat, continued after it. The tracts in question were not made a non-regulation province. They were not without any regulation and subject only to the executive government. The Act XXIV of 1839 itself supplied the machinery. It and the rules validly made under it are the laws which governed those tracts. Now, the Scheduled Districts Act also applies. Section 3 vests the administration of justice in the Collector. He is made a Court. He exercises jurisdiction as a Court. The analogy of principal and agent is totally misleading and inapplicable. The Collector when he exercises such functions is called Agent to the Governor of Fort St. George. The word "Agent" is undoubtedly a word of designation or appellation, and not a term of definition. The expression occurs also in the corresponding Bengal Regulation of 1833, and it is clearly used there as an appellation. The words are "designated as Agent, etc." A comparison of the two regulations shows that Act XXIV of 1839 was modelled upon the Bengal enactment. Compare the terms in use as political agents and special agents. The Legislature would have expressed the idea in clear terms if that were the meaning intended. Moreover, the expression is not Agent to the Governor in Council but only Agent to the Governor,—a very different thing. If appellant's argument is correct then the Agent is the Agent not of the local government but only of the Governor, who is not the government. The appeal under rule XXII is not to the Governor but to the Governor in Council. Section 4 is equally against the appellant. The rules that can be validly made may determine in what suits the Agent's decision shall be final, and in what an appeal lies to the Sadr Court. The stress laid upon the words "to what extent" is entirely unjustified taking the whole together. The words may refer to pecuniary limits or indicate that the appeal is to be confined

(1) Civil Miscellaneous Petition No. 392 of 1886 (unreported).

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to points of law only or to facts as well. It has nothing whatever to do with the appellate powers of the Governor in Council. The only Court is the Sadr Court; no other Court is created or mentioned. The argument that rule XXII does not confer strictly appellate jurisdiction but is only tantamount to saying that the decree of the Agent is to be final only if approved by Governor in Council is opposed to the plain wording of rule XXII. An appellate jurisdiction unless expressly conferred by Statute cannot be invoked. It is submitted that the rules are *ultra vires*. The fact that the question has not been raised before is no argument in support of the rules.

In section 7 of the Scheduled Districts Act the words "in force" are against the appellant. "In force" means "validly or legally in force." Section 25 of the Indian Councils Act is next relied upon. The origin and history of that enactment is to be found in Ilbert's 'Government of India.' Newly added provinces not within the three long-established presidencies had to be governed, and were governed, in the absence of parliamentary legislation, by Lieutenant-Governors or Chief Commissioners under the Government of India. A body of rules which obtained in these provinces by being enforced by the executive government was validated by section 25. Punjab is an instance. The tracts in Ganjám and Vizagapatam are not non-regulation provinces. They are neither "non-regulation" nor "provinces." A province is a tract of country having a central government of its own. These tracts were not subject to any other Government, but were exactly like the rest of the presidency. The machinery of justice was differently carried on; that was all. They were under the operation of all the regulations. By section 2, only rules for administration of justice ceased to be in force in the affected tracts —, not ordinary laws of property, inheritance and other civil rights. Then again, they were subject to Act XXIV of 1839 and rules validly made thereunder. They were thus subject to laws and rules having the force of law. In the last resort justice was administered in the tracts, not by executive orders of Government, but in virtue of legislative provisions contained in Act XXIV of 1839. In no sense were they a non-regulation province. That is not the same as a scheduled district. Section 25 would only apply if the rule is invalid only by reason of offending against the Statute of 1833, section 59, which deprived the Governor in Council

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of legislative powers. Here the rules are not invalid only by reason of that. They are invalid as offending against a special Act which is not referred to or covered in section 25. They purport to be made under that Act. The exercise of the power will not be good unless it is made under the Act, and if it purports to be made under a special power which the Act does not contain, it is bad. Decided cases show that for the interpretation of section 15 of the High Courts Act the phrase "appellate jurisdiction" does not mean exclusive appellate jurisdiction. It is enough if the High Court has concurrent appellate jurisdiction. Here the High Court, as heir to the Sadr Court, has the general appellate jurisdiction, and the Governor in Council has, even if rule XXII were valid, only a special and limited appellate jurisdiction. The Agency Courts are covered by section 15. The words are sufficiently comprehensive and the only condition precedent is that the High Court should have appellate jurisdiction over the Agent's Court. The maxim that special Acts are not affected by general provisions, relied upon by the other side, applies only where the enactments are of the same legislatures. Act XXIV of 1839 is that of a subordinate legislature and will be controlled by the provisions of an Act of Parliament. The argument as to there being two rule-making authorities merely begs the question, since under section 15 the High Court alone can make rules now. The Agent's Court is not a Court of superior jurisdiction to the District's Court. Both are of equal jurisdiction. By jurisdiction, is meant ordinary jurisdiction, not special jurisdiction conferred by some Act or rules. Original civil jurisdiction is unlimited in both cases and is the same. That is the test. It might be contended that the District Court is superior since it has jurisdiction under the Temple Act, the Land Acquisition Act, the Rent Act, the Trust Act, the Probate Act, and various other special Acts which the Agent's Court has not.

The Acting Advocate-General in reply :—The appellate jurisdiction which the Governor in Council had under Regulation V of 1802, as constituting a Sadr Court from all mufassal cases in the regulation provinces, was not re-granted in respect of the Agency tracts by Act XXIV of 1839. The Governor in Council had ceased to be the Sadr Court. The appellate jurisdiction of the Sadr Court was taken away in respect of these tracts by section 2. They were taken from the category of regulation and placed in

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that of non-regulation provinces. The administration of justice was vested in the Collector and was to be exercised by the Collector as Agent to the Governor. The de-regulationizing meant, by itself, that all the branches of government, including administration of justice, were in the executive government, and thus it was to be exercised by the Collector as Agent to the Governor in Council, the latter having full authority to control and direct the agents in civil proceedings. The appellate jurisdiction of the Sadr Court could be and was validly taken away by Act XXIV of 1839. The Sadr Court was the Company's Court and not in the position of the supreme Court at the Presidency town. If section 4 of Act XXIV of 1839 is ambiguous the construction placed by the rules immediately after the Act was passed may be considered of some little weight since their validity itself is questioned. (See *Ex parte Weir*(1).) The rules were drafted by the Sadr Court when the intention and policy of the Act were known to them, and their interpretation of the Act is a species of contemporaneous exposition and the rules have been acted upon ever since. (See Hardcastle on the 'Construction of Statutory Law,' 2nd edition, page 171, and Sidgwick on 'Statute and Constitutional Law,' 2nd edition, page 213.) As to section 25 of the Indian Councils Act, it was argued that it does not apply to the tracts in question but only to provinces. The reference to the Governor in Council in that section clearly shows that the non-regulation province may be within the limits of this presidency. The phrase "non-regulation province" was a sort of administrative slang, and was used in that sense in section 25. The word "province" there means "tract" or "district."

Sir CHARLES ARNOLD WHITE, C.J.—These are two appeals from orders of Boddam, J., dated respectively, September 30th, 1898, and September 12th, 1899. The first order was an order made by consent, transferring a suit which was pending in the Court of the Agent to the Governor, Vizagapatam district, to the District Court, Vizagapatam. The second order was an order dismissing an application to review that order.

The appeals purport to be brought under section 15 of the Letters Patent. A preliminary objection has been taken that no appeal lies. The application for an order of transfer was made at

(1) L.R., 6 Ch. App., 979.

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the suggestion of the Agent on the ground that as he had acted as the adviser of both parties and had formed decided views on the questions involved in the suit he felt he could not approach the case with an open mind. No question was raised, or considered, as to the jurisdiction of the High Court to make an order of transfer and the order was made by consent of all parties. On April 17th, 1899, a review petition was presented to Boddam, J., on behalf of the defendant in the suit asking that the order of transfer might be set aside on the ground that it had been made without jurisdiction. The petition came on for hearing on September 12th, 1899. On the hearing of this petition the question of jurisdiction was argued. The learned Judge held that there was jurisdiction in the High Court to make the order of transfer and he accordingly dismissed the petition. In form, the order of Boddam, J., of September 12th, 1899, was an order dismissing a review petition. In substance it was an adjudication upon the question whether the High Court has jurisdiction to order the transfer of a suit from the Court of the Agent to the District Court. I am of opinion that both orders are "judgments" within the meaning of section 15 of the Letters Patent, and that an appeal lies therefrom. My learned colleague takes the same view. The preliminary objection is overruled.

Section 25 of the Code of Civil Procedure has no application to the present case inasmuch as the Court from which the suit was transferred is in a scheduled district as defined in Act XIV of 1874.

Section 15 of the Indian High Courts Act, 1861, (24 and 25 Vict., cap. 104) provides as follows:— "Each of the High Courts "established under this Act 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 from any such Court to any other Court of equal or "superior jurisdiction, and shall have power to make and issue "general rules for regulating the practice and proceedings of such "Courts, and also to prescribe forms for every proceeding in the "said Courts for which it shall think necessary that a form be "provided and also for keeping all books, entries and accounts to "be kept by the officers and also to settle tables of fees to be allowed "to the sheriff, attorneys and all clerks and officers of Courts, and "from time to time to alter any such rule or form or table; and "the rules so made, and the forms so framed, and the tables so

"settled shall be used and observed in the said Courts, provided "that such general rules and forms and tables be not incon- "sistent with the provisions of any law in force, and shall before "they are issued have received the sanction in the Presidency "of Fort William of the Governor-General in Council and in "Madras or Bombay of the Governor in Council of the respective "Presidencies."

On the construction of this section Boddam, J., held that the Agency Court was subject to the appellate jurisdiction of the High Court on the grounds that any rules framed by Government which purported to take away, or restrict, the appellate jurisdiction of the High Court over Agency Courts were *ultra vires*, that a District Court was a Court of equal or superior jurisdiction to an Agency Court, that consequently all the requirements of the section had been satisfied and the order of transfer was valid.

It will be observed that there are two conditions which must exist before an order of transfer can be validly made under the section:— (1) The Court from which the suit is transferred must be subject to the appellate jurisdiction of the High Court. (2) The Court to which the suit is transferred must be a Court of equal or superior jurisdiction to the Court from which the transfer is made.

In the present case the suit in respect of which the order of transfer has been made is a suit of the character described in rule XXII of certain rules framed by Government in 1840 which purport to have been made under the powers conferred by Act XXIV of 1839 and which may be referred to as the Agency Rules.

Rule XXI provides, "From all decrees upon original suits "passed by the Agent (with the single exception specified in the "next following rule) an appeal shall lie to the Sadr Court to "be disposed of as provided in section 6, Act XXIV of 1839; "provided such appeal is preferred either to the Agent or the Sadr "Court within three months after the Agent's decision; or after "that period if sufficient cause can be assigned to the Sadr Court "for any delay which may have occurred by petition on the "prescribed stamp, and subject to the other rules required in other "appeals to the Sadr Court, as provided in the Madras Code and "Acts applicable to that Presidency."

Rule XXII provides, "From decrees of the Agent in suits "wherein the landed possession of a zamindar, bissoye, or other "feudal hill chief may have formed the subject of litigation, an "appeal will lie to the Governor in Council alone, who may refer "any such appeal for the decision of the Sadr Court, provided that "the decree of the latter Court shall not be carried into execution "without the permission of the Governor in Council."

In my opinion, for reasons which I will mention later, assuming these two rules to be valid so as to confer an appellate jurisdiction upon the Governor in Council, an Agency Court may be said to be subject to the appellate jurisdiction of the High Court within the meaning of section 15 of the Act of 1861. The general question, however, as to whether the Agency Rules were made with or without authority has been raised before us and it is better that we should deal with it.

The first point to be considered is whether the body of rules in which the two rules above referred to are contained is within the powers conferred by Act XXIV of 1839—an Act whereby it was declared that the operation of the rules for the administration of civil and criminal justice, as well as for the collection of revenue should cease to have effect within the tract of country in which the Jeypur zamindari—the subject matter of this suit—is situate. At the time the Act came into operation, the tract of country in question was subject to the ordinary law of the land with regard to the administration of civil and criminal justice and the judicial powers at one time exercised by the Governor and by the members of Council had ceased to exist. Under the system introduced in 1802 by Regulation V of that year—"a Regulation for constituting a Sadr Adalat or Chief Court of Civil Judicature for trying appeals from the decisions of the Provincial Courts of Appeal"—the Sadr Adalat consisted of the Governor in Council (section 2) and from its decisions in civil suits of the value of Rs. 45,000 and upwards an appeal lay to the Governor-General in Council (sections 31–36). Under this system so far as the mufassal was concerned, the executive government was the highest appellate authority, not in its executive capacity but as a judicial tribunal. In 1806 the constitution of the Sadr Adalat was altered and new Judges were appointed (Regulation IV of 1806) and in the following year the Governor was declared to be no longer a Judge of the Court (Regulation III of 1807). In 1825, the Court was made to

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consist of such number of Judges as the Governor in Council might deem requisite (Regulation III of 1825). It does not seem clear when the councillors ceased to be members of the Sadr Adalat and it would appear that a member of the executive Council was Chief Judge of the Court down to 1862, but there can be no question that in 1839 when the Agency Courts were created by the Act of that year the executive government had been divested of the appellate jurisdiction which had at one time been vested in them as a judicial tribunal. Sections 2, 3 and 4 of Act XXIV of 1839 are as follows:—

Section 2. "And it is hereby enacted, that from and after the said 1st day of December 1839, the operation of the rules for the administration of civil and criminal justice, as well as those for the collection of the revenue, shall cease to have effect, except as hereinafter mentioned, within the undermentioned tracts of country at present included in the districts of Ganjám and Vizagapatam."

* * * *

Section 3. "And it is hereby enacted that the administration of civil and criminal justice (including the superintendence of the police), and the collection and superintendence of the revenues of every description, within the tracts of country specified in the foregoing section, which are now included in the district of Ganjám shall be vested in the Collector of Ganjám and within those which are now included in the district of Vizagapatam, in the Collector of Vizagapatam and shall be exercised by them respectively as Agents to the Governor of Fort-Saint George."

Section 4. "And it is hereby enacted that it shall be competent to the Governor in Council of Fort Saint George by an order in Council, to prescribe such rules as he may deem proper for the guidance of such Agents, and of all the officers subordinate to their control and authority, and to determine to what extent the decision of the Agents in civil suits shall be final, and in what suits an appeal shall lie to the Sadr Adalat and to define the authority to be exercised by the Agents in criminal trials, and what cases he shall submit to the decision of the Fouzdary Adalat."

The Officiating Advocate-General contended that the effect of these sections was to take away from the Sadr Adalat the appellate jurisdiction which was vested in that tribunal at the time the Act came into operation and to restore to the Governor in Council the

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appellate jurisdiction which, as regards the Governor had been taken away in 1807, and as regards the Councillors appears to have been taken away in 1825. Section 3 of the Act provides that the administration of civil and criminal justice shall be vested in the Collectors and shall be exercised by them as Agents to the Governor. In my opinion the use of the word "Agent" in describing the officer in whom the administration of civil and criminal justice is, in express terms, vested by the section cannot be said to vest this jurisdiction in the Governor in Council. If the Legislature had intended to take away the appellate jurisdiction of the Sadr Adalat and to transfer this jurisdiction to the Governor in Council, they would, in my opinion, have done so directly and explicitly, and not by a side wind. The effect of the section in my opinion is to vest the administration of civil and criminal justice in the Agents—not as agents to a principal, the principal being the Governor in Council, but as the officers in whom the administration is vested by the section, subject to the provision that the administration should be carried on in accordance with such rules as the Governor in Council might prescribe for the guidance of the Agents under the powers conferred by section 4 of the Act.

The logical conclusion of the Officiating Advocate-General's argument is that the effect of the Act of 1839 was to take away the administration of criminal and civil justice from the established tribunals of the country and to vest it in the Governor in Council. Yet it could scarcely be argued that the effect of the Act is to authorise the Governor in Council to try suits which since 1839 have been tried by the Agent.

In support of the view that the word "Agent" is not used in section 3 in its technical and legal sense, it may be pointed out that section 3 of the Act of 1839 is a reproduction in a slightly condensed form of a corresponding Bengal enactment (Regulation XIV of 1833), and that the Bengal enactment speaks of the officer in whom the administration of civil and criminal jurisdiction is vested, as an officer "to be denominated" the Agent of the Governor.

In my opinion the wording of section 4 of the Act of 1839 supports the view that it was not intended to revest appellate jurisdiction in the Governor in Council or to interfere with the existing jurisdiction of the Sadr Adalat Court except to the extent of authorizing the Governor in Council to determine to what

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extent the decision of the Agents in civil suits should be final. It appears to me that all the section contemplated was an exhaustive division of civil suits into two classes, in one of which (by virtue of the determination of the Governor in Council) the decree of the Agent should be final, and in the other of which there should be an appeal to the existing appellate tribunal—the Sadr Adalat; not, as the Officiating Advocate-General has argued, a division into three classes—in one of which the decree of the Agent should be final, in the second of which an appeal should lie to the Governor, and in the third of which (by virtue of the determination of the Governor) an appeal should lie to the Sadr Adalat as a tribunal to which the appellate jurisdiction of the Governor restored (as the Officiating Advocate-General contended), by the Act of 1839, was for certain purposes to be delegated. So far as this section is concerned, the Officiating Advocate-General had to rely entirely on the variation in the phraseology adopted in the section—"to what extent" the decision of the Agents in civil suits shall be final and "in what suits" an appeal shall lie to the Sadr Adalat. It seems to me that for the purposes of this section the two phrases "to what extent" and "in what suits" mean the same thing. As I construe the Act of 1839 nothing more was conferred upon the Governor in Council than a power to frame rules of procedure for the guidance of the Agents, and a power to determine in what suits the decision of the Agent should be final and in what suits the decision should be appealable, and it was not the intention of the Legislature by the Act to confer upon the Governor in Council appellate jurisdiction in the ordinary sense of the term. No doubt the existence of this jurisdiction as created by rule XXII was assumed in an order of transfer which was made on the application of an Agent in Original Suit No. 3 of 1892, and was taken for granted by this Court and by the Privy Council in the case of *Mahadevi* v. *Vikrama*(1), but the point which has been raised in this appeal was not argued in that case.

It does not of course follow that because the Act does not itself confer appellate jurisdiction the Act might not confer powers under which the Government might assume such jurisdiction.

The next question, therefore, is, does the Act authorize the Governor, by rule or otherwise, to assume appellate jurisdiction.

(1) I.L.R., 14 Mad., 365.

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In my opinion it does not. It is to be observed that the scope and purpose of the rules are limited to the guidance of the Agents and their subordinate officers. The mode in which the Governor in Council is to determine the extent to which the decision of the Agents in civil suits shall be final, and in what suits an appeal shall lie to the Sadr Adalat, is left at large. Presumably the Legislature meant to draw some distinction between the manner in which the power to make rules of procedure was to be exercised and the manner in which the power to deal with existing rights of appeal was to be exercised. The distinction appears to have been recognised by the Legislature in the Scheduled Districts Act (XXIV of 1874), section 6 of which enacts that rules for the guidance of officers in force at the commencement of that Act should continue to be in force. The Agency Rules which were issued shortly after the passing of the Act of 1839 and which, it would seem, were drafted by the Sadr Adalat at the request of the Governor in Council (see the letter of the Registrar of the Court to the Chief Secretary, dated April 7th, 1840) are described as rules framed by Government for the guidance of the Governor's Agents under Act XXIV of 1839. The words "for the guidance of the Governor's Agents" would appear to cover nothing more than matters of procedure. However, if the rules only dealt with matters with which in some form or other the Governor in Council under section 4 of the Act was competent to deal, the fact that those matters purport to have been dealt with by rule instead of having been dealt with by executive order would present no difficulty. But on a careful consideration of the terms of section 4 of the Act of 1839, read by the light of section 3 of the same enactment, I can come to no other conclusion than that any rule or order which purported to transfer appellate jurisdiction vested in the Sadr Adalat at the time of the passing of the Act from that Court to the Governor in Council is beyond the powers conferred by the Act. Rule XXII purports to do this. Consequently Rule XXII so far as the Act of 1839 is concerned is, in my opinion, *ultra vires* and invalid.

The next question for consideration is whether the rule in question though, in my judgment, invalid for the reasons stated, so far as the Act of 1839 is concerned, has been validated by subsequent legislation. Section 7 of the Scheduled Districts Act, 1874, enacts that all rules prescribed by the Local Government for the guidance of officers appointed for the purposes of section 6 of that

Act in force at the time of the passing of the Act shall continue to be in force. The words "in force" clearly mean "legally and validly in force" and the section cannot be construed as validating any rules which might be illegal and invalid.

In my opinion, however, the rules in question are valid and legal rules by virtue of the provisions of section 25 of the Indian Councils Act, 1861, (24 and 25 Vict., cap. 67). In the Court below the attention of the learned Judge was not called to this enactment. The Act recites that it is expedient that power should be given to the Governor in Council of the Presidencies of Fort St. George and Bombay to make laws and regulations for the Government of the said presidencies, and, as regards the Madras Presidency, the object of the Act is to restore to the Governor in Council the legislative authority which was taken away in 1833 by 3 and 4 Will. IV, cap. 85. Section 25 declares that no rule, law or regulation passed by the Governor in Council in respect of a non-regulation province shall be deemed invalid only by reason of the same not having been made in conformity with the provisions of the Acts 3 and 4 Will. IV, cap. 85, and 16 and 17 Vict., cap. 95, or of any other Act of Parliament respecting the powers of the Governor in Council. The provisions of 16 and 17 Vict., cap. 95, have no application to *this case*. The material provision of the Act of Will. IV is the proviso to section 59 which is to the effect that no Governor in Council shall have the power of making or suspending any regulations or laws in any case whatever unless in case of urgent necessity (the burden of the proof whereof shall be on the Governor in Council) and then only until the decision of the Governor-General of India in Council shall be signified thereon. Section 25 of the Indian Councils Act, 1861, is not easy to construe, but I have come to the conclusion though not without some doubts, that the intention of the Legislature was to validate all rules passed by the Governor in Council in respect of a non-regulation province (and for the purpose of this section "province" clearly means tract or district) notwithstanding the fact that the legislative powers of the Governor in Council had been taken away in 1833 except in cases of urgency, unless it could be shown that such rules were inconsistent with the legislative powers possessed by the Governor in Council prior to 1833. It has not been suggested on behalf of the respondent that these rules could not have been made under the legislative powers possessed by the Governor or the Governor in Council prior to 1833. If the section is capable of this construction—and, in my opinion, it is,—the rules in question were, if not validated retrospectively in 1861, at any rate valid at and from that date, and, as regards rules passed prior to 1861, are now of the same power and effect as if they had formed part of the Act of 1839. If the ordinary modern phraseology had been adopted and the rules had been described as made under a specified Act and all other powers and authorities enabling the Governor in that behalf, or if no Act had been specified as the authority under which the rules were made, their validity—assuming section 25 of the Act of 1861 can be construed as indicated above—could not now be impeached. In my opinion if the rules can be shown to be valid under the general law, their validity is not affected by the fact that they purport to be made under a specified enactment which did not, in law, confer authority to make them.

In my judgment, for the reasons stated, the rules made in 1840 with their subsequent amendments with reference to Agency tracts are valid rules.

It was argued by the Officiating Advocate-General that, even assuming the rules to be invalid, the order of transfer which had been made was not authorised by section 15 of the Indian High Courts Act, 1861. As I have already stated the two conditions which must exist are—first, that the Court from which the order of transfer is made should be subject to the appellate jurisdiction of the Court making the order; secondly, that the jurisdiction of the Court to which the suit is transferred should be equal or superior to that of the Court from which the transfer is made. As regards the first condition it seems to me that, in any view, an Agency Court may be said to be "subject to the appellate jurisdiction of the High Court." Even if the Act of 1839 can be construed as the Officiating Advocate-General has asked us to construe it, its effect is to make the Agency Court for certain purposes and to a limited extent subject to the appellate jurisdiction of the High Court and the rules provide for the manner in which this jurisdiction is to be exercised. The words of the section are "subject to the appellate jurisdiction"—not, subject to the exclusive appellate jurisdiction and it does not follow that, because there is appellate jurisdiction in the Governor in Council, an Agency Court is not "subject to the appellate jurisdiction" of the High Court within the meaning of the section. As regards the second condition,

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however, I do not think that a District Court is a Court of equal or superior jurisdiction to an Agency Court within the meaning of these words as used in section 15. So far as the two Courts are comparable, it would seem that the jurisdiction of the Agency Court is ampler than that of the District Court. Both Courts have unlimited original jurisdiction. The Agent's Court may hear a special appeal from an appellate decision of a divisional assistant which, subject to this right of special appeal, is final (see rule XVII). The District Court does not possess any corresponding jurisdiction. Under rule XIX the Agent has power of revision. The District Court has no such power. Rule XXVII gives to the Agent a compulsory power of reference to arbitration. The District Court has no such power. Again, under rule XX, all decrees passed by an Agent on appeal from decrees of his subordinates are final, subject to a power to the Sadr Court on special grounds, to require him to review his judgment, whilst the effect of rule X (2) and rule XVI is to give to the Agent in respect of appeals in suits exceeding Rs. 5,000 in value, an ampler jurisdiction than that of the District Court. On the other hand it has been urged that the Courts are, for all practical purposes, of equal jurisdiction, that the fact that in certain cases the decision of the Agent was final whilst that of the District Court was appealable was no ground for saying that the jurisdiction of the Agent's Court was larger than that of the District Court and that many of the rules upon which the argument that the Agent's Court was superior to the District Court was based were themselves *ultra vires*.

However, I do not think this question ought to be decided on a minute comparison of the respective jurisdictions of the two Courts. In my view it was not the intention of the Legislature to bring Agency Courts within the scope of section 15 of the Indian High Courts Act, 1861. If the words "such Courts" are to be construed as including Agency Courts there would be two rule-making authorities, the Governor in Council under the Act of 1839 and the High Court subject to the sanction of the Governor in Council under the Act of 1861. Further, a power in the High Court to order a transfer from an Agency Court is quite inconsistent with the general policy of the Act of 1839, and if Parliament had intended to go back upon this policy in the Act of 1861 they would have given effect to their intention in clear and unambiguous terms.

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The Act of 1839 was passed to meet the special requirements of wild and backward districts for which the machinery of the Regulations was unsuitable. When Parliament passed the Act of 1861 they must be taken to have known of the special requirements of these non-regulation provinces and of the way in which the Indian Legislature had sought to meet their special requirements by the Act of 1839. It is obvious that the policy of the Act of 1839 might be almost entirely frustrated if there were a general power in the High Court to transfer suits from an Agency Court to itself.

In my opinion section 15 of the Act of 1861 does not apply to suits instituted in an Agency Court.

I think the order of Boddam, J., transferring the suit in question was made without jurisdiction and should be set aside. As the order was in the first instance made by consent we make no order *as to costs*.

BENSON, J.—These are Letters Patent appeals against orders of Mr. Justice Boddam transferring Original Suit No. I of 1898 from the Court of the Governor's Agent, Vizagapatam, to the District Court of Vizagapatam, and refusing to review that order when asked to do so on the ground that it was passed without jurisdiction. A preliminary objection was raised that no appeal under section 15 of the Letters Patent lies against such orders, but I am of opinion that the orders were "judgments" within the meaning of that section as explained by Bittleston, J., in *DeSouza* v. *Coles*(1) and that, therefore, an appeal does lie in accordance with the principle of the decision of the Full Bench in *Chappan* v. *Moidin Kutti*(2). The order of the learned Judge transferring the case is impugned on the ground that the High Court has no jurisdiction to make such an order, and that the consent of the parties cannot cure the defect.

It is conceded that the High Court has no jurisdiction under section 25, Code of Civil Procedure, to make the transfer as the Agent's Court is in a Scheduled District within the meaning of section 1 of the Code.

The question is whether the High Court has jurisdiction to make the order by virtue of section 15 of Act 24 and 25 Vict., cap. 104, the Act which established the High Court. It runs as

(1) 3 M.H.C.R., 384. (2) I.L.R., 22 Mad., 68.

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follows:—"Each of the High Courts established under this Act 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 from any such Court to any other Court of equal or superior jurisdiction and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts, etc."

The first matter that was argued is whether the Court of the Governor's Agent at Vizagapatam is "subject to the appellate jurisdiction of the High Court" within the meaning of this section. If it is not, it is conceded that the High Court has no power to transfer the suit.

In order to determine this matter it is important to bear in mind the circumstances under which the Agent's Court was established, as well as the terms of the Statute which created it.

Following the system already introduced into Bengal by Lord Cornwallis, Civil Courts of various grades—Native Commissioners, Zillah Courts and Provincial Courts—were established by a series of Regulations passed in 1802 by the Governor of Madras in Council. These Courts had no jurisdiction in the Presidency Town, but only in the mufussal, and the ultimate appeal from their decisions lay to the Sadr Adalat, which at that time consisted of the Governor in Council, with a further appeal from its decisions, in suits of a certain value, to the Governor-General in Council, (Regulation V of 1802). In like manner, the Governor in Council was the highest Court of criminal jurisdiction under the name of the Fouzdary Adalat (Regulation VIII of 1802). In 1806 the Courts were constituted with the Governor as Chief Judge to exercise "occasional superintendence" and two additional Judges who were not members of Council (Regulation IV of 1806), and in the following year the Governor ceased to be the Chief Judge and a member of Council took his place (Regulations I and III of 1807). This arrangement continued until the amalgamation of the Sadr Courts with the Supreme Court in 1862. In 1818, the Governor-General having relinquished his right of hearing appeals from the Sadr Adalat at Madras, an appeal to the King in Council was permitted (Regulation VIII of 1818). Thus it will be seen that when civil and criminal Courts were first established in the mufussal under the Regulations of 1802, the appellate jurisdiction was vested in the Governor and his Council—that is in the

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executive government exercising its functions under the title of Sadr Courts. The connection of the executive government with the Sadr Courts was however soon withdrawn by subsequent regulations except as regards the Chief Judge, who continued to be a member of the Executive Council until 1862. The regulations were all enacted under the legislative powers conferred on the Governor of Madras in Council, but in 1833 these legislative powers were taken away by section 59 of 3 and 4 Will. IV, cap. 85 (except in cases of urgent necessity) and all legislative power in India was vested in the Governor-General in Council to be exercised at a meeting of the Council, continued so to be vested until 1861 when local legislative Councils were re-established in Madras and Bombay under the Indian Councils Act (24 and 25 Vict., cap. 67).

Soon after the legislative power was transferred to the Governor-General in Council, he resolved to abolish the ordinary machinery of the administration—the civil and criminal Courts—in certain wild and backward parts of the country, and to substitute therefor a special administration, regarded as more suitable to the special conditions of those tracts. This was effected so far as the Madras Presidency was concerned by the passing of Act XXIV of 1839—the Act from which the Agent's Courts still derive their powers. It is styled "An Act for the administration of justice and collection of revenue in certain parts of the districts of Ganjam and Vizagapatam." The parts are specified, and they include the zamindari of Jeypore, part of which is the subject of the present suit. Section 2 enacts that in the tracts specified "the operation of the rules for the administration of civil and criminal justice, as well as those for the collection of revenue, shall cease to have effect, except as hereinafter mentioned" from the 1st December 1839. Having thus abolished the existing administration, it goes on to enact (section 3) that "the administration of civil and criminal justice (including the superintendence of the police) and the collection and superintendence of the revenue of every description" shall be vested in the Collectors of the respective districts "and shall be exercised by them respectively as Agents to the Governor of Fort Saint George." Section 4 enacts that "it shall be competent to the Governor in Council of Fort "Saint George, by an order in Council, to prescribe such rules as "he may deem proper for the guidance of such Agents, and of all

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"the officers subordinate to their control and authority, and to "determine to what extent the decision of the Agents in civil "suits shall be final and in what suits an appeal shall lie to the "Sadr Adalat, and to define the authority to be exercised by the "Agents in criminal trials, and what cases he shall submit for the "decision of the Fouzdary Adalat."

Under the authority given in this section the Governor in Council prescribed a body of rules, often referred to as "the Agency Rules," which established, *inter alia*, various grades of civil Courts subordinate to the Agents and defined the powers of all the Courts including that of the Agents both as original and appellate Courts, and laid down rules for their procedure. These rules were, at the request of the Governor in Council, drafted by the Sadr Court (see the Court's letter, dated 7th April 1840, to Chief Secretary) and were framed generally on the lines of the rules made under the corresponding enactment passed for similar tracts in Bengal a couple of years previously, and were promulgated by Government in 1840. The existing rules are substantially the same as those of 1840. They not only define the powers of the Agents and the lower Courts, but also lay down the powers of the Sadr Court. A decree of the Agent on appeal from the lower Courts is final (rule XX), but power is reserved to the Sadr Court to require him, for special reasons, to review his judgment. By rule XXI an appeal is allowed to the Sadr Court against all original decrees of an Agent save those specified in rule XXII. This rule XXII, as framed in 1840, provided that from decrees of the Agent in suits wherein the landed property of a zamindar, bissoye or other feudal hill chief may have formed the subject of litigation, "an appeal will lie to the Governor in Council alone." In 1860 the latter part of the rule, as it now stands, was added, viz.: "who may refer such appeal for the decision of the Sadr Court, provided," &c. Rule XXVIII requires the Agent to submit to the Sadr Court half-yearly statements of cases disposed of. Rule XXXI provides that petitions against the proceedings of the Agent shall, in the first instance, be submitted to the Government who will refer them when necessary to the Courts of Sadr or Fouzdary Adalat or to the Board of Revenue, as the case may be; and rule XXXII makes a similar provision for dealing with references by the Agent as to matters not dealt with by the rules. Thus it will be seen that under the rules no appeal lies to the Sadr Court,

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in a large and important class of suits (including that out of which the present appeal arises), the appeal in such suits being reserved to the Governor in Council alone. It is, however, contended that the reservation of appellate power to the Governor in Council by rule XXII is *ultra vires* and of no force, because the Act of 1839 does not empower the Governor in Council to set up any appellate authority except the Sadr Court, nor does it expressly reserve appellate powers to the Governor in Council. The construction of section 4 of the Statute is not free from difficulty, but if the whole scheme and history of the Statute be considered, I do not think that the rule will be found to be *ultra vires*. The purpose of the Act was to abolish the application of the complex regulations in certain wild and backward parts of the country and to substitute a simple system of administration more suited to the conditions of the people in those tracts. To this end all power was vested in the Collector to be "exercised by him as the Agent of the Governor in Council," by which I understand that he was to exercise his powers under the control, and in accordance with the directions, of the Governor in Council from time to time. It is difficult to see what other meaning can be attached to the concluding words of section 3. If, then, the Governor in Council was intended to control and direct the Agent in the exercise of his powers, the Governor in Council possessed the power to allow an appeal to himself in any particular case or in any class of cases which he might specify. This power, which is given by implication under section 3, is not, I think, limited by section 4 which deals with the power of the Governor in Council to prescribe rules for the guidance of the Agent, and "to determine to what extent the decision of the Agent in civil suits shall be final and in what suits an appeal shall lie to the Sadr Court." Those words do not seem to me necessarily to carry with them the idea of the finality of the Agent's decision in all cases where no appeal is allowed to the Sadr Court. If the section ended with the word "final," the power "to determine to what extent the decision of the Agent shall be final" might well be taken to include the power of saying that certain classes of decrees should not be final unless approved by the Governor in Council; and the addition of the words "and in what suits an appeal shall lie to the Sadr Adalat," though they at first sight suggest such appeal as the only alternative to finality, do not, I think, necessarily imply it. The words are not "in what suits"

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the decision of the Agent shall be final, but in "what suits" an appeal shall lie to the Sadr Adalat, and to "what extent" in other suits, the Agent's decree shall be final. The words "to what extent" are very general, equivalent to "how far," and seem to be wide enough to cover limitation as to pecuniary value, or conditions as to confirmation by the Governor in Council, and the like, thus giving full effect to what appears to be the policy of the Act as shown in the preceding sections. The reservation of appellate power in certain civil suits to the Governor in Council would have seemed less strange then than now, since it was then but a few years since the Governor in Council was the Sadr Court for all purposes, and the system established by the Act of 1839 merely restored in certain exceptional tracts the conditions of administration which existed everywhere before the establishment of the regular Courts.

It is to be observed that, in the rules framed under the corresponding Bengal Act, a similar reservation of appellate power is made in favour of the Governor-General in Council. I think, too, that in construing the Act where it is ambiguous, we may properly bear in mind the construction which was placed upon it at the time by those who were authorised to make rules to give effect to its policy (see the remarks of James and Mellish L., JJ., in *Ex parte Weir*(1). When we find that, as in the present case, the rules were framed by the highest judicial authority in the presidency, in communication with Government immediately after the passing of the Act and while its policy was still fresh in their minds, we may fairly attach some importance to those rules as a *contemporanea expositio*, though, of course, too much weight must not be given to such exposition when, as in this case, the validity of the rule is itself in question. (Hard-Castle, on the 'Construction of Statutory Law,' 2nd edition, page 171, Sidgwick on 'Statute and Constitutional Law,' 2nd edition, page 213.) The reservation of appellate power to the Governor in Council under Rule XXII has been in existence now for sixty years, and in no case, so far as I am aware, has its validity been questioned in the Courts. Its validity was tacitly assumed and acted upon by the High Court and the Privy Council in the case of *Mahadevi* v. *Vikrama*(2) and it may be that many properties are now held under titles

(1) L.R., 6 Ch. App., 279. (2) I.L.R., 14 Mad., 365.

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dependent on its validity. In these circumstances I should be unwilling to hold that it is *ultra vires* unless it is clearly so. For the reasons I have already given I do not think it by any means clear that it is *ultra vires*.

If, however, it is *ultra vires*, I am of opinion that it is rendered valid by section 25 of the Indian Councils Act (24 and 25 Vict., cap. 67). I have already noticed that prior to 1833 the Governor of Madras in Council had power to make regulations, and did make regulations, establishing Courts of justice and regulating their powers and procedure in the mufussal districts of Madras. In 1833 that power was taken away (save in cases of urgency) and was vested in the Governor-General in Council, with the proviso that it was to be exercised only at a meeting of the Council (3 and 4 Will. IV, cap. 85).

Doubts were entertained as to the validity of certain rules, laws and regulations made for certain "non-regulation" territories or provinces by the Governor-General in Council by reason of their not having been made at a meeting of the Council, as required by 3 and 4 Will. IV, cap. 85, and doubts were also entertained as to the validity of certain rules, laws and regulations made by the Governor in Council of Madras and Bombay for the "non-regulation" territories under their jurisdiction after their legislative powers had been abolished, except in cases of urgency, by the said Statute. Section 25 of the Indian Councils Act was enacted to remove these doubts, and its effect appears to be to give the same validity to laws, rules and regulations made by the Governor in Council for non-regulation territories in Madras between the passing of 3 and 4 Will. IV, cap. 85 and 24 and 25 Vict., cap. 67 as they would have possessed if 3 and 4 Will. IV, cap. 85, had never been passed. In other words, it validates in these wild territories any rule made between 1833 and 1861 provided it was a rule which could have been legally enacted by the Governor in Council under the powers possessed by him prior to 1833, but it does not validate any rule which could not have been then legally enacted. It is, perhaps, hardly necessary to add that rule XXII was such as might legally have been enacted by the Governor in Council prior to 1833, and the non-regulation territories referred to in section 25, so far as Madras is concerned, were the territories in Ganjam and Vizagapatam, in which the operation of the regulations had been abolished by Act XXV of 1839.

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Rule XXII, then, not being invalid, we find that the Sadr Court had no appellate jurisdiction in the important class of suits referred to in that rule, and the appellate jurisdiction which it possessed in other suits was the creature of the rules framed by Government under the Act, was limited by those rules, and might at any time be curtailed, or even abolished altogether, by an alteration of the rules. Under the rules too, the Sadr Court possessed no power to transfer a suit from any of the Agency Courts either to another Agency Court or elsewhere.

That being the position deliberately assigned to the Sadr Court by special legislation passed for tracts of a special character, it may, I think, well be doubted whether the Legislature intended that that position should be affected by the general terms of section 15 of the High Courts Act (24 and 25 Vict., cap. 104) already quoted:—"Each of the High Courts established "under this Act 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 from any such Court to any other Court of "equal or superior jurisdiction and shall have power to make and "issue general rules for regulating the practice and proceedings "of such Courts," etc. The main purpose of the Statute in Madras was to merge the then existing Supreme Court (with original jurisdiction in the town of Madras) and the Courts of Sadr Adalat and Fouzdary Adalat (with appellate jurisdiction over the mufussal) into a single High Court of Judicature, and the jurisdictions of the old Courts were continued to the new Court. It is a well established rule of construction that general words in a later Statute are not to be taken as altering or revoking by implication, and in the absence of a clearly expressed intention the special provisions of an earlier Statute, directed towards a special object, where the general words may otherwise have their proper application. "Having already given its attention to a particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there is something which shows that the attention of the Legislature had been turned to the special Act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely

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that an exception was intended as regards the special Act. The general Statute is read as silently excluding from its operation the cases which have been provided for by the special one," (Maxwell on the 'Interpretation of Statutes,' 3rd edition, page 243 and the cases there quoted.) Thus, for example, where an Act took away the right of bringing an action respecting certain disputes, which were referred to the summary adjudication of the justices, it was held that the subsequently established County Courts acquired no jurisdiction to try such cases, under the general authority to try "all pleas" (*Ex parte Payne*(1)). In the Agency tracts of Ganjam and Vizagapatam the Legislature, having given its special attention to the matter, deliberately abolished the jurisdiction of the ordinary Courts, including that of the Sadr Court, by special legislation, and set up special Courts in their place. No power was reserved to the Sadr Court, save such as might be given by the Governor in Council by rules framed under the Act. Neither in the Act, nor in the rules under the Act, has the Sadr Court any power to transfer suits from the Agent's Courts. There is nothing in section 15, or in any other section, of the High Courts Act, to indicate that it was the intention of the Legislature to interfere by that Act with the special system established under Act XXIV of 1839. The High Courts Act was passed for another purpose and there is full scope for the application of section 15 without applying its general terms to revoke or override the policy of the special Act. If the High Court has the power to transfer suits from the Agency Courts to the ordinary Civil Courts, and should exercise the power freely, the whole policy of Act XXIV of 1839 might be set at naught, since the effect would be to subject such suits to the jurisdiction of the ordinary Courts, and to the complex procedure and rights of appeal which it was the policy of that Act to set aside. It is true that the High Court is not likely to exercise the power unwisely, but the history of the conflict between the Supreme Courts and the Executive towards the close of the last century shows that a complete divergence of policy between the two authorities is not impossible, and might lead the High Court to exercise its powers so as to nullify the policy of the Act. That the general policy of the Act remains unchanged appears to be clear from its being retained in force, and from the subsequent

(1) 5 D. & L., 679.

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enactment of the Scheduled Districts Act (XIV of 1874) and the exclusion of the operation of the Civil Procedure Code from those districts.

For all these reasons I am of opinion that section 15 must be read as silently excluding from its operation the special Courts established by Act XXIV of 1839, and that it does not authorize the High Court to transfer suits away from the Agency Courts. It may be added that the previous decisions of this Court throw but little light on the matter. In *Agent to the Governor, Vizagapatam* v. *Srinivasa Bhakshipatrudu*(1) a single Judge transferred a suit to the District Court on the *ex parte* application of the Agent. In *Niladewi Patta Mahadevigar* v. *Appa Rao Pantulu*(2) a Bench of two Judges refused to make a transfer on the ground that under the rules they had no power to do so—but neither the validity of the rules nor the effect of section 15 of the High Courts Act appears to have been argued before the Judges.

Lastly, even if section 15 is applicable to Agency Courts it is doubtful whether a District Court can be said to be a Court "of equal or superior jurisdiction" to that of an Agent under Act XXIV of 1839 so as to justify such a transfer as that under consideration. The jurisdictions of the two Courts are, in many respects, dissimilar, so that it is difficult to compare them as regards equality, but if a comparison is made, the Agents' Courts would seem to be superior, since they possess superior powers in regard to appeals over Rs. 5,000 in value [rules XVI and X (2)], and special appeals (rule XVII), and revision of lower Courts (rule XIX), and reference to arbitration without consent of parties (rule XXVII), and in regard to the finality of their decrees (rule XX).

In the result I am of opinion that the orders of Mr. Justice Boddam must be reversed and the appeals must be allowed, on the ground that section 15 of the High Courts Act does not give the High Court jurisdiction to make the transfer, nor does the consent of parties cure the defect of jurisdiction. As the first order of transfer was made by consent, I would make no order as to costs.

(1) Civil Miscellaneous Petition No. 971 of 1892 (unreported).
(2) Civil Miscellaneous Petition No. 392 of 1886 (unreported).

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Boddam.

RAMASWAMI SASTRULU (DEFENDANT No. 13), APPELLANT,

v.

KAMESWARAMMA (PLAINTIFF), RESPONDENT.*

1899. August 15, 25. 1900. February 19.

Civil Procedure Code—Act XIV of 1882, *s.* 244—"*Parties to the suit*"—*Subsequent suit by a defendant who had been exonerated in a former suit—Maintainability of such suit.*

A family consisted of plaintiff's father, first defendant's father, and second defendant's grand-father. Plaintiff's brother died, leaving a widow. Plaintiff's father then died and also left a widow (plaintiff's mother), him surviving. The brother's widow brought a suit for maintenance against the representatives of the first and second defendants' branches of the family, plaintiff's mother being joined as third defendant. A decree was passed against the two first-mentioned defendants, but plaintiff's mother was exonerated on the ground that, being a female, she was not liable. In execution of the decree, certain lands were brought to sale and purchased by the brother's widow, who transferred them to another person. At the death of plaintiff's mother, which occurred subsequently, the said lands would have vested in the plaintiff, who now brought this suit claiming that the sales referred to were not binding on her (plaintiff) inasmuch as her mother had not been a party to the decree under which they had taken place:

Held, that where a party defendant in a suit is exonerated from such suit, the suit being dismissed against him and a decree passed against a co-defendant in the suit, and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit is attached and sold, the latter is not entitled to maintain a suit for recovery of possession of the property, and the question of his claim to, and to recover possession of, the property is a question falling within section 244 of the Code of Civil Procedure, so as to debar him from maintaining such suit.

Gadicherla China Seetayya v. *Gadicherla Seetayya*, I.L.R., 21 Mad., 45, explained.

SUIT for possession of land with mesne profits. A family consisted of plaintiff's father, first defendant's father and second defendant's grand-father. Plaintiff's brother had predeceased her

* Second Appeal No. 814 of 1898 against the decree of J. H. Munro, Acting District Judge of Kistna, in Appeal Suit No. 511 of 1896, affirming the decree of N. Swaminadha Ayyar, Subordinate Judge of Kistna, in Original Suit No. 41 of 1894.

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(plaintiff's) father, leaving a widow, defendant No. 12, him surviving. Plaintiff's father then died, her (plaintiff's) mother having possession of his share of the property, as widow. Suit No. 337 of 1875 for maintenance was brought by defendant No. 12 (widow of plaintiff's brother) against the representatives of the first and second defendants' branches of the family, plaintiff's mother being also joined as third defendant. A decree was passed against the two first-mentioned defendants, but plaintiff's mother was exonerated on the ground that, being a female, she was not liable. In execution of the said decree the lands now sued for were brought to sale and bought by defendant No. 12, who transferred them to defendant No. 13. The widow, plaintiff's mother, had died in 1884, at which date the right to the property, according to plaintiff, became vested in her; and she claimed that the sales under which defendant No. 13 had acquired the lands were not binding on her inasmuch as her mother had not been a party to the decree under which they had taken place. The Subordinate Judge upheld this view, and decreed for possession to be given to plaintiff, as prayed. Defendant No. 13 appealed to the District Judge who affirmed the decree of the lower Court.

Defendant No. 13 preferred this second appeal.

The case came on for hearing before O'FARRELL and MICHELL, JJ., when their Lordships made the following

ORDER OF REFERENCE TO FULL BENCH:—MICHELL, J.—It is contended for the appellant (thirteenth defendant) that the plaintiff was precluded from bringing this suit for recovery of possession of the properties in question because she was bound to bring a suit to set aside the sale of the properties effected in execution of the decree obtained by twelfth defendant in suit No. 337 of 1875 and not having brought such a suit within one year from the date of confirmation of that sale, such suit is barred under article 12 of schedule II of Act XV of 1877. That suit, as appears from the judgment therein (exhibit P), was a suit by a widow for maintenance against three persons, of whom the first and second defendants were male members of the family to which the late husband of the plaintiff therein (present twelfth defendant) and the father of the present plaintiff belonged, and the third defendant therein was present plaintiff's mother, through whom present plaintiff claims the properties now in question. All the defendants in that suit were *ex parte* and judgment was given against the first

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and second defendants therein only, the third defendant (present plaintiff's mother) being exonerated from the suit on the ground that being a female she was not liable. But the appellant's vakil relies on *Suryanna* v. *Durgi*(1). That case, however, was dissented from in the Full Bench judgment in *Kadar Hussain* v. *Hussain Saheb*(2). In both those cases the plaintiff in the suit for possession of the property of which he had been dispossessed in consequence of its having been sold in execution of the decree in the former suit, appears not to have been a party to such former suit, whereas in the present case the person through whom the plaintiff claims was a party to the former suit. But the reasoning of the decision in *Kadar Hussain* v. *Hussain Saheb*(2) appears to me to render that decision equally applicable to a case, such as the present, in which the plaintiff, though a party to the former suit, was exonerated from that suit, and was not affected, in regard to her title to the property in question, by the decree in such former suit, and proceedings taken in execution thereof. In the present case, moreover, the decree in the former suit was only a personal decree, whereas in those cases it was a decree against immovable property. In my opinion, therefore, this contention fails.

It is also contended that plaintiff's mother's only remedy was by application in the matter of the former suit (No. 337 of 1875) and that this suit is barred by the provisions of section 244 of the Code. *Kuriyali* v. *Mayan*(3) is relied on. But in that case the plaintiff had been brought in as the representative, on the record in the former suit, of the deceased defendant therein, against whom the decree in such former suit had been passed, whereas in the present case the person through whom plaintiff claims was exonerated in the former suit, which was dismissed as against her. In *Vibhudhapriya Thirthasami* v. *Vidianidhi Thirthasami*(4), however, on which also the appellant's vakil relies, it was held that a defendant against whom no decree had been passed, the suit having been dismissed as against him, was entitled to take proceedings under section 244 if his rights were invaded in execution proceedings taken against other defendants against whom the decree had been passed. This decision appears to me to be in conflict with the

(1) I.L.R., 7 Mad., 258.
(2) I.L.R., 20 Mad., 118.
(3) I.L.R., 7 Mad., 255.
(4) I.L.R., 22 Mad., 131.

decision in *Nagamuthu* v. *Savarimuthu*(1), and, with great respect for the opinion of the learned Judges in the former case to the contrary, I am unable to see that the two cases are distinguishable. The decision in *Gadicherla China Seetayya* v. *Gadicherla Seetayya*(2) is in conformity with that in *Nagamuthu* v. *Savarimuthu*(1).

I think, therefore, that the question, as to which there is, as it appears to me, this conflict of decisions, should be referred to a Full Bench.

O'FARRELL, J.—I concur. As to the first point, whatever may be the class of cases to which article 12, schedule II, Act XV of 1877, applies, we are bound by the Full Bench decision in *Kadar Hussain* v. *Hussain Saheb*(3) to say that cases like the present, where dispossession is the cause of action, do not fall within its scope.

On the second point, whether the present suit is barred by the provisions of section 244(*c*), Civil Procedure Code, I agree that there should be a reference to a Full Bench. The decision in *Vibhudhapriya Thirthasami* v. *Vidianidhi Thirthasami*(4) appears to me to be directly in conflict, not only with the cases therein attempted to be distinguished, but with *Gadicherla China Seetayya* v. *Gadicherla Seetayya*(2), which is not referred to. I would follow the decision last named. It appears to me that section 244 is only intended to apply to parties to the suit and their representatives who fill the position at the time the question arises for determination. It has therefore no reference to the case of parties who have been exonerated from the suit before decree and who are in the same position as if they had never been parties at all. As the cases are in conflict, however, I concur in a reference to a Full Bench.

We accordingly refer to a Full Bench the following question :—When a party defendant in a suit is exonerated from such suit, the suit being dismissed as against him, and a decree is passed against a co-defendant in the suit, and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit is attached and sold, is the latter entitled to maintain a suit for recovery of possession of the property, or is

(1) I.L.R., 15 Mad., 226.
(2) I.L.R., 21 Mad., 45.
(3) I.L.R., 20 Mad., 118.
(4) I.L.R, 22 Mad., 131.

the question of his claim to, and to recovery of, possession of the property a question falling within section 244 of the Code of Civil Procedure, 1882, so as to debar him from maintaining such suit.

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

V. Krishnaswami Ayyar, for appellant, referred to *Vibhudapriya Thirthasami* v. *Vidianidhi Thirthasami*(1), *Gadicherla China Seetayya* v. *Gadicherla Seetayya*(2), *Nagamuthu* v. *Savarimuthu*(3), *Sankaravadivammal* v. *Kumarasamya*(4), *Muttia* v. *Appasami*(5), *Gowri* v. *Vigneshvar*(6) and *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(7). He contended that plaintiff should have set aside the sales complained of by suit; that inasmuch as she had not done so the present suit was barred; and that the matter was one that could only be dealt with under section 244 of the Code of Civil Procedure.

Sundara Ayyar and *Nagabhushanam*, for respondent, submitted that there was no decree to be executed, that section 244 of the Code of Civil Procedure did not apply, and that the cause of action was a new one. They referred to *Mukarrab Husain* v. *Hurmat-un-nissa*(8), *Krishnabhupati Devu* v. *Vikrama Devu*(9), *Vibhudapriya Thirthasami* v. *Vidianidhi Thirthasami*(1), *Sanwal Das* v. *Bismillah Begam*(10), *Kameshwar Pershad* v. *Run Bahadur Singh*(11), *Gour Kishore Chowdhry* v. *Mahomed Hassim Chowdhry*(12), and *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(7). The decision in *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(7) was considered in *Mammod* v. *Locke*(13). *Gowri* v. *Vigneshvar*(6) was opposed to the other decisions and *Nagamuthu* v. *Savarimuthu*(3) and *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*(7) supported their contention, as did *Kameshwar Pershad* v. *Run Bahadur Singh*(11). In *Sankaravadivammal* v. *Kumarasamya*(4), there was a decree against plaintiff's property; and in that sense it was passed against her. The words "parties to the suit" must be understood with reference to those

(1) I.L.R., 22 Mad., 131.
(2) I.L.R., 21 Mad., 45.
(3) I.L.R., 15 Mad., 226.
(4) I.L.R., 8 Mad., 473.
(5) I.L.R., 13 Mad., 504.
(6) I.L.R., 17 Bom., 49.
(7) L.R., 19 I.A., 166; I.L.R., 19 Calc., 683.
(8) I.L.R., 18 All., 52.
(9) I.L.R., 18 Mad., 13 at p. 17.
(10) I.L.R., 19 All., 480.
(11) I.L.R., 12 Calc., 458.
(12) 10 W.R., (C.R.), 191,
(13) I.L.R., 20 Mad., 487.

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that follow. A defendant who has been dismissed from a suit is no longer a party to the suit within the meaning of the section. The decree, if any, in such suit cannot be executed as against such a defendant. The words "parties to the suit" must mean "judgment-creditors and judgment-debtors." The fact that the Code made provision for cases relating to third parties in sections 335 and 280 showed that such cases did not fall within the scope of section 244.

JUDGMENT.—We are of opinion that when a party defendant in a suit is exonerated from such suit—the suit being dismissed against him and a decree passed against a co-defendant in the suit—and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit is attached and sold, the latter is not entitled to maintain a suit for recovery of possession of the property, and that the question of his claim to, and to recover possession of, the property is a question falling within section 244, Civil Procedure Code of 1882, so as to debar him from maintaining such suit.

It was contended before us that a defendant in whose favour the suit is dismissed is not a party to the suit within the meaning of the section, because there is no decree which can be executed against him and that the words "parties to the suit" in the section must be limited to the judgment-creditors and judgment-debtors, because they are the only persons between whom questions could arise "relating to the execution, discharge or "satisfaction of the decree or to the stay of execution thereof." We do not think this is a correct view of the section.

We do not think that the words "parties to the suit" can be limited in the way suggested. The Privy Council have more than once pointed out that a narrow construction should not be placed on the words of this section—the object of the enactment being to check needless litigation.

The view we hold is in accordance with the decision in *Sankaravadivammal* v. *Kumarasamya*(1) (which was apparently not brought to the attention of the Judges making the reference), and which has been approved in *Gowri* v. *Vigneshvar*(2), and the same view of the law was expressed in *Vibhudhapriya Thirthasami* v. *Vidianidhi Thirthasami*(3).

(1) I.L.R., 8 Mad., 473. (2) I.L.R., 17 Bom., 40.
(3) I.L.R., 22 Mad., 131.

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The decision in *Gadicherla China Seetayya* v. *Gadicherla Seetayya*(1), which was cited as being in conflict with this view, is not so in reality. The report of the case is not clear, but on reference to the records it appears that the names of the defendants exonerated were in fact removed from the suit and they had thereby ceased to be parties to the suit.

If the decision in *Nagamuthu* v. *Savarimuthu*(2) can be held to support the respondent's contention—a point which is by no means clear—we are unable to agree with it for the reasons above given.

The case then coming on for final hearing after the receipt of the above Full Bench decision, the Court (SUBRAHMANIA AYYAR and DAVIES, JJ.) delivered the following final

JUDGMENT.—According to the Full Bench ruling, this suit will be dismissed with costs throughout with reference to item 5 in plaint schedule A, and in regard to items 6 and 7 in that schedule the appeal will be dismissed with proportionate costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar (Officiating Chief Justice) and Mr. Justice O'Farrell.

GOURACHANDRA PATNAIKUDU (DEFENDANT), APPELLANT,

v.

VIKRAMA DEO (PLAINTIFF), RESPONDENT.*

1899. August 31. September 1, 6.

Ganjám and Vizagapatam Agency Courts Act—Act XXIV of 1839—Agency Rules passed under the Act—Agent's Court at Vizagapatam—Court of lowest grade—Jurisdiction.

The Agent to the Governor at Vizagapatam has jurisdiction over all suits of a civil nature arising in the Agency.

The rule regarding the institution of suits of a lesser pecuniary value than Rs. 5,000 in the Divisional Assistant's Court is, like the analogous rule contained in section 15 of the Code of Civil Procedure, one of procedure and not of jurisdiction. *Velayudam* v. *Arunachalam* (I.L.R., 13 Mad., 273), considered.

(1) I.L.R., 21 Mad., 45. (2) I.L.R., 15 Mad., 226.

* Appeal No. 209 of 1898 against the decree of W. O. Horne, Acting Agent to the Governor at Vizagapatam, in Original Suit No. 6 of 1897.

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SUIT instituted in the Court of the Agent to the Governor at Vizagapatam for the recovery of a village with mesne profits. The Acting Agent, after finding in favour of the plaintiff and ordering the defendant to restore it, said :—"It should be mentioned that defendant objects to the jurisdiction of this Court, on the ground that under the agency rules of civil justice all suits, except (i) those cognizable by District Munsifs, and (ii) those valued at Rs. 5,000 and over, shall be instituted in the Court of a Divisional Assistant. This suit was instituted in the Agent's Court. The objection was not taken by defendant until the last hearing. It is stated by plaintiff that he brought this question of jurisdiction to the notice of the Court when filing the suit and that the question was reserved for consideration. The Court has no recollection whatever of the fact but is prepared to accept the statement. I cannot however consider that the rule alluded to is exclusive and prohibitory. I think that common sense indicates that the greater jurisdiction includes the less and that this Court has jurisdiction to try this suit."

Defendant appealed on the grounds, among others, that the lower Court had no jurisdiction to try the suit, and that its ruling that the greater jurisdiction included the less was opposed to law and to the provisions of the Agency Rules framed under Act XXIV of 1839.

Ramachandra Rao Saheb and *Nagabhushanam* for appellant.—The value of this suit is Rs. 1,820. According to the Agency Rules framed under Act XXIV of 1839, suits ranging in value between Rs. 500 and Rs. 5,000 have to be instituted in the Court of the Divisional Assistant. See Rule X, clauses 1 and 2 which are as follows :—Clause 1 :—"With the exception, firstly, of the particular suits described in the preceding rule, which are cognizable by the munsifs, and, secondly, of the suits described in clauses 2 and 3 of the present rule, all suits shall be instituted in the Court of the Divisional Assistant. Provided always that the Divisional Assistant may transfer any civil suit of a value not exceeding Rs. 500 instituted before him to any munsif within his division for trial." Clause 2 :—"Suits exceeding Rs. 5,000 in value shall be instituted in the Court of the Agent, who may, however, when he thinks proper, refer any such suit for the decision of the Divisional Assistant." Clause 5 of the same rule also provides :—"The Civil Courts of each grade shall receive, try, and determine suits

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hereby declared to be cognizable by those Courts, if, in the case of suits for land or other immovable property, such land or property shall be situate within the limits to which their respective jurisdictions may extend, and in all other cases, if the cause of action shall have arisen or the defendant at the time of commencement of the suit shall dwell or personally work for gain within such limits."

The present suit should accordingly have been instituted in the Court of the Divisional Assistant. It was, however, instituted in the Court of the Agent, and it is submitted that the Agent had no jurisdiction to try the suit. The view taken by the Agent that the greater jurisdiction includes the less is opposed to the Agency Rules. In the Agency Rules there is no provision corresponding to the first clause of section 12 of the Madras Civil Courts Act (III of 1873). That section confers upon District Judges and Subordinate Judges jurisdiction to try all original suits and proceedings of a civil nature. In virtue of that section, there is no inherent want of jurisdiction in a District Judge or a Subordinate Judge to try a suit cognizable by a District Munsif. But the absence of any corresponding provision in the Agency Rules would seem to indicate that the Agent cannot exercise jurisdiction over suits cognizable by Courts subordinate to his. The decision in *Velayudam* v. *Arunachalam*(1) is exactly in point. That decision was passed in spite of section 12 of the Civil Courts Act. *A fortiori* it follows that in this case the Agent acted without jurisdiction. [In the course of the argument *Aukhil Chunder Sen Roy* v. *Mohiny Mohun Dass*(2), *Shri Sidheshwar Pandit* v. *Shri Harihar Pandit*(3), and *Bibi Ladli Begam* v. *Bibi Raje Rabia*(4) were also cited.]

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*) and *Tiruvenkatachariar* for respondent.—The Agent had jurisdiction to try the suit. No doubt, according to the Agency Rules, this suit should strictly speaking have been filed in the Court of the Divisional Assistant. But it cannot be said that there was any inherent want of jurisdiction in the Agent to try the suit. Rule XIX empowers the Agent to call to his own file any suit pending in the Court of his subordinates, and when he does call for a suit he can presumably try it. The object of the Agency Rules seems to

(1) I.L.R., 13 Mad., 273. (2) I.L.R., 5 Calc., 489.
(3) I.L.R., 12 Bom., 155. (4) I.L.R., 13 Bom., 650.

be to assimilate the jurisdiction of Agents and Divisional Assistants to that of District Judges and Subordinate Judges in the districts to which the Madras Civil Courts Act applies. Moreover, there is no provision in the Agency Rules directing each suit to be filed in the Court of the lowest grade competent to try it. Even such a rule contained in section 15 of the Code of Civil Procedure has been held to be a rule of procedure and not of jurisdiction. *Midhi Lal* v. *Mazhar Husain*(1), *Matra Mondal* v. *Hori Mohun Mullick*(2), *Krishnasami* v. *Kanakasabai*(3) and *Augustine* v. *Medlycott*(4).

JUDGMENT.—The learned vakil for the appellant does not desire to argue the appeal on the merits, and the only point which he presses is the question of jurisdiction. No doubt the Agency Rules provide that suits exceeding Rs. 5,000 in value shall be instituted in the Court of the Agent, and therefore by implication that suits below that value and not cognizable by a munsif shall be instituted in the Court of the Divisional Assistant. There is, however, nothing equivalent to the positive direction in section 15 of the Civil Procedure Code that every suit shall be instituted in the Court of the lowest grade, competent to try it. Even that provision has been held to be a rule of procedure and not of jurisdiction; a direction to the suitor and not an absolute rule binding the Court (see *Midhi Lal* v. *Mazhar Husain*(1), *Matra Mondal* v. *Hori Mohun Mullick*(2), *Krishnasami* v. *Kanakasabai*(3), *Augustine* v. *Medlycott*(4)). We think these decisions are sound, and we doubt the correctness of the decision in *Velayudam* v. *Arumachala*(5). We do not see why the same principles should not be applied in the case of the Agent and his Divisional Assistant whose respective positions are analogous to those of District and Subordinate Judges. The Agent has power under rule XIX to remove to his own or any other Court in the jurisdiction any suit which may be depending in a lower Court; from which it would appear that his jurisdiction extended over all suits of whatever value within the agency. Although, therefore, there is no provision in the Agency Rules equivalent to section 12 of the Civil Courts Act (III of 1873) which expressly provides that the jurisdiction of a District Judge extends to all original suits and proceedings of a civil nature, we think it is fairly inferrible from the wording of the

(1) I.L.R., 7 All., 230.
(2) I.L.R., 17 Calc., 155.
(3) I.L.R., 14 Mad., 183.
(4) I.L.R., 15 Mad., 241.
(5) I.L.R., 13 Mad., 273.

rules that the Agent has jurisdiction over all suits of a civil nature arising in the agency, and that the rule regarding the institution of suits of a lesser pecuniary value than Rs. 5,000 in the Divisional Assistant's Court is, like the analogous rule contained in section 15, Civil Procedure Code, one of procedure and not of jurisdiction. We must not however be understood as implying that the rule may be disregarded with impunity. Recourse to the Agent's Court rather than that of the Divisional Assistant throws upon the unsuccessful party the burden of an appeal to the High Court or the Governor in Council, and may be a good ground for refusing the costs of a successful respondent who has unnecessarily sued in the Higher Court. In the present case, however, we understand there were good reasons why the suit should have been heard by the Agent, and the appellant does not contest the correctness of the decision on the merits. We, therefore, dismiss the appeal with costs.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Davies, Mr. Justice Benson, and Mr. Justice Boddam.

MASTHAN SAHIB (DEFENDANT), APPELLANT,

v.

ASSAN BIVI AMMAL (PLAINTIFF), RESPONDENT.*

1899. October 20. 1900. January 30. March 1.

Muhammadan Law—Suit for dower—Dower prompt or deferred—Presumption.

According to Muhammadan Law, dower, being consideration for marriage, is, unless payment of the whole or part of it is expressly postponed, presumed to be prompt and exigible on demand.

Tadiya v. *Hasanebiyari*, (6 M.H.C.R., 9), followed.

SUIT by a Muhammadan wife against her husband for dower. Plaintiff contended that her husband had agreed to pay the dower on demand, which defendant denied. The first issue framed by the District Munsif was "whether the plaintiff's dower was exigible

* Second Appeal No. 1436 of 1898 against the decree of N. Sarvothama Rao, Temporary Subordinate Judge of Tinnevelly, in Appeal Suit No. 52 of 1898, affirming the decree of T. V. Vasudeva Sastri, Acting District Munsif of Tinnevelly, in Original Suit No. 681 of 1896.

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on demand or not." He found that no express agreement on defendant's part to pay the dower on demand had been made out, and (following *Tadiya* v. *Hasanebiyari*(1)) that in the absence of express contract dower is presumed to be prompt and may be enforced at any time. He gave judgment for plaintiff for the amount sued for. The Subordinate Judge concurred in the finding that no agreement for express dower had been made out, and upheld the decree on the ground that in the absence of any express agreement one way or the other the presumption is that the dower is prompt.

The defendant preferred this second appeal.

The case first came on for hearing before Sir CHARLES ARNOLD WHITE, C.J., and MOORE, J., when their Lordships made the following

ORDER OF REFERENCE TO FULL BENCH.—The question referred arises out of a suit for dower. The parties are Muhammadans. The Court of First Instance found that no express agreement on defendant's part to pay the dower on demand had been made out. The lower Appellate Court concurred in this finding. The lower Appellate Court held that, in the absence of any express agreement one way or the other, the presumption was that the dower was prompt, *i.e.*, payable in whole on demand. In so holding the lower Appellate Court appears to have relied on the authority of *Tadiya* v. *Hasanebiyari*(1). In that case this Court decided that according to Muhammadan Law dower is presumed to be prompt in the absence of express contract. The ground of the decision was that the authorities agreed that there was a presumption of Muhammadan Law to this effect. This seems to be the only reported decision of this Court upon the point in question. There are decisions of the Bombay and the Allahabad High Courts which are inconsistent with this presumption and the balance of authority generally seems to us to support the contention that there is no such presumption. The principal authorities in support of the view that such a presumption exists appear to be as follows:—(*a*) The case above referred to (*Tadiya* v. *Hasanebiyari*(1)). (*b*) A passage in Macnaghten's 'Principles and Precedents of Muhammadan Law,' page 59, clause 22, to the following

(1) 6 M.H.C.R., 9.

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effect: "Where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand." (*c*) A Privy Council decision (*Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor*(1)). The decision turned on the construction of the contract but the judgment contains the following expression of opinion: "The admitted rule seems to be that laid down in Macnaghten's 'Principles.'"

The principal authorities in support of the view that no such presumption exists appear to be as follows:—(*a*) A case reported (*Fatma* v. *Sadruddin*(2)). In that case the Court adopted the rule given in Baillie's 'Digest of Muhammadan Law,' page 126 (2nd edition, page 127) as "the more approved rule." (*b*) A case (*Eidan* v. *Mazhar Husain*(3)). It was there held that when the payment of the dower has not been stipulated to be "deferred," payment of a portion of the dower must be considered "prompt;" and that the amount of the portion must be determined with reference to custom, and, where there is no custom, by the Court with reference to the status of the wife and the amount of the dower. The Court declined to adopt the view expressed in Macnaghten's 'Principles' on the ground that the greater weight of authority was in favour of the doctrine set forth in Baillie's 'Digest.' (*c*) The passage in Baillie's 'Digest' above referred to. The passage is as follows: "When nothing has been said on the subject, both the woman and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman." The second edition of Baillie's 'Digest' contains a note in which the authorities on which Macnaghten's view is based are discussed. (*d*) A passage in Shama Churn Sircar's 'The Muhammadan Law' (1875), volume II, page 358, article 461. In Ameer Ali's 'Muhammadan Law' (1894), on pages 386 and 387, a distinction is drawn between the Shiah Law and the Hanafi doctrines with reference to this question, and it is pointed out that the principle upon which the Hanafi doctrine is founded seems to have been overlooked in the Privy Council decision (*Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor*(1)). The question is also discussed in Sir Roland Wilson's 'Digest of

(1) 19 W.R., (C.R.), 315. (2) 2 Bom. H.C.R., 291. (3) I.L.R., 1 All., 483.

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the Anglo-Muhammadan Law' (1895), page 42, paragraph 46. In our opinion the balance of authority appears to be in favour of the principle adopted by the Bombay and Allahabad High Courts. The question we refer for the decision of a Full Bench is "whether, in the absence of an express contract as to whether the dower was to be prompt or deferred, the lower Appellate Court was right in dealing with the case on the presumption that the whole dower was exigible on demand, or whether the lower Appellate Court, for the purpose of determining whether the dower was, in whole or in part, exigible on demand, ought to have taken into consideration the woman, the amount of the dower and any other material facts."

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

K. Srinivasa Ayyangar for appellant:—There is no presumption in Muhammadan Law that dower will be prompt. The only decision against that view is that in *Tadiya* v. *Hasanebiyari*(1), and there are some *dicta*. There has been a divergence of opinion between Macnaghten and Baillie: the former being followed in Calcutta and the latter in Allahabad and Bombay; whilst Baillie is not referred to in the Calcutta cases. Baillie deals with the point in his 'Digest of Muhammadan Law,' 2nd edition, page 127, as follows:—"When the parties have explained how much of the dower is to be *mooûjjul* or prompt, that part of it is to be promptly paid. When nothing has been said on the subject, both the woman and the dower mentioned in the contract are to be taken into consideration with the view of determining how much of such a dower should properly be prompt for such a woman, and so much is to be *mooûjjul* or prompt, accordingly, without any reference to the proportion of a fourth or a fifth; but what is customary must also be taken into consideration." On this the author has a note in which he fully discusses the view taken by Macnaghten. See also Shama Churn Sircar's 'Muhammadan Law,' (Tagore Law Lectures, 1873-74), part I, page 358. Deferred dower is due either upon divorce or separation, or at the wife's death—when it is payable to her heirs—or at the death of the husband: it is a debt due to the wife in respect of which she has a lien on the husband's

(1) 6 M.H.C.R., 9.

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property, before its division amongst the other sharers; and it is a debt provable in insolvency. The arrangement between the parties in the present case having been simply for dower, the sole question is whether such an arrangement is to be construed as prompt or deferred. Macnaghten purports to cite the Hedaya, in support of his view of the presumption, but the Hedaya does not contain the proposition. [BODDAM, J.—Dower being the consideration for marriage, it is difficult to understand on what principle its payment should be assumed to be deferred after the marriage has taken place.] It is more in the nature of maintenance, and the wife is not entitled to maintenance so long as her husband supports her. Syed Ameer Ali in his work on 'Muhammadan Law,' volume II, at page 386, draws a distinction between Shiahs and Hanafis. These parties are Shiahs. In most Muhammadan marriages a large dower is fixed because divorce of a wife is so easy that the prospect of having to pay a deferred dower (which would become due on divorce) acts as a deterrent and is for the wife's benefit. The earliest reported decision is in 1 Morley's 'Digest,' N.S., page 182, paragraph 5, where it is laid down that a wife cannot claim more than one-third of her dower while her husband lives, and a case from the North-West Provinces is cited. See also the Full Bench decision in *Fatma* v. *Sadruddin*(1), where Baillie is cited. In the Privy Council case, the question of "prompt or deferred" was not really before the Committee as the wife had died, and the son sued the father to recover his share of his mother's dower, which was then admittedly due. The contention was that, though prompt, the dower was not payable till the death of the husband, as the marriage would not be dissolved until that event. The Privy Council decided against that view. [DAVIES, J.—The rule in Macnaghten is however quoted with approval and it concurs with good reason.] *Mussamut Mulleeka* v. *Mussamut Jumeela*(2) was an appeal from the decision in *Mussamut Beebee Jumeela* v. *Mussamut Mulleeka*(3) and the Privy Council left this particular question undecided. In the following year the case of *Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor*(4), was decided and the reference in the judgment to Macnaghten's proposition would seem to indicate that it had been

(1) 2 Bom. H.C.R., 291.
(2) 11 B.L.R., 375.
(3) (1864) W.R., (C.R.), 252.
(4) 19 W.R., (C.R.), 315.

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treated as being the correct one in the course of argument, so that the point was not really argued before their Lordships.

Mr. *Joseph Satya Nadar*, for respondent, referred to Wilson's 'Digest,' page 365; also to Syed Ameer Ali's 'Muhammadan Law,' volume II, page 386, paragraph 1; *Taufik-un-nissa* v. *Ghulam Kambar*(1) following *Eidan* v. *Mazhar Husain*(2); and Shama Churn Sircar's 'Muhammadam Law,' part II, page 361, from which it appears that dower is the absolute property of the wife from the date of the consummation of marriage, and can be alienated by her.

JUDGMENT.—We think the decision of the lower Appellate Court that in the absence of an express contract the dower in this case was exigible on demand, was a right decision, following the rule laid down in *Tadiya* v. *Hasanebiyari*(3). That rule has been quoted with approval by the Privy Council (*Mirza Bedar Bukht Mohummed Ali Bahadoor* v. *Mirza Khurrum Bukht Yahya Ali Khan Bahadoor*(4)). The rule is, in our opinion, more consonant with reason than the rule held to prevail in some other Presidencies where the proportion in which such dower is to be considered prompt or deferred is left uncertain. We take it that the dower is consideration for the marriage and therefore that unless payment of the whole or part of it is expressly postponed it is payable on demand. This appears to be the view the parties themselves entertained of the matter, for the defendant did not plead that any part of the dower was deferred, but on the other hand he pleaded that it had been paid in full, thereby showing his consciousness that it ought to have been so paid either according to custom or according to the law ruling in this Presidency for the last thirty years. Even if the weight of authority in other parts of India were opposed to the law laid down in *Tadiya* v. *Hasanebiyari*(3), we think more harm than good would be done by altering it after this lapse of time in favour of another rule which is inexact and unworkable in practice.

The case then came on for final hearing after receipt of the above Full Bench opinion, when the Court (Sir CHARLES ARNOLD WHITE, C.J., and BENSON, J.) delivered the following final

JUDGMENT.—In accordance with the Full Bench decision the second appeal is dismissed with costs.

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(1) I.L.R., 1 All., 506.
(2) I.L.R., 1 All., 483.
(3) 6 M.H.C.R., 9.
(4) 19 W.R., C.R., 315.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Michell.

ERUSAPPA MUDALIAR (PETITIONER), APPELLANT,

v.

COMMERCIAL AND LAND MORTGAGE BANK, LIMITED (COUNTER-PETITIONERS), RESPONDENTS.*

1899. Oct. 30, 31. Nov. 6.

Transfer of Property Act—Act IV of 1882, *ss.* 60, 88, 99—*Purchase by mortgagee holding decree for sale, of portion of mortgaged property, subject to mortgage—Impossibility of mortgagee freeing himself by such purchase from liability to be redeemed—Civil Procedure Code—Act XIV of* 1882, *ss.* 244, 258—*"Court executing a decree" includes proceedings initiated by decree-holder and by judgment-debtor.*

A mortgagee having obtained a decree against his mortgagor for the sale of the mortgaged property, a portion of the latter was subsequently sold, subject to the said decree, in execution of a money decree obtained by a third party against the mortgagor. The mortgagee purchased the portion so sold, whereupon the mortgagor presented a petition under section 258 of the Code of Civil Procedure claiming that the mortgagee was bound to discharge his mortgage debt and should be called upon to certify satisfaction of his decree:

Held, that petitioner was not entitled to the relief prayed for, but only to proceed upon the footing that the portion of the mortgaged property which had been purchased by the mortgagee remained, notwithstanding such purchase, redeemable by petitioner together with the remainder of the property.

On the question whether the purchase by a mortgagee of a portion of the mortgaged property at a Court sale in execution of the money decree of a third party involves a taking advantage by the mortgagee of his fiduciary position as mortgagee:

Held, that the principle of the impossibility of a mortgagee freeing himself from his liability to be redeemed as affirmed in *Martand* v. *Dhondo* (I.L.R., 22 Bom., 624) and *Mayan Pathuti* v. *Pakuran* (I.L.R., 22 Mad., 347) was applicable, even in the absence of fraud or collusion between the mortgagee and the third party in execution of whose decree the purchase of the equity of redemption had been made, and that such a purchase contravened the principle underlying section 99 of the Transfer of Property Act and expressed in section 88 of the Indian Trusts Act.

The provision in section 244 of the Code of Civil Procedure that questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of a decree shall be determined by order of the Court executing the decree, relates not only to proceedings initiated by the decree-holder but also to applications made by the judgment-debtor.

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* Civil Miscellaneous Appeal No. 65 of 1899 against the order of L. C. Miller, Acting District Judge of Trichinopoly, in Civil Miscellaneous Petition No. 1007 of 1898, in the matter of Original Suit No. 27 of 1896.

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Whether the subject-matter of the petition was an "adjustment" of the decree, within the meaning of section 258 of the Code of Civil Procedure—*Quære.*

PETITION presented by a mortgagor under section 258 of the Code of Civil Procedure praying that the mortgagees (counter-petitioners) might be called upon to certify satisfaction of a decree obtained by them in a suit on the mortgage. The mortgagees had sued petitioner, as mortgagor, in Original Suit No. 27 of 1896, and obtained a decree for the sale of the mortgaged property. Subsequently a portion of the latter was sold in execution of a money decree for Rs. 1,339 held by a third party, and was purchased by the mortgagees. The sale proclamation under which the sale took place declared the property to be subject to certain encumbrances, among them to the debt amounting to Rs. 1,20,000, due to the mortgagees,—the decree-holders in the said Original Suit No. 27 of 1896,—under their decree. The property was sold subject to these encumbrances, and was purchased by the mortgagees, for Rs. 475. The mortgagor, the judgment-debtor in Original Suit No. 27 of 1896, now prayed the District Court to compel the decree-holders, to certify satisfaction of their decree in that suit by the said purchase. The Acting District Judge, after dealing with the facts, said:—"The effect of the contention is that the mortgagee having purchased the property as described in the sale proclamation, must be taken to have paid for the equity of redemption on the footing that the property sold, though only part of that mortgaged, was worth the whole mortgage debt and so to have satisfied the debt and extinguished the mortgage. But he is not bound to extinguish the mortgage and his intention cannot have been to do so by purchasing only part of the mortgaged property. It may be that the property so purchased is worth the whole amount of the debt, in which case the mortgagor may be able, when the mortgagee proceeds to execute his decree, to prevent the sale of the rest of the property. I do not think the mortgagee can be made liable for more than the actual value of the property purchased by him (*Chunna Lal* v. *Anandi Lal*(1)) if sold free of encumbrance even though the sale proclamation did not declare that that property was liable only for a portion of the mortgaged debt. That being so, the mortgage is still alive and the decree is not satisfied." He dismissed the petition.

(1) I.L.R., 19 All., 196, at p. 199.

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The petitioner appealed against the order of dismissal on the ground, among others, that the mortgagees, decree-holders, having purchased the property subject to the whole mortgage, the lower Court ought to have directed the decree-holders to certify satisfaction of the whole decree.

Sundara Ayyar for appellant.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*) and *S. Srinivasa Ayyangar* for respondents.

JUDGMENT.—The facts of this case are as follows:—The respondents before this Court, the Commercial and Land Mortgage Bank, Limited, India, in Original Suit No. 27 of 1896 on the file of the District Court of Trichinopoly, sued the now appellant before this Court on a mortgage of certain properties of which he was the owner for over Rs. 1,20,000 and obtained a decree under section 88 of the Transfer of Property Act for sale of those properties. Subsequently a portion of those properties was sold in execution of a simple money decree for Rs. 1,339 and interest thereon and costs obtained by one A. Srinivasa Ayyar against the appellant in Regular Suit No. 239 of 1896 on the file of the District Munsif of Trichinopoly, and was purchased by the Bank. The property so sold was sold subject to the decree debt under the abovementioned decree held by the Bank. Thereupon the appellant presented a petition to the District Court of Trichinopoly purporting to be made under section 258 of the Code of Civil Procedure claiming that, under the circumstances above stated, the Bank were bound to discharge their mortgage-debt and praying that they might be called upon to certify satisfaction of the decree in Original Suit No. 27 of 1896.

The District Judge was of opinion that the Bank's mortgage-debt was not extinguished by reason of their having purchased the property sold in execution of the decree in Suit No. 239 of 1896, and that they could not be held liable for more than the actual value of that property, supposing it to be sold free of incumbrance, "even though the sale proclamation did not declare that that property was liable only for a portion of the mortgage-debt." He therefore dismissed the petition.

Against this order of the District Judge the petitioner appeals on the grounds (1) that the respondents having purchased the property sold in execution of the decree in Suit No. 239 of 1896 subject to the whole mortgage, the lower Court ought to have

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directed them to certify satisfaction of their whole decree; and (2) that even on the view taken by the lower Court it ought to have directed the ascertainment of the real value of that property and directed the Bank to certify satisfaction of their decree to the extent of such value.

Before dealing with the merits of the case, we will dispose of a preliminary objection which was raised by the learned vakil for the respondents to the entertainment by the lower Court of the petition of the appellant, on the ground that the alleged extinguishment of the respondents' mortgage-debt, by their purchase of the portion of the mortgaged property at the execution sale, assuming such purchase to have had that effect, was not an "adjustment" of the decree within the meaning of section 258 of the Civil Procedure Code. We should hesitate before we held that what occurred was such an "adjustment" of the decree, but we do not consider it necessary to decide this question, because we are of opinion that, apart from section 258, the Court had power to entertain the petition under section 244 of the Civil Procedure Code. We are unable to accede to the contention of the learned vakil for the respondents that, with reference to the terms of section 244, the question raised by the petition could only be raised in answer to a claim made by the respondents on an application by them for execution. That section simply provides that questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree shall be determined by order of the Court executing the decree and not by separate suit. We cannot construe the words "a Court executing a decree" as meaning, as contended on behalf of the respondents, that the section only covers cases of proceedings initiated by the decree-holder and does not include applications (relating to the execution, discharge or satisfaction of the decree) made by the judgment-debtor.

Turning now to the merits of the case, in none of the cases cited in argument by the learned vakils on either side, as they admit, nor in any reported case, so far as we are aware, does precisely the same question, which we have now to determine, appear to have been decided. The question before us resolves itself, we think, mainly into this, whether the purchase by the Bank at the Court sale in execution of the money decree of the third party of a portion of the properties mortgaged to the Bank and in respect of

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which they had obtained their decree for sale, involved a taking advantage by them of their fiduciary position as mortgagees, and, if so, what are the legal consequences in regard to the respective rights and liabilities of the mortgagor and mortgagees under the mortgage. It is contended for the Bank that as they did not purchase under a decree obtained by themselves, and as leave to bid at the Court auction was therefore not necessary and as there is no ground apart from the mere fact of their being mortgagees of the property for regarding them as having purchased collusively or otherwise than *bonâ fide*, the purchase cannot be considered to have involved any undue advantage taken by them of their fiduciary position as mortgagees.

In *Martand* v. *Dhondo*(1), it was held that a mortgagee who had attached the mortgaged property in execution of a money decree obtained by him against the mortgagor for a debt other than the mortgage-debt and had himself purchased the property at the sale in execution of that decree without obtaining the leave of the Court to bid at the auction had not thereby freed himself from his liability to be redeemed by the mortgagor, not because he had purchased without obtaining leave but because of "the impossibility of a mortgagee by such sales and purchases as these freeing himself from his liability to be redeemed". That case was decided under the law as it existed before the Transfer of Property Act came into force in the Bombay Presidency, but upon the same principle as that embodied in section 99 of the Transfer of Property Act. It was pointed out, in the judgment, that that section extends to attachments under personal decrees for any debts, whether the mortgage-debt or any other debt, the principle which had been held, in cases there referred to, to apply to attachments under personal decrees obtained on the covenant or contract by the mortgagor to pay the mortgage-debt. The Court was of opinion that "the same reasoning applies to a mortgagee buying the equity of redemption under a decree obtained upon a claim independent of the mortgage as applies to a decree obtained upon a collateral instrument to secure the mortgage-debt." This decision of the Bombay High Court was concurred with by this Court in *Mayan Pathuti* v. *Pakuran*(2), in which the facts were similar, and in which after holding that the execution sale of the

(1) I.L.R., 22 Bom., 624. (2) I.L.R., 22 Mad., 347.

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mortgaged property to the mortgagee having been confirmed, the mortgagors were precluded from obtaining the relief to which they would otherwise have been entitled under section 99 of the Transfer of Property Act, viz., the setting aside of the sale, Mr. Justice Subrahmania Ayyar said that this decision as to the finality of the order confirming the sale was not to be understood to imply that the mortgagors were precluded from redeeming the property, which they might still be entitled to do "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*(1))." It appears to us that the same principle which was affirmed in those cases requires that we should go yet a step further and hold that it applies also to a case, which the present case is, when a mortgagee buys the equity of redemption at a Court auction in execution of a personal decree for money obtained by a third person against the mortgagor, even though there be no fraud or collusion between him and the third party. It appears to us that the advantage which his position as mortgagee gives him over competing or would-be competing bidders, in respect of his presumably superior knowledge or better opportunities of knowledge of the mortgaged property and its value and otherwise, exists equally in such a case as it does in a case when the personal decree in execution of which he purchases is a decree obtained by himself, and that therefore in both cases alike he must be looked upon as availing himself of his position as mortgagee to obtain an undue advantage over the mortgagor or otherwise to be acting *malâ fide* in the eye of the law (whether there be actual fraud or collusion or not), and in contravention of the principle which underlies section 99 of the Transfer of Property Act and which is given expression to in section 88 of the Indian Trusts Act.

The learned vakil for the respondents relied on (among other cases) the case of *Shaw* v. *Bunny*(2), in which it was held that when a first mortgagee having a power of sale duly exercises it, and a subsequent mortgagee becomes the purchaser, the latter, in the absence of special circumstances showing want of *bona fides* on his part, acquires the same irredeemable title as a stranger purchasing would have acquired. Even in that case, however, one of the two Lords Justices who decided the case, Lord Justice Turner, was

(1) I.L.R., 22 Bom., 624. (2) 2 De G. J. & S., 468.

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prepared to dissent from the view taken by Lord Justice Knight Bruce and to hold that the first mortgagee had not lost his right of redemption, if he could have found authority to support this view, and he expressed himself as submitting with much reluctance to the judgment of the Master of the Rolls upon this point, which took the view which was taken by Lord Justice Knight Bruce being affirmed. Assuming that the law laid down in that case would be the law to be followed in a similar case arising in this country, viz., a case in which the question is one between a second mortgagee purchasing, in a sale under the first mortgage, and the mortgagor,—a point on which it is not necessary for us to express an opinion—such a case is materially distinguishable from the present case, inasmuch as in the former the purchase is in law free from the mortgage held by the purchaser (it becoming extinguished thereby), whereas in the latter the purchase is subject to the mortgage. In the former case it is the interest of the second mortgagee to offer a price which would cover both the mortgage-debts, whereas in the latter, on the other hand, it is the interest of the mortgagee whose mortgage is unaffected by the sale, to buy at the lowest price.

In one point of view, the principle which was affirmed in *Martand* v. *Dhondo*(1) appears to us to apply even more forcibly in a case, like the present, where the decree in execution of which mortgaged property is sold and bought by the mortgagee is a decree obtained by a stranger than in a case where such decree is one obtained by the mortgagee. For whereas in the latter case the mortgagee is required to obtain the leave of the Court to bid, in the former case there is no such check against his purchasing.

It was contended for the appellant that the advantage unduly gained by the mortgagee and corresponding loss sustained by the mortgagor, in such a case as the present, if his purchase of the mortgaged property, or part of it, is to hold good just as if it had been a purchase by a third party, consists in the difference between the market value of the property free from the mortgage and the price for which the equity of redemption was bought by the mortgagee. We think this is not the true view. What constitutes the substantial advantage which would be gained by the mortgagee and the substantial prejudice to the mortgagor, in our

(1) I.L.R., 22 Bom., 624.

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opinion, is the fact that the mortgagor would be deprived of the right of redemption and of the time and opportunities which the law allows to a mortgagor for redemption. There might or might not be a loss to the mortgagor and advantage to the mortgagee by reason of the latter purchasing the property; that would depend upon the price paid. But in all cases there would result, to use the words of Lord Justice Turner in *Shaw* v. *Bunny*(1) "an entire change of character in the person who has made the purchase," and a corresponding change of character in the mortgagor, resulting in the latter being deprived of his right, and the former being set free from his liability, to redemption. This, therefore, in our opinion, is the loss of the mortgagor which must be made good, and this is the advantage gained by the mortgagee which must be accounted for by him, upon the principle above considered. This view is not, we think, inconsistent with the provisions of the last paragraph of section 60 of the Transfer of Property Act, because those provisions, though they would apply to a case where a purchase by a mortgagee of part of the mortgaged property was effectual to extinguish the equity of redemption in respect of that part (as, *e.g.*, when it was sold to him by the mortgagor by a voluntary sale), do not touch a case where the question is whether such a purchase by the mortgagee can have the effect of depriving the mortgagor of his right to redeem.

The other authorities referred to in the argument do not, in our opinion, require to be noticed, except perhaps *Moro Raghunath* v. *Balaji Trimbak*(2). There, it is to be observed, the mortgagor, for some reason or other not appearing in the report, proceeded on the assumption that the equity of redemption in respect of the portion of the property which had been sold under the decree obtained on the second mortgage had been extinguished. In that view, no doubt, the utmost that he could claim was that credit should be given to him for a portion of the mortgage-debt proportionate to the full value of the portion of the property which was treated as having been so absolutely vested in the mortgagee.

In the view we have taken, the appellant must be held to have misconceived his rights, and we must accordingly confirm the order dismissing his petition, on the ground that he is not entitled to the relief he seeks, but only to proceed on the footing that the portion

(1) 2 De G.J. & S., 468.

(2) I.L.R., 13 Bom., 45.

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of the property which has been purchased by the Bank is, notwithstanding such purchase, redeemable by him together with the remainder of the property. Under the circumstances we think each party should bear his own costs of this appeal.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

JANARDANA SHETTI GOVINDARAJAN AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

BADAVA SHETTI GIRI AND OTHERS (DEFENDANTS NOS. 2 TO 4), RESPONDENTS.*

1899. October 27. November 22.

Specific Relief Act—Act I of 1877, *s.* 42—*Suit by trustees for a declaration that an appointment to the office of pattamali was invalid—Omission to ask for consequential relief—Custody by pattamali of articles belonging to temple—Possession by trustees not divested where pattamali was acting in the capacity of a mere servant—Maintainability of suit without prayer for consequential relief.*

Some of the trustees of a temple having sued others for a declaration that an appointment by the latter of a person to the office of pattamali was invalid, it was objected by the defendants that even if the allegation were true, the suit must fail as the pattamali (who was also impleaded as a defendant) had taken charge of documents and jewels belonging to the temple, and consequential relief should have been prayed for. The plaint was accordingly amended, but the District Court, whilst holding that the appointment of the pattamali was invalid, dismissed the suit on the ground that the amendment had been made after the lapse of the period of limitation:

Held, that the suit for a declaration would lie without consequential relief being prayed for, inasmuch as its object was not to establish any legal character or any right to any property in the plaintiffs but was in effect to have an act done by the other trustees in contravention of duty declared null and void. Even if section 42 of the Specific Relief Act applied to such a decree, which was doubtful, no further relief than the declaration was necessary, as the custody of the documents and jewels by the pattamali was merely that of a servant under the trustees, with whom the possession in fact and in law remained. There was therefore nothing of which delivery could be sought from the possession of the pattamali and no question of limitation arose.

* Second Appeal No. 1515 of 1898 against the decree of W. H. Welsh, Acting District Judge of South Malabar, in Appeal Suit No. 611 of 1897, affirming the decree of M. Srinivasa Rao, Subordinate Judge of Cochin, in Original Suit No. 5 of 1894.

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SUIT for a declaration and for possession of documents and jewels. Plaintiffs were trustees of the Srimal Janardana temple at Amarapathy in British Cochin, as also were defendants Nos. 1 to 3. Plaintiffs complained that defendants Nos. 1 to 3 had improperly appointed defendant No. 4 to the office of pattamali in the said temple, and that he had been interfering in its affairs. The suit as originally instituted asked merely for a declaration that defendant No. 4 was not the lawful pattamali of the temple. To this, objection was taken that, even if the appointment should not be valid, the suit for a mere declaration was not maintainable, as defendant No. 4 was admittedly in possession of the documents, jewels, &c., belonging to the temple. The plaint was accordingly amended by the addition of a prayer for consequential relief, namely, for the surrender by the fourth defendant of the said documents and jewels belonging to the temple. This amendment was made after a period of three years had elapsed from the date upon which the pattamali had taken possession of the said articles. The Subordinate Judge found that the appointment had been validly made and dismissed the suit. On appeal, the District Judge, though differing from the Subordinate Judge on the question of the validity of the appointment, held that the suit, being in form one to recover moveables, was barred by limitation as the amendment of the plaint had been made more than three years after defendant No. 4 had taken possession of such moveables.

Plaintiffs preferred this second appeal.

Mr. *A. G. Gover* for appellants.

P. K. Subrahmania Ayyar for respondents Nos. 1 and 2.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*), *Sankaran Nayar* and *Subrahmania Sastri* for respondent No. 3.

SUBRAHMANIA AYYAR, J.—The plaintiffs (appellants) along with the defendants Nos. 1 to 3 are the adhikaris, managers or trustees of a temple in British Cochin. The latter improperly appointed the fourth defendant to the office of pattamali, under colour of which office the fourth defendant had been interfering in the affairs of the temple. The appellants sought in their plaint, as it originally stood, for a declaration that the appointment of the fourth defendant is invalid. Subsequently, on the defendants Nos. 2 to 4 raising an objection that the fourth defendant having taken charge of the documents relating to

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temple lands, the temple jewels, and the utensils specified in the plaint schedules, a prayer for their surrender also should have been asked for, the plaint was allowed to be amended accordingly.

The Subordinate Judge, being of opinion that the appointment was valid, dismissed the suit. On appeal the District Judge found upon the evidence that the appointment was not made in accordance with the usage of the institution at a properly convened meeting of the yogakars—a general body of worshippers—and the adhikaris, and was therefore invalid, yet he upheld the Subordinate Judge's decree on the ground that the amendment of the plaint was made after the lapse of three years—the period of limitation prescribed for a suit for the recovery of the documents, &c., to which the amendment related.

In ascertaining whether the decision of the District Judge is correct, we must see what the question, arising for determination on the facts disclosed in the case, is. That question is whether a mere declaration that the appointment is invalid would not be sufficient and whether a prayer for delivery of the documents, &c., or for an injunction restraining the fourth defendant from performing the duties of a pattamali should have been also included in the plaint. If the declaration would be sufficient, the amendment of the plaint must be treated as surplusage and cannot affect the plaintiffs' right to the declaratory decree asked for.

Now what is the nature of the suit? It is not one to establish any legal character or any right to any property vested in the plaintiffs but is, in effect, one brought by some trustees to have an act done by other trustees in contravention of their duty declared null and void. It is clear that such a suit will lie. Suppose, instead of asking after the appointment was made for a declaration that the appointment was invalid, the plaintiffs had asked, on the eve of the appointment, for an injunction prohibiting the defendants Nos. 1 to 3 from proceeding to appoint a pattamali against the usage of the institution and in violation of their duty, surely there would have been nothing to prevent the Court from granting the injunction. Does it not follow from this that if the appointment had already been made the plaintiffs might well ask for a decree declaring that the appointment was invalid? There is no reason to suppose that such a decree cannot be granted independently of section 42 of the Specific Relief Act (compare *Fischer* v.

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Secretary of State for India in Council(1)). Even if section 42 is applicable to a case like the present, it is difficult to see how any further relief than a mere declaration, either by way of delivery of documents, &c., or of injunction, is necessary. Now a person properly appointed to the office of pattamali is but a servant of the temple, and as such has only a servant's custody of the things in his charge. He consults the documents for the purpose of ascertaining such particulars as are to be found therein in respect of the rents due to the temple. He gives the jewels and utensils out from time to time to the other servants whose business it is to use them and, on the articles being returned, keeps them safely in the temple premises. This sort of dealing with temple property on the part of a mere servant, or one purporting to act as such under the trustees, it is obvious, cannot affect, in the slightest degree, the possession which in fact and in law remains with the latter. All that a valid appointment as a pattamali would have conferred on the fourth defendant and all that he himself claimed throughout was, in the words of Sir Frederick Pollock, "a mere authority or license to deal with the thing in a certain way." Thus there is nothing to seek delivery from the possession of the fourth defendant and hence no question of limitation on that ground arises. When once the pretended appointment is declared invalid the fourth defendant has to walk out of the temple and to refrain from exercising the functions of the office. And as no circumstances have been disclosed in the case necessitating the grant of an injunction, no such remedy is called for.

I would, therefore, allow the appeal with costs throughout, reverse the decrees of the lower Courts and declare and adjudge that the fourth defendant was not validly appointed as pattamali of the plaint mentioned temple. The memorandum of objections is dismissed with costs.

MOORE, J.—I concur.

(1) L.R., 26 I.A., 16 at pp. 27, 28; I.L.R., 22 Mad., 270.

APPELLATE CIVIL.

Before Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Boddam.

HAJI ISMAIL SAIT (PLAINTIFF), APPELLANT,

v.

THE TRUSTEES OF THE HARBOUR, MADRAS (DEFENDANTS), RESPONDENTS.*

1900. January 30, 31. February 1, 2. March 6.

Madras Harbour Trust Act (Madras)—Act II of 1886, *ss.* 33, 60, 61, 87—*Maintenance of harbour causing encroachments on seashore—Liability of a Public Body for maintaining works authorised by statute—Common law liability where not expressly excluded by statute—Limitation.*

A harbour, which was in the first instance constructed by Government, was, by the Madras Harbour Trust Act, 1886, vested in trustees, together with the foreshore within the limits of the port. Prior to the date of the Act, an erosion, by the action of the sea, of a portion of the foreshore had commenced, in consequence of the existence of the harbour; and a revetment or barrier of stones had been built to counteract it. The trustees subsequently, but prior to 1891, extended the arms of the harbour, and in 1895 the result of the continuous encroachment of the sea was that a part of the said revetment or barrier of stones and some land was washed away. Plaintiff was the owner of land adjoining that which was so washed away, and the sea also encroached upon and injured plaintiff's land and the buildings upon it. The Madras Harbour Trust Act contains no provision for the payment of compensation by the trustees. By section 61, the trustees are empowered to perform all works necessary to carry out the objects of the Act. Plaintiff sued the trustees to recover damages for the injury caused to his land by their maintaining and extending the arms of the harbour, as erected when the Board of Trustees was created, without taking steps to erect such buildings as would prevent the sea from encroaching upon and injuring the plaintiff's land:

Held, (affirming SHEPHARD, J.), that the plaint containing the above averments of fact disclosed no cause of action.

The dates upon which damage to the plaintiff's buildings was alleged to have occurred were 25th December 1897, and 9th and 10th April 1898 respectively. By section 87 of the Madras Harbour Trust Act, no suit shall be commenced against any person under the Act after six months from the accrual of the cause of such suit. The plaint was originally presented on 9th July 1898, and it was amended on 13th September 1898. On the day upon which the six months from 25th December 1897 expired, and until the day before the plaint was presented, the Court was closed. By the same section, it is provided that no suit or other proceeding shall be commenced against any person for anything done or purporting to have been done in pursuance of the Act without giving to such person one

* Appeal No. 20 of 1899, under section 15 of the Letters Patent, against the decree of the High Court, in Original Side Appeal No. 5 of 1899, preferred from the decree of the High Court, Original Side, in Civil Suit No. 105 of 1898.

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month's previous notice in writing of the intended suit or proceeding, and of the cause thereof. Two letters had been written on behalf of the plaintiff. The first of these, dated 14th April 1898, represented the damage caused to plaintiff's property as above set out, and notified, under section 87, if that section should apply, that if the amount of damage suffered and assessed by plaintiff in the said letter should not be paid on or before the expiry of one month from the date thereof, legal proceedings would be instituted to recover the damage without further notice. The second letter, dated 11th May 1898, referred to further damage suffered and called upon defendants to pay an increased sum, failing which action would be brought to recover such sum together with a further sum representing any further damage that might be done to the property by the sea before the suit should be filed or heard. The letter stated the ground of complaint to be that the encroachment of the sea was the result of the harbour groynes by which the action of the sea had been affected, that defendants had acted illegally and negligently in maintaining and extending those groynes and so causing the encroachment, and that by so doing they had caused the foreshore vested in them to be washed away and the sea to be let in to the plaintiff's premises, thus causing the damage complained of, which defendants had taken no steps to prevent:

Held, *per* SHEPHARD, J., that the plaintiff must be deemed to have commenced the suit in due time, since it was owing to the act of the Court itself that he was prevented from presenting his plaint till the day upon which it was filed. Also, that the notice was sufficient; and that on the facts of the case section 87 had no application. *Semble*, that though a special rule of limitation was prescribed by the Act, section 5 of the Limitation Act applied.

Per O'FARRELL, J.—That the last clause of section 87, which provides that neither the Board nor any of its officers or servants shall be liable in damages for any act *bonâ fide* done or ordered to be done in pursuance of the Act, had no reference to the present case. That section applied only to cases of acts done without legal authority or in excess of legal authority, but under the *bonâ fide* belief that they were covered by such authority.

Per BODDAM, J.—That the cases in which it has been held that that no action lies for non-feasance apply only to highways and have no application to the present case.

Per DAVIES, J.—The liability of the trustees, in the absence of any statutory duty cast upon them to insure plaintiff from loss, was confined to the maintenance of the particular work they took over, and, if there was any general obligation to protect the plaintiff's property, it lay on the Government, who constructed the harbour, the Legislature not having imposed it on the trustees.

SUIT for damages. Plaintiff in his plaint stated as follows:—

"The plaintiff is the owner of a piece of land with godowns and other erections thereon, which is situated in the village of Royapuram to the north of the Madras harbour within the jurisdiction of this Honourable Court and bounded on the north and west by the new road, on the south by Mada Church Road and on the east by the remains of the defendants' railway.

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"The north and south arms of the Madras harbour and all the foreshore lying within the limits of the port of Madras including the foreshore to east of the said property of the plaintiff and the revetment or stone barrier thereon became vested in the defendants by Madras Act II of 1886.

"The defendants negligently and unlawfully and without taking due and sufficient precautions to prevent injury from being thereby occasioned to the plaintiff, took over and allowed to continue and maintained and extended harbour arms or groynes, which at the time of such taking over, had caused and were causing and have since continued to cause an encroachment of the sea on the coast to the north of the said harbour, whereby the said foreshore to the east of the plaintiff's premises has been submerged and washed away by the inroad of the sea and the sea has been let in on to the plaintiff's said premises and the damage mentioned in the fifth paragraph hereof has been thereby caused.

"The defendants have failed and neglected to repair and maintain the said revetment or stone barrier or to take such other remedial or precautionary measures as were necessary to prevent the mischief referred to in paragraph 3 hereof.

"On or about the 25th December 1897 parts of two of the plaintiff's godowns were destroyed and other erections on the plaintiff's land were damaged by the inroad of the sea caused by the defendants as aforesaid and part of the plaintiff's land was likewise washed away and on or about the 6th, 9th and 10th April 1898 further similar damage was likewise caused to the plaintiff's said premises.

"The defendants since the said 25th December 1897 with a view to repair and strengthen the said revetment or stone barrier have caused a break-water of stones to be placed on the foreshore next to the plaintiff's said piece of land and in part on the sides of the outer walls of the godowns which were washed down, with the object of preventing further inroads of the sea, but the said break-water was not properly constructed and has not prevented such further inroad.

"That the damage done to the said godowns and premises and to plaintiff's property and the value of the land lost as aforesaid amount to Rs. 35,000, particulars whereof are set forth in the schedule hereto; the plaintiff has demanded such amount from the defendants, but they have refused to pay.

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"The cause of action arose on the dates mentioned in paragraph 5 hereof.

"The plaintiff, therefore, prays judgment:—(1) For payment by the defendants to him of the sum of Rs. 35,000 damages and interest thereon. (2) For costs of this suit. (3) Such further or other relief in the premises as to this Honourable Court may seem meet and the nature of the case may require."

To this the defendants filed the following written statement:—

"The defendants allege that the Madras harbour was commenced by the Government of Madras and was with the other works pertaining thereto continued by the defendants, the said harbour and works being vested in the defendants by Madras Act II of 1886 to be by them maintained, conserved and improved.

"The defendants admit that they have allowed to continue, maintained and extended the groynes of the Madras harbour, part of the harbour vested in them as aforesaid, but they say that they were authorized by the said Act II of 1886 to continue, maintain and extend the said groynes and that, in so continuing, maintaining and extending the said groynes, they have not been guilty of any negligence.

"The defendants deny that they were under any legal duty to take measures to prevent any injury being caused to the plaintiff in consequence of the continuance, maintenance and extension of the said groynes.

"The defendants deny that they have failed to maintain the said revetment or stone barrier in proper repair.

"The defendants deny that they were under any legal duty towards the plaintiff to repair and maintain the revetment or stone barrier referred to in paragraph 4 of the plaint, and they say that, even if they have failed to repair and maintain the said revetment, the plaintiff cannot recover damages from the defendants by reason of their omission to do so.

"The defendants deny that the damage alleged to have occurred in paragraphs 3 and 5 of the plaint was due to the failure on the part of the defendants to maintain the said revetment or stone barrier in repair or to the continuance, maintenance and extension of the said groynes.

"The defendants continued, maintained and extended the said groynes *bonâ fide* in pursuance of Madras Act II of 1886 and are by virtue of section 87 of the said Act exempt from any liability

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for any damage that may have been caused to the plaintiff by reason of the continuance, maintenance and extension of the said groynes.

"In respect of the damage alleged to have been done to the plaintiff's land on the 25th December 1897 the plaintiff has not brought his suit within six months of the accrual of the cause of action as required by section 87 of Madras Act II of 1886.

"The defendants do not admit that damage to the extent alleged in the plaint was done to the plaintiff's land.

"The amount claimed as damages is excessive.

"The cause of action mentioned in the notice of action is not that upon which the plaint has been brought."

Particulars of the alleged negligence were delivered by plaintiff, of which the following are material:—

1. At the time defendants took over the harbour arms or groynes referred to in paragraph 3 of the plaint, the said arms or groynes had been and were causing or contributing towards causing the encroachment of the sea referred to in the said paragraph. Defendants acted negligently and were and are in default in that they maintained and permitted to continue the said arms or groynes without constructing sea-walls or other walls upon the foreshore to the north of the harbour for the purpose of resisting the said encroachment and protecting the said foreshore from the inroads of the sea. Defendants acted negligently and were and are in default in that they maintained and permitted to continue the said arms or groynes without constituting such sea-walls or other walls as would have efficiently resisted the said encroachment and protected the foreshore to the north of the harbour from the inroads of the sea.

2. Defendants extended the arms or groynes without constructing sea-walls or other walls on the foreshore to the north of the harbour for the purpose of resisting the said encroachment and protecting the foreshore from the inroads of the sea.

3. For allowing the revetment referred to in paragraph 2 of the plaint to fall into disrepair—(after taking it over)—and become weakened and so less efficient for the purpose of checking the inroads of the sea to the north of the harbour than it was when they took it over.

4. Defendants acted negligently and were and are in default in that after taking over the said revetment or stone barrier they

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omitted to strengthen and extend the said revetment or stone barrier for the purpose of resisting the said encroachment and protecting the said foreshore from the inroads of the sea.

The following issues were framed :—(1) Does the plaintiff show any cause of action in the plaint? (2) At the time the defendants took over the harbour works, was an encroachment of the sea being caused by the works so taken over? (3) Since the taking over of the works by the defendants, have their maintenance or extension by the defendants caused any and what further encroachment? (4) Has any part of the foreshore mentioned in paragraph 3 of the plaint been caused to be washed away in consequence of any negligence, either active or passive, of the defendants and which? (5) Is the suit barred by limitation to any and what extent? (6) Are the defendants protected by section 87 of Act II of 1886 to any and what extent? (7) Has any proper notice of action been given? (8) To what relief, if any, is the plaintiff entitled?

Section 87 of the Madras Harbour Trust Act is as follows :—

"No suit or other proceeding shall be commenced against any person for anything done or purporting to have been done, in pursuance of this Act, without giving to such person one month's previous notice in writing of the intended suit or other proceeding, and of the cause thereof, nor after six months from the accrual of the cause of such suit or other proceeding.

"The Board shall not be responsible for any act or default of any officer or servant appointed under this Act, or of any master attendant, any harbour master or of any pilot or of any deputy or assistant of any of the officers aforesaid, or of any person acting under the authority or direction of any such officer, deputy or assistant;

"nor for any damage sustained by any vessel in consequence of any defect in any of the moorings, hawsers or other things belonging to the Board;

"nor shall the Board, or any of the said officers or servants, be liable in damages for any act *bonâ fide* done, or ordered to be done, by them in pursuance of this Act."

The other material sections of the Madras Harbour Trust Act are to be found set out in the judgment of BODDAM, J. Two letters, exhibits A and C, dated 14th April and 11th May 1898, respectively, were written on behalf of plaintiff, giving notice of action. They are as follows :—

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HIGH COURT, MADRAS, 14*th April* 1898.

EXHIBIT A.

To

THE TRUSTEES OF THE HARBOUR OF MADRAS.

SIRS,

Our client, Mr. Haji Ismail Sait, of the English Warehouse, Madras and Bangalore, is the owner of a piece of land with four godowns and other buildings thereon, bounded on the east by the sea to the north of the Madras harbour, a short distance from the north arm of the harbour.

It is represented to us by our client that by reason of the extension of the north arm of the said harbour, the sea has encroached on the lands to the north of the harbour.

It is further represented to us by our said client that, on or about the 25th December last, the greater part of two of the said godowns was washed down by the sea, that a third was much damaged and will probably come down; and that a fourth has cracks in the walls and cannot be used without danger; the wall also which extends from the godowns to the end of the piece of land on the north was washed down, and our client has also lost a piece of his land which has been washed away by the inroads of the sea.

It is further represented to us that our client wrote to the Secretary of your Board on the said 25th December, 1897, calling your attention to the damage done to his property, but that he has received no reply to his letter.

Our client claims that by your failure to take such remedial or precautionary steps as should counteract the mischievous results upon his private property of the creation and maintenance in its present condition of the north arm of the harbour which is vested in you, you have illegally diverted the wash of the sea, which you have caused or permitted to encroach upon his land to the damage of his property as above mentioned.

We are instructed to give you notice, which we hereby do, that our client assesses the damages caused to his property as above mentioned at the sum of Rs. 30,000; and we beg to inform you under section 87 of your Act, if such section apply to our client's claim, that, if that sum be not paid to him or to us on his behalf by you on or before the 28th instant, he will, at the expiry of one

month from the date of this letter, without further notice, institute legal proceedings against you for the recovery of the aforesaid damages.

We are,
Sirs,
Yours obediently,
BARCLAY, ORR & DAVID.

HIGH COURT, MADRAS,
11*th May* 1898.

EXHIBIT C.

To

THE TRUSTEES OF THE HARBOUR OF MADRAS.

SIRS,

We beg to call your attention to the fact that the deposit of stones on our client Mr. Haji Ismail Sait's property at Royapuram affords no protection whatever against the sea.

On the 8th, 9th and 10th April last, the sea washed over the portions of our client's property already breached although there was no more than the ordinary wind and sea of the hot weather.

We are instructed by our client to call on you to pay the sum of Rs. 35,000 as damages for the injury already done to his said property by the encroachment and inroad of the sea and to give you notice if you do not pay it that he will sue you for it and for a further sum representing any further damage that may be done to his property by the sea before the suit is filed or heard. His grounds for claiming that you should be held liable to pay such damages (on which the suit will be based) are, that the encroachment of the sea to the north of the harbour is the result of the harbour groynes by which the action of the sea has been affected, that you have acted illegally and negligently in maintaining and extending those groynes in the way you have done and so causing the encroachment and that by so maintaining and extending those groynes you have caused the foreshore vested in you to the east of our client's premises to be washed away or submerged and have thereby let the sea in on to our client's premises and caused the injury to our client's property resulting from the inroads of the sea, and that you have taken no due steps to prevent the inroads of the sea on our client's property or the consequent loss to our client.

Yours obediently,
BARCLAY, ORR & DAVID.

The case came on for hearing in the first instance before SHEPHARD, J., on the questions raised by issues Nos. 1, 5, 6 and 7, on the allegation made in the plaint together with the admitted facts referred to by his Lordship in the following judgment.

The Advocate-General (Hon. Mr. *C. Arnold White*), Hon. Mr. *E. Norton*, and Mr. *K. Brown* for plaintiff.

Mr. *J. H. M. Ryan* and Mr. *R. A. Nelson* for defendants.

On the 8th December 1898 the Court (SHEPHARD, J.) delivered the following

JUDGMENT:—The first question is whether the suit is barred by limitation. The plaint was originally presented on the 9th July 1898, and it must be assumed that the cause of action arose on the 25th December 1897 and the 9th and 10th April 1898. The plaint was amended on the 13th September 1898. According to section 87 of the Madras Harbour Trust Act, under which the Board of Trustees is constituted, no suit shall be commenced against any person under the Act after six months from the accrual of the cause of such suit. It is argued on the plaintiff's behalf that, although the suit was commenced more than six months after the 25th December 1897, it is nevertheless maintainable because, on the day when the six months expired and until the day before the plaint was presented, the Court was closed. If section 5 of the Limitation Act is applicable to the present case this argument clearly must prevail, and there is authority for holding that that the second paragraph of that section is applicable to a case for which a special rule of limitation is prescribed by the Madras Forest Act of 1882 (*Reference under Forest Act V of* 1882(1)). This case was not recorded by the Full Bench in *Veeramma* v. *Abbiah*(2). Apart from authority and assuming that the provisions of the general law of limitation do not control the special provision of the Harbour Trust Act, I should be prepared to hold that the plaintiff must be deemed to have commenced this suit in due time because it was owing to the act of the Court itself that he was prevented from presenting his plaint till the 9th July (see *Aravamudu Ayyangar* v. *Samiyappa Nadan*(3) and cases therein cited).

This argument does not avail the plaintiff if the amended plaint, which must be taken as having been presented on the 13th September, contains any new cause of action. But the view put forward

(1) I.L.R., 10 Mad., 210. (2) I.L.R., 18 Mad., 99. (3) I.L.R., 21 Mad., 385.

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by Mr. Norton on the plaintiff's behalf was that no such alteration of the plaint had really been effected. This is a matter which I shall have to consider hereafter. In any view of the amended plaint the suit is not altogether barred by the law of limitation.

The next question is as to the sufficiency of the notice which under the same section of the Act has to be given by an aggrieved party. For the purpose of this question, three letters were admitted, one of the 14th April from the plaintiff's solicitors to the defendants, one of the 25th April in reply thereto, and a further letter from the plaintiff's solicitors, dated 11th May 1898. Two objections were raised by the said Counsel for the defendants. It is said that the two notices sent on the plaintiff's behalf are bad, because they are conditional in form and because they do not state with sufficient clearness the cause of action alleged. I do not think that either of these objections can be allowed to prevail. Having regard to the object for which notice of action is required, I think that the defendants were sufficiently apprised as to the complaint which the plaintiff had to make, and that they cannot say that they had not full opportunity to consider the complaint and prepare their defence or make amends.

I now have to deal with the more important question raised by the first and sixth issues. I have had some difficulty in ascertaining with any precision what it is that the plaintiff charges against the defendants. The third paragraph of the amended plaint admittedly contains the principal allegations. The principal charge made is that the defendants maintained and extended the harbour groynes without taking due and sufficient precaution to prevent injury from being done to the plaintiff who is the owner of premises lying to the immediate north of the harbour. In consequence of this conduct of the defendants, it is alleged that the plaintiff's premises have been submerged by the sea. The fourth paragraph of the plaint, which, as Mr. Norton, I think, rightly admitted, is immaterial or at any rate of secondary importance, alleges that the defendants have failed to maintain the revetment which in the second paragraph is described as being constructed on the foreshore to the east of the plaintiff's premises and as being part of the property vested in the defendants. The fourth paragraph goes on to complain of omission to adopt other remedial and precautionary measures for the purpose of preventing the mischief already complained of. I understand from the plaintiff's Counsel

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and it is clear from the plaint itself that no act of commission is charged. Omission to take preventive measures appear to be the gist of the plaintiff's action. As Mr. Norton put it, the case was that, although the erosion of the foreshore on the north was the natural and necessary consequence of the construction of the harbour, that consequence might have been prevented and it was the duty of the defendants to take steps to prevent it. In order to see if such a duty is imposed upon the defendants, it is necessary to consider the provisions of the Act. The preamble says that it is expedient to make provision for the regulation, conservancy and improvement of the harbour of Madras. It was for the management of an existing harbour and not for the construction of a new harbour that the defendant's Board was brought into existence, and here it may be noted that the plaint admits that the encroachment of the sea on the north had begun at the time when the defendants took over the control of the harbour. By section 25 certain property including the ground on which the revetment stands was vested in the Board. Sections 60 and 61 prescribe the works which the Board may execute including works for the protection of the harbour and such as may be expedient for carrying out the purpose of the Act. Reference was also made to the last clause of section 87, but, as it seems to me, this need not be considered, because it is not charged against the Board that they did any act or ordered any act to be done to the detriment of the plaintiff. There is no provision in the Act for compensating proprietors of land injuriously affected by the operation of the Board on the maintenance of the harbour nor was any section indicated, in which the Board is enjoined to take steps or incur expenditure for the protection of such persons. Now in so far as the plaint charges as wrongful the maintenance of the harbour entrusted to the management of the Board and complains of damage done to the plaintiff's land as a consequence of the existence of the harbour, it is plain that no action will lie. It must be taken that, if the Legislature did not actually know of the mischief caused by the erection of the harbour, they, at least, contemplated the necessary consequences of their own act. Their intention would be defeated if it were open to persons in the plaintiff's position to complain of the harbour as of a nuisance (*Hammersmith, &c., Railway Company* v. *Brand*(1)). To

(1) L.R., 4 H.L., 171.

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any such complaint the simple answer of the defendants is that they are acting under their statute and doing no more than it enjoins them to do. The Court cannot treat as a wrong that which the Legislature has authorized. *Vaughan* v. *The Taff Valley Railway Company*(1) was cited and it was argued that the defendants were bound to use care and diligence in the performance of their duties. In my opinion there is no analogy between that case and the present case, because here it is not alleged that anything was done by the Board. There is nothing here to correspond to the running of the locomotive engine in *Vaughan* v. *The Taff Valley Railway Company*(1). Even in cases which more nearly resemble the present, such as *Hammersmith, &c., Railway Company* v. *Brand*(2) and *London and Brighton Railway Company* v. *Truman*(3), cause for complaint arises only when something is done. The railway must have trains run over it or no vibration can be occasioned; the cattle yard must be used or no inconvenience to neighbours can arise, and the degree of inconvenience may depend on the mode of user, which is left to the discretion of railway company similarly with the Harbour Board. It may well be that they may be liable for damage done to ships or otherwise in consequence of the neglected condition of the harbour or careless management of the traffic, unless they are protected by the provisions of section 87. But the present case is altogether different. The mere existence of the harbour in a state of quiescence, and independently of the use of it, is the cause of damage to the plaintiff's land. It is not alleged against the Board that they might have maintained the harbour in such a way as not to cause such damage or that they had any choice but to maintain it in the condition and on the lines according to which it was originally constructed by the Government. No case was cited in which, in the absence of express provisions, a public body authorized by statute to maintain property in a condition which must be prejudicial to third parties, has been held liable for mere omission to take measures to obviate the mischief. Some stress was laid on the circumstance that the soil on which the revetment rests is vested in the Board. The defendants might have maintained the revetment and therefore, it is argued, they ought to have done so.

(1) 29 L.J., Ex., 247; 5 H. & N., 679. (2) L.R., 4 H.L., 171.
(3) L.R., 11 App. Cas., 45.

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Assuming that the fourth paragraph of the plaint is to be treated as alleging a substantive cause of action—and I have already observed that it was not so treated in the argument—I do not think the averments made in it are sufficient. There is no averment that the maintenance of the revetment would have had the effect of preventing the mischief of which the plaintiff complains, and I do not see how any such averment could have been made, considering that it is admitted that the encroachment of the sea had begun when the Act was passed and, therefore, had not been prevented by the presence of the revetment. What the plaintiff requires is not merely the maintenance of the protective works which were in existence when the Board was incorporated but the improvement and strengthening of those works and the construction of others for the same purpose. This is in effect a repetition of what is claimed in the third paragraph of the plaint. That being so, the observations already made apply equally to the fourth paragraph of the plaint.

The plaintiff's case is certainly one of some hardship and it may reasonably be said that the Act ought to have provided compensation for owners of land affected by the harbour works. The omission of such provision is, however, no ground for an inference in the plaintiff's favour. The proposition which I am asked to affirm, viz., that, although the Board are freed from the liability which would attach to an ordinary individual, they are nevertheless responsible in damages for omission to construct protective works, is one which would strike at the root of the immunity from action which the Legislature must be deemed to have conferred on the Board. The Legislative sanction, which protects the Board from actions for nuisance in the maintenance of the harbour, would be valueless if, instead of that action, the present action were maintainable. Having regard to the averments made in the plaint and the provisions of the Act, I think the plaintiff has failed to make out a case and, therefore, I must dismiss the suit with costs.

Against the above judgment the plaintiff preferred an appeal, (Original Side Appeal No. 5 of 1899), which, in due course, came on for hearing before Sir S. SUBRAHMANIA AYYAR, OFFG. C.J., and O'FARRELL, J.

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The Advocate-General (Hon. Mr. *C. Arnold White*), Hon. Mr. *E. Norton*, and Mr. *R. F. Grant* for appellant.

Mr. *J. H. M. Ryan*, Mr. *R. A. Nelson*, and Mr. *Allan Daly* for respondents.

The Advocate-General:—Plaintiff is the owner of land near the harbour. It is conceded that a process of erosion has continued for a considerable time; that it probably commenced before the harbour was built—certainly before the trustees took it over: and that it is a natural process. But it is contended on behalf of the plaintiff that the erosion has been increased by the construction of the harbour. Prior to the Madras Act II of 1886, the harbour was in the hands of Government. After the existing works had been handed over to the trustees, under that Act, the trustees extended the works and so increased the erosion. It is contended that such extension is not authorised by the Act. (He referred to the Madras Harbour Trust Act, 1886, sections 2 and 3, and chapter II.) The plaintiff's contention is that the Board of Trustees can carry out the powers conferred upon it by the Legislature without injuring third parties. We concede that if the Board cannot exercise its power without injuring others, it is protected by the statute. But we also contend that we are entitled to have that question tried—the question, in short, is, whether the maxim *sic utere tuo ut alienum non lædas* applies. (He referred to schedule A of the Act which defines the property that became vested in the Board on the passing of the Act; also to sections 60, 61, 87.) The negligence complained of is the omission to erect works to protect the property of the plaintiff, as a member of the public, from erosion. Defendants did take steps to counteract the erosion, by erecting a revetment—which also shows their knowledge that the sea was advancing. But they have failed to maintain that revetment and so damage has been caused. (He referred to the particulars of negligence.) Even without an allegation of negligence, it is submitted that there is a good cause of action and the maxim referred to applies. (He referred to the judgment of the lower Court.) We complain that there has been a positive act,—not merely quiescence:—arms have been built out into the sea, and these have caused the sea to set in a certain direction. [SUBRAHMANIA AYYAR, OFFG. C.J.:—If the harbour was a nuisance at the time when it was handed over, must it not be assumed that the Legislature authorised that nuisance and authorised the Board to carry it on?] If so, which is not admitted, the action of the Board must be limited to such acts as are expressly authorised. In *Hammersmith, &c., Railway Company* v. *Brand*(1), the real ground of the decision is that the Legislature intended, under the Lands Clauses Act, to take away the right of compensation altogether: the Legislature had framed a complete code, from which any right to compensation was omitted, and so it must be inferred that it was intentionally omitted. The head-note states that the right of action is taken away—namely, by that Act. The Harbour Trusts Act does not expressly take away the common law right to sue for compensation, and so it must be inferred that that right was left. In *London and Brighton Railway Company* v. *Truman*(2), it was the natural and necessary consequence of keeping a cattle-shed that it should be a nuisance. But it is not the necessary result of a harbour that the land of adjoining owners must be washed away. [SUBRAHMANIA AYYAR, OFFG. C.J.:—Can it be predicated that the erection of a harbour will not necessarily alter the direction of the beat of the sea on the shore?] It is submitted that a harbour can be maintained without inflicting damage on any one, and if damage is inflicted the Board is liable, unless that damage was unavoidable. In *Metropolitan Asylum District* v. *Hill*(3) and *Vaughan* v. *The Taff Valley Railway Company*(4), it was shown that the best mechanical appliances available had been used. If the Harbour Board can prove the same, they may possibly have a good defence, but that question should be tried. In *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company*(5), the law was accepted and damages alone were assessed. [He also referred to *Geddis* v. *Proprietors of Bann Reservoir*(6), *Glossop* v. *Heston and Isleworth Local Board*(7), per Brett, L.J., at page 119; *Vernon* v. *Vestry of St. James, Westminster*(8), *Evans* v. *Manchester, Sheffield, and Lincolnshire Railway Company*(9).] It is sufficient for plaintiff to show that damage has been sustained by reason of the harbour to establish a *primâ facie* case, which the defendants should be called upon to answer. It is incumbent on defendants to show that they could not execute

(1) L.R., 4 H.L., 171.
(2) L.R., 11 App. Cas., 45.
(3) L.R., 6 App. Cas., 193.
(4) 29 L.J., Ex., 247; 5 H. & N., 679.
(5) [1898] 2 Ch., 614.
(6) L.R., 3 App. Cas., 430.
(7) L.R., 12 Ch. D., 102 at p. 119.
(8) L.R., 16 Ch. D., 449.
(9) L.R., 36 Ch. D., 626.

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the works authorised by the statute to be executed, without causing the injury complained of, and that question should be tried.

Mr. *J. H. M. Ryan.*—The case of *Cracknell* v. *Mayor, &c., of Thetford*(1), as explained in *Geddis* v. *Proprietors of Bann Reservoir*(2), is conclusive. The real complaint against the Board is not merely that they extended the harbour arms so as to cause injury but that they extended them without building protective sea walls on the foreshore; that they did an act that was authorised but that they omitted to do it with proper precautions. But the answer is that the Board is not authorised to build sea walls for any object except that of protecting the harbour itself; the sole object of the Act is the protection of the harbour: see sections 60, 61 and 33, the latter of which only permits expenditure to be made on the walls of the harbour itself. Even if the harbour has caused damage, which damage could have been prevented by building sea walls, the Board has no power to spend money on such walls and such expenditure would have been *ultra vires*. On this, *Cracknell* v. *Mayor, &c., of Thetford*(1) is conclusive. A converse case was *Geddis* v. *Proprietors of Bann Reservoir*(2), where a corporation was held to be liable where it had power to take preventive measures and neglected to take them. The decision in the latter case turned on clause 2 of the statute, namely, as to whether the corporation had power to scour and cleanse the Muddock river except for the purposes of the defendant's statute. The corporators had the power to scour the river for the purposes of their scheme, and if they had so scoured it the plaintiff's lands would not have been flooded. But here, the harbour trustees were not endowed with power to do what plaintiff says would have prevented the injury. If the trustees owe a duty to plaintiff, they owe a similar duty to all other landowners along the shore; had they shielded the plaintiff, they would have thrown the set of the tide against another owner's land lower down; and the duty would have been endless. The complaint is not the extension simply, but the extension without proper precautions. Whether the Board is liable or not depends on the intention of the Legislature. The encroachment had commenced before the harbour was handed over; yet the Legislature gave the Board only limited powers and such protective works as it did authorise were only

(1) L.R., 4 C.P., 629. (2) L.R., 8 App. Cas., 430.

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authorised for the protection of the harbour itself. Further, it is submitted that the defendants are protected by section 87, and that even if plaiutiff should be held entitled to some remedy he is not entitled to damages.

The Advocate-General in reply:—In order to enjoy protection under section 87 defendants must show that they acted *bonâ fide;* and that is a question of fact to be proved, and the onus is on defendants to prove it. It is wrongly contended that defendants had no power to do an act to check the injury they had set going: section 33 enables works to be executed to carry out the object of the trust, and that would entitle the Board to execute works necessary to prevent injury from occurring to others and so to save the Board from liability. There is also a common law duty imposed on the defendants not to injure others and this is not taken away by the statute; so that expenditure incurred with that object cannot be said to be *ultra vires*.

On 23rd August 1899 the Court delivered the following judgments:—

SUBRAHMANIA AYYAR, OFFG. C.J.:—This case comes up for decision on the pleadings. Now, putting aside vague general expressions which occur in the plaint and the written statement filed on behalf of the plaintiff and taking the definite allegations therein, the plaintiff's case is that the Harbour Trust Board, in maintaining and extending the northern wall of the harbour without providing a revetment or sea-wall sufficient to protect the plaintiff's property from being encroached upon by the sea, has committed an actionable wrong and is responsible to the plaintiff for the damages sustained by his buildings having been undermined and destroyed by the sea.

In arguing on his behalf the learned Advocate-General contended that the wall as it stood when constructed by the Government and as subsequently extended by the Board, was and is a nuisance to the plaintiff and relied strongly on the maxim *sic utere tuo ut alienum non lædas.* Now, though that maxim is an oft-quoted one, yet it is obvious that only in cases where the relative rights of owners of two different landed properties are clear, with reference to specific rules of law, and one of those properties has been used in a manner inconsistent with such rules, the maxim can be safely employed as indicating that the law has

been broken. Where such is not the case, however, the maxim furnishes no certain guide for the solution of the question whether the user of one of the two properties to which user objection is taken, does or does not amount to an actionable wrong. See per Erle, C.J., in *Brand* v. *Hammersmith and City Railway Company*(1) who there points out that the maxim is no help to decision as it cannot be applied till the decision is made. And the fallacy of characterizing a work like the wall in question as a nuisance is shown by the passage which follows that just quoted, where the Chief Justice, referring to the act complained of in that instance, observes that the term nuisance means "both annoyance that is actionable, and also that which is not actionable; and where the question is whether an annoyance is actionable, the word 'nuisance' introduces an equivocation which is fatal to any hope of a clear settlement."

It is therefore necessary to enquire whether any right of the plaintiff has been infringed. The plaintiff does not allege that the building of a wall such as the one in question is *per se* a nuisance. Indeed, it is difficult to see how such an allegation can be sustained, for the building of a harbour and such like is only a natural mode of using the property near the foreshore. (Moore's 'History of the Foreshore,' page 660. See, as to the Crown's prerogative to establish ports, &c., Bacon's 'Abridgment,' 7th edition, Volume VI, page 402, and *Hunter* v. *Northern Marine Insurance Company*(2).) Nor is it alleged that the harbour wall itself has been negligently constructed. Under the circumstances the mere fact that damage has been caused by the wall is not decisive of the question whether any right of the plaintiff has been infringed. See *West Cumberland Iron and Steel Company* v. *Kenyon*(3) where Lord Esher (then Brett, L.J.,) expressed himself on the point thus:—"The action is brought on the ground of an alleged breach of the maxim *sic utere tuo ut alienum non lædas*. The cases have decided that where the maxim is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use

(1) L.R., 2 Q.B., 223 at p. 247. (2) L.R., 13 App. Cas., 717 at pp. 722, 723.
(3) L.R., 11 Ch. D., 782 at pp. 787, 788.

of his own land. If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner, he cannot succeed." See also *Wilson* v. *Waddell*(1) where Lord Blackburn observes:—"The general rule of law in both countries is that the owner of one piece of land has a right to use it in the natural course of user; unless in so doing he interferes with some right created either by law or contract."

Having thus seen that the plaintiff has not shown that the Board or the Government has been using their property in any but a natural manner unattended by negligence in the construction of the wall itself, the question arises whether there was any negligence on their part in omitting to provide and maintain such a revetment or sea-wall as would have protected the plaintiff's property from destruction by the sea. In other words, were they under a duty to construct such a work in the interests of the plaintiff though not required for the purposes of the harbour. No authority was cited for the view that the Government or the Board owed any such duty to the plaintiff. Of the decisions cited on his behalf as establishing the liability of the defendants, none seems to touch the present case. No doubt one of them, *Geddis* v. *Proprietors of Bann Reservoir*(2) at first sight appears to be very similar to the present case and the observations of Lord Blackburn there may seem to settle the question here. But in that case it was established upon the construction of the particular statute incorporating the defendant company that there was on its part a duty to exercise its statutory powers of dredging and cleansing the channel. As Lord Justice Collins points out in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works*(3):—"In *Geddis* v. *Proprietors of Bann Reservoir*(2), Lord Blackburn was dealing with a case in which the rights of adjoining owners had been in fact invaded, the statute under which the defendants acted not enabling them to flood the plaintiff's lands when such flooding might have been avoided by dredging, as the defendants had power to do, the channel by which they sought to pass their compensation water back to the river. They were under a duty to pass the water down to the river, and they were given powers to make and maintain channels for this purpose, and where they had

(1) L.R., 2 App. Cas., 95 at p. 99. (2) L.R., 3 App. Cas., 430.
(3) [1898] 2 Ch., 603 at pp. 611, 612.

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not exercised these powers they could not say that the damage to the adjoining proprietors was a necessary incident of the exercise of their statutory right. The statutory power which Lord Blackburn thought them bound to exercise was one without which their duty of passing the water on could not be properly carried out." It is true, that here the Government or the Board, as the owners of the soil, can erect protective works of the kind mentioned by the plaintiff, but where is the duty making it obligatory to erect such works when, as already stated, they were using their property only in a natural manner unattended by negligence? The Government or the Board may have been bound so to construct the harbour wall as to interfere as little as possible with the plaintiff's property. Neither is, however, called upon to undertake any independent work for the protection of the plaintiff. In support of this, reference may be made to the case put by Collins, L.J., at page 612 in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works*(1) by way of illustration, viz., that of an owner of a house, for which no right of support from the adjoining house had been acquired, with reference to the owner of the latter house withdrawing the support to which the former owner was not entitled. Though in such a case the pulling-down owner must be careful to interfere as little as possible with the other house, he is certainly not called upon to take active steps for its protection, as by shoring it up. Reference may also be made to *Ponting* v. *Noakes*(2) as, in principle, a somewhat analogous case. Though it is well known that yew trees are poisonous to horses that eat of them, yet it was held in that case that a person who grew a yew tree near the boundary of his land was under no duty to take means to prevent his neighbour's horses from eating of the tree. In cases like the above there is, as Collins, L.J., pointed out, "a broad distinction between exercising a right with reasonable care so as not to do avoidable damage and taking active measures to insure the continuance of something that is not a right in the adjoining owner." *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works*(1). While I am in this part of the case I may refer to *King* v. *Commissioners of Sewers of Bognor*(3), not, indeed, as an authority for the proposition sought to be laid

(1) [1898] 2 Ch., 603 at p. 612. (2) [1894] 2 Q.B., 281.
(3) 6 L.J., K.B., 338 at p. 342.

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down here, but for showing to what unreasonable lengths the duty, if there be any such, would be carried, and that hence such a duty ought not to be implied in law. There Lord Tenterden, C.J., observed "if we were to say the Commissioners in this case were bound at their expense to erect a groyne to protect this land and the effect of that erection might, and probably would, be to do damage to the land lying further eastward and then other persons would have a right to call upon them to erect a groyne to defend them, and so they might go on travelling eastward from place to place until at last they came to the North Foreland. It is well known the sea is encroaching along the whole of the coast round by the Isle of Thanet, notwithstanding it is so different from that of Felpham, it being a high line of chalk cliff. It has encroached very greatly even there. Now if we were to say the Commissioners could be called upon to do this, it would be carrying the proposition to an extent to which, as it seems to me, in reason and law it cannot be carried." Considering the difference between the sea and ordinary water courses, it is difficult to maintain that the distinction, recognised in the case of the latter, with reference to what may be done by way of defence and what may be done by way of natural user, is applicable to the former. Therefore, though the harbour wall in question was not raised by way of defence against the encroachment by the sea, as in the case referred to, still it would seem that the reasoning of the Chief Justice in the above extract should be followed in cases like this, since the purpose for which the wall was built was a perfectly legitimate one. As regards the non-repair of the revetment which was constructed on the foreshore with a view to prevent the encroachment by the sea, it is scarcely necessary to say that in the circumstances of the case, that amounts to nothing more than a discontinuance of a favour shown by the defendants to the plaintiff.

In my view, therefore, the plaintiff has not shown that the Government or the Board had, in omitting to provide a revetment or sea-wall to protect his land, failed to carry out any duty which they owed to him. Such omission is therefore not actionable.

Supposing, however, that in building the wall without making adequate provision for the protection of the plaintiff's land the Government had infringed his right, still it cannot be held that the Board is responsible to him, since, under Madras Act II of

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1886, which vests the harbour in the Board, that body is not at liberty to spend any money coming to its hands for a purpose such as the construction of works needed for the protection of persons in the position of the plaintiff but not required for the purposes of the harbour. Now, clauses 1 to 5 of section 33 of the Act, which enumerate the different specific purposes to which money received by the Board is to be applied, have no reference whatever to works like the revetment. Nor can the words of the sixth and remaining clause "generally for the purposes of this Act" be possibly held to cover expenditure on such a work, since, as already stated, it is not one required for any of the purposes of the Board. It is hardly necessary to say that had the Legislature intended to empower the Board to utilize its money in connection with the defence and protection of properties belonging to other persons affected by the construction of the wall in question, express provisions as to it would have been inserted in the Act. The absence of such provisions is fatal to the suggestion that it is competent to the Board to devote any part of its moneys for protection and defence as aforesaid. In short, the Act must be held to empower the Board to maintain and improve the harbour, notwithstanding that the wall in question proved to be a nuisance to the plaintiff or those through whom he claims when it was constructed. This case is therefore distinguishable from *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company*(1), cited for the plaintiff, in that there the statute under which the defendants were acting was construed to entitle them to exercise their powers only in so far as such exercise did not affect the legal rights of their neighbours.

In the view I take of this case in holding that the Board had been making only a natural use of the property, any enquiry into whether the damage can be avoided or mitigated is quite immaterial. Much less will such enquiry be material even if the user be taken to be not natural, for the plaintiff will then have a right to relief for any consequential damage, and the Court, as Lord Hatherley said, in *Attorney-General* v. *Colney Hatch Lunatic Asylum*(2) "is not in the habit of listening to any argument on the ground of expense when it restrains the doing of a wrong." Nor is it necessary to consider the defendants' plea based on section 87 of the Act. I would therefore dismiss the appeal with costs.

(1) [1898] 2 Ch., 614. (2) L.R., 4 Ch. App., 146 at p. 158.

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O'FARRELL, J.—The plaintiff in this case is the proprietor of certain godowns situated close to the foreshore within the limits of the port of Madras as defined by section 3(2) of the Madras Harbour Trust Act II of 1886. The defendants are the trustees for the harbour, in whom the property both in the artificial harbour itself (as defined by section 3(3) of the Act) and in the foreshore within the limits of the port, are vested—see, as to the latter, section 25 and schedule A to the Act. The harbour was, as is well known, constructed by Government without statutory enactment and the Act of 1886 simply hands it over to the trustees, giving them full powers of maintenance and improvement. At the time when it was so handed over it is common ground that erosion of the foreshore adjacent to the plaintiff's premises had set in as a consequence of the existence of the harbour. Subsequently, however, in exercise (it must be presumed) of their powers of improvement the defendants extended the groynes.

It is not denied that the sea has now encroached on and beyond the foreshore and has caused damage to the plaintiff's property. In the letter of 14th April 1898, addressed to the defendants by the plaintiff's solicitors and filed as exhibit A, the claim would appear to be based on the defendants' act in extending the northern arm or groyne without taking due precautions to counteract the injury to private property that would thereby result, but in the further notice sent on 11th May the words "maintaining and extending" are used and in the plaint what is charged is that the defendants "negligently and unlawfully and without taking due and sufficient precautions to prevent injury from being thereby occasioned to the plaintiff, took over and allowed to continue and maintained and extended harbour arms or groynes, which at the time of such taking over had caused and were causing and have since continued to cause an encroachment of the sea on the coast to the north of the said harbour whereby the said foreshore to the east of the plaintiff's premises has been submerged and washed away by the inroad of the sea and the sea has been let in on to the plaintiff's said premises and the damage mentioned in the fifth paragraph hereof has been thereby caused."

Paragraphs 4 and 6 of the plaint refer to a specific means which, it is alleged, the defendants might have adopted for the prevention of damage, viz., the proper maintenance of a revetment or stone barrier already constructed by them on the foreshore,

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The particulars of the grounds of claim furnished by the plaintiff after the settlement of issues also make mention of the defendants' failure to properly maintain the revetment as constituting the negligence complained of. Further, the plaintiff's Counsel at the hearing appears to have distinctly admitted that the erosion complained of was the natural and necessary consequence of the construction of the harbour but that that consequence might have been prevented by remedial and preventive measures which it was the duty of the defendants to adopt.

The first and most important question we have now to decide is, whether the learned Judge was right in his finding that the plaintiff had made out no cause of action, and I have been thus particular in setting out the pleadings and contentions of the plaintiff, because it is upon them that the whole question turns. I think two things are clear from what I have previously said—first, that the foundation of the plaintiff's case is negligence, and secondly, that the negligence is not anything done or omitted by the defendants (or their predecessors in title, the Madras Government) in the construction or maintenance of the harbour itself, but the failure to take remedial or preventive measures to counteract the necessary results of such construction and maintenance. I do not think it is open to the learned Advocate-General now to argue that it lay upon the defendants to prove that the harbour had, in the first instance, been constructed or the groynes extended in the best and most skilful manner possible so as to effect the purpose intended without causing damage to private property. The plaintiff's case I take to have been that, however skilfully the work was carried out, it was inevitable that damage should ensue unless certain additional measures were taken, and the gist of his complaint is that these measures were not taken.

This being, as I conceive, the real matter at issue, the law to be applied is not doubtful; as is, in fact, conceded by the learned Counsel for the respondents. It is best stated in the words of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir*(1). His Lordship says:—"I take it, without citing cases, ... that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature

(1) L.R., 3 App. Cas., 430 at p. 455.

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has authorised, if it be done negligently. And I think that if by reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, 'negligence' not to make such reasonable exercise of their powers." These observations sum up in a compendious form the principle involved in the cases of *Vaughan* v. *The Taff Valley Railway Company*(1) and *Hammersmith, &c., Railway Company* v. *Brand*(2) and others of the same nature. I do not think, with the greatest respect for the learned Judge whose judgment we are considering, that he is right in drawing a distinction between nuisances caused by the mere existence of a railway or a harbour or the like and those which are the result of their daily user. In principle it seems difficult to see any reason for such a distinction and, in fact, in one case which has been much commented upon at the bar (*Cracknell* v. *Mayor, &c., of Thetford* (3)), it was the "mere existence in a state of quiescence" of the staunches put down by the defendants which, in combination with the action of natural forces, caused the damage relied upon as the foundation of the suit. No such distinction as is now suggested was there set up, though it would have been clearly pertinent. I need not, however, say anything further on the point as the learned Counsel for the respondents has frankly conceded that if, by a reasonable exercise of the powers vested in the trustees, they could construct a sea-wall or revetment on the foreshore which would protect the plaintiff's property, they are bound to do so. His contention is that they are not authorized to construct any such sea-wall except for the purpose of protecting the harbour itself, and that to employ the public funds at their disposal for the protection of the plaintiff's property would be a breach of trust. He refers us to sections 60 and 61 and also to section 33 of the Act and relies upon *Cracknell* v. *Mayor, &c., of Thetford*(3) and *Geddis* v. *Proprietors of Bann Reservoir*(4) already cited. In the former case the corporation were found to be not liable, because they were held to have no power under the statute to remove the silt or cut the weeds except for the purposes of improving the navigation. In the latter case, the corporation were held to have such statutory powers and were, therefore, declared liable. In both cases the decision turned upon

(1) 29 L.J., Ex., 247; 5 H. & N., 679. (2) L.R., 4 H.L., 171.
(3) L.R., 4 C.P., 629. (4) L.R., 3 App. Cas., 430 at p. 455.

the existence or non-existence of statutory powers. No question of common law powers arose in either case, because in the former the corporation were not the owners of the soil on which the weeds grew and the silt was deposited, and similarly in the latter they had a mere easement in the bed of the Muddock (see page 437 of the report). Now in the present case there is an important distinction; the defendants are the owners of the foreshore as I have already noted. As such owners they have, subject to any express or implied restrictions imposed by the Act itself, the power to erect sea-walls on the foreshore. The whole question is then narrowed to this: Is there anything in the Act which does restrict them? Section 60 says that they may execute such works as they may determine to be necessary for the purposes of the harbour. Section 61 says such works may include (and I would note in passing that the word "include" seems to imply that the enumeration is not intended to be exhaustive) various works, all obviously having direct reference to the purposes of the harbour, the one most pertinent to the present discussion being contained in the 6th sub-section. This runs "the construction of such break-waters and other works without the limits of the harbour as shall be expedient for the protection of the said harbour and all such other works and appliances as may be, in the opinion of the Board, expedient for carrying out the purposes of this Act." It may be conceded that the construction of a break-water for the protection of private property from erosion caused by the harbour is not exactly a work *ejusdem generis* with the others enumerated in the section; but ought we to conclude from this that it is necessarily prohibited by the Act? There is, as the learned Counsel admits, a duty cast upon the trustees to do the acts authorised by the Legislature with proper care and not negligently; to omit to construct works of prevention, if that can reasonably be done, he also admits is "negligence"; is it then to be inferred, without express words, that the trustees are prohibited by the statute from doing that which it would be otherwise their duty to do? I think not. I should require very strong words in the Act before I could assent to any such proposition. The same reasoning applies to section 33 (6) which provides that the funds at the disposal of the trustees may be applied, *inter alia*, "generally for the purposes of this Act." The purposes of the Act are to maintain and improve the harbour with reasonable regard to the rights of private individuals and without injury,

so far as such injury can be prevented, to their property. The construction of works to guard against injury which the trustees are bound to prevent is, therefore, strictly one of the purposes of the Act.

In the view that I take of this part of the case I have the misfortune to differ from the learned Officiating Chief Justice. I have had an opportunity of reading the judgment which he has just delivered, and have carefully reconsidered my own position with reference to the view therein expressed and the cases cited, and I see no reason to alter the opinion I originally formed. I did not, in the first instance, refer in detail to cases by which the dictum of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir*(1) is borne out because I understood Mr. Ryan to admit not merely that the *dictum* was an accurate epitome of the authorities on the point, but that it applied to the facts of the present case. I understood him to say (and on this point I have a note taken at the time) that if the Board were authorized to construct sea-walls for the purpose of protecting private property, and if by reasonable exercise of such powers they could have obviated the damage to the plaintiff's property, they were bound to do so. His point was that the Board, on the construction of the Act, did not possess any such powers. That the learned Counsel was right in making this admission appears to me to be clear from a consideration of all the cases, notably the railway cases referred to by Collins, L.J., in the case of *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works*(2). In *Vaughan* v. *The Taff Valley Railway Company*(3), for instance, it was found—and the point was relied on in all the judgments—that the railway company had taken every precaution and adopted every means in their power which science could suggest to prevent their engines from emitting sparks. In that case it is clear that the defendant company took active measures to prevent injury. The supplying of a smoke cap to the chimneys of the locomotives, the securing of the ash-pan, the slowing down of the pace of the engines to the minimum point consistent with practical utility, were all active measures for the protection of private owners of property and were not only not required for the working of the railway but tended to prejudice its

(1) L.R., 3 App. Cas., 430 at p. 455. (2) [1898] 2 Ch., 603.
(3) 29 L.J., Ex., 247; 5 H. & N., 679.

efficiency. If the Company could have contended that it was under no duty towards the owners of adjoining property, I think it is inconceivable that the point would not have been taken. In *Geddis* v. *Proprietors of Bann Reservoir*(1), the House of Lords expressly decided that "where persons were incorporated by Act of Parliament for a particular purpose . . . . . if the effecting of it may occasion (not only in the course of originally erecting the necessary works for the required purpose, but at recurring intervals afterwards) inconvenience or injury to others, they may be treated as under an obligation to take, from time to time, measures to prevent the occurrence of such inconvenience and injury". As Lord Hatherley remarked in that case (see page 450) "you shall use all those precautions against injury to others which you would use against injury to yourselves in carrying on a similar work, and if we find that in carrying out your powers damage has been done by you the law will say that the powers which you can exercise shall be exercised for the prevention of mischief." I do not understand Lord Justice Collins in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works*(2) to dissent from the dictum of Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir*(1). He merely pointed out that it was applicable only to cases where an actual right has been invaded. The Water Company in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works*(2) had laid their pipes at a certain depth below an uneven road which they knew the defendants had a statutory right to level. They paid nothing for the privilege. They had acquired no right to a particular thickness of soil above their pipes. In such circumstances, Collins, L.J., held that *Geddis* v. *Proprietors of Bann Reservoir*(1) did not apply. In other words, the defendants would not be bound to take active steps to prevent injury to a person having a mere privilege, as distinguished from an actual right.

It must be remembered, I think, that the immunity from actions for damage established by *Hammersmith, &c., Railway Company* v. *Brand*(3), and other cases in respect of the promoters of works of public utility is itself a novel doctrine, which was forced upon the Courts by the manifest absurdity of applying the

(1) L.R., 3 App. Cas., 430 at p. 455. (2) [1898] 2 Ch., 603.
(3) L.R., 4 H.L., 171.

principles underlying *Fletcher* v. *Rylands*(1) and similar cases to the growing industry of railways. The principle was not finally established without much opposition. The earliest case of *Reg.* v. *Pease*(2) was decided in 1832 and even so late as 1869 we find no less an authority than Baron Bramwell prepared to hold that that case and similar cases such as *Vaughan* v. *The Taff Valley Railway Company*(3) were wrongly decided.

In regard to the cases cited by the learned Officiating Chief Justice relating to the "natural" user of lands I venture, with the greatest deference, to think that the construction of a harbour is not a natural user in the sense in which the word is employed in those decisions. I think the word as there used means "common or usual," "ordinary or every day" or the like. In *Fletcher* v. *Rylands*(1) the storage of water in a tank on the defendant's land was termed by Lord Cairns a "non-natural" use of the land and this is, I think, the sense in which the language used in the decisions cited by the Officiating Chief Justice must be understood. The attempted distinction is, I believe, generally conceded to be an unfortunate one, and is probably the chief reason why *Fletcher* v. *Rylands*(1) has been exposed to so much adverse criticism, notably in America.

As to the other point in the case, whether the defendants had the power to construct sea-walls for the protection of private property, I have little to add to what I have already said. If the defendants are—as I conceive they are—under a common law obligation to protect the owners of property (if that can be reasonably done) from injury caused by the existence of the harbour, that obligation can only be taken away by express words, which I do not find in the statute. As observed by Lord Cairns in *Hammersmith, &c., Railway Company* v. *Brand*(4), "The Legislature "has very often interfered with the rights of private persons, but "in modern times it has generally given compensation to those "injured; and if no compensation is given, it affords a reason, "though not a conclusive reason, for thinking that the intention of "the Legislature was not that the thing should be done at all events, "but that it should be done, if it could be done, without injury "to others. What was the intention in any particular Act is

(1) 37 L.J., Ex., 161. (2) 2 L.J., M.C., 26; 4 B. & Ad., 30.
(3) 29 L.J., Ex., 247; 5 H. & N., 679. (4) L.R., 4 H.L., 171.

"a question of the construction of the Act." The plaintiff is admittedly not entitled to compensation under the Act and I can find nothing in the Act to prohibit expenditure for such purposes as I have indicated. It is, no doubt, not specifically mentioned in the Act, but no more are other items of legitimate expenditure, *e.g.*, the payment of legal expenses incurred for the defence of actions brought against the Board.

With regard to what is a "reasonable exercise" of the defendants' powers, if any, to construct sea-walls, I would desire, in order to guard against misconception, to say that the expression must have regard to all the circumstances not only of the particular case but of similar cases likely to occur. If the result of a reasonable expenditure to protect the plaintiff's property will be to entail further expenditure which would be unreasonable (as, *e.g.*, the construction of protective walls through the entire length of the port) then even the original expenditure would become unreasonable. That, however, is a question of fact which I do not desire to prejudge.

The other point urged by Mr. Ryan for the respondents is that they are in any case protected by the last clause of section 87 of the Act which provides that neither the Board nor any of its officers or servants shall be liable in damages for "any act *bonâ* "*fide* done or ordered to be done by them in pursuance of this "Act." There was an issue on the point in the Court of First Instance and it was decided against the defendants. I agree with Mr. Justice Shephard that this section has no reference to the present case. It applies, in my opinion, to cases where acts are done by the Board or its servants without legal authority or in excess of legal authority, but under the *bonâ fide* belief that they were acting by or within that authority. The words "*bonâ fide*" show this. They can have no meaning as applied to acts that are not merely believed to be, but really are, authorized by law. The words quoted are intended, I think, to confer an immunity similar to that afforded to Magistrates who act without jurisdiction, but in good faith and in a reasonable belief that they have jurisdiction.

In the result I would allow the appeal and as the suit has been decided on a preliminary point I would remand it for disposal on the merits with the remark that the question to be determined on the fourth issue is whether the damage complained of could have been obviated or materially mitigated by a reasonable expenditure on the construction of sea-walls on the foreshore or on other remedial or precautionary works of a like nature.

Under section 575 of the Code of Civil Procedure the appeal is dismissed with costs.

The appellant thereupon preferred an appeal under section 15 of the Letters Patent which, in due course, came on for hearing before the Court as above constituted.

Hon. Mr. *E. Norton* and Mr. *K. Brown* for appellant.—The property has vested in the Harbour Board under section 25 of the Act. It is conceded that the harbour was erected by Government not under any statute but apparently to meet the needs of commerce. The arms of the harbour, having become vested in the Board, were extended by it and then the harbour was formed. One effect of the northern arm has been to cause the encroachments now complained of. Negligence is not charged in connection with the mode of construction, but it is complained that the encroachment is the result of the extension, and that no attempt has been made to stop the damage though the defendants knew it was being caused. Issues Nos. 5, 6 and 7 having been found in plaintiff's favour and no objections being filed, the only remaining issue is the first, as to whether there is a cause of action. A portion of the foreshore is also vested in the defendants, and some land above high water mark. The revetment which was extended by the defendants has since been abandoned. By that extension they must be taken to have acknowledged their liability to protect the property of other land-owners. They, however, urge that the Madras Harbour Trust Act makes no provision for any expenditure beyond what is required for the construction and maintenance of the harbour, and that they have consequently no power to execute protective works. Such a provision was unnecessary, for the defendants must be held to be under the common law duty to carry out their works without injuring others. The absence of a clause in the Harbour Trust Act providing for payment of compensation by the defendants must be taken to leave defendants unexempted from the ordinary incidents of their common law liability. Had there been such a clause plaintiff's rights would have been limited to such as were given by it. The words in the 6th sub-section to section 61 of the Act, "All works necessary

to carry out objects of the Act," are large enough to authorise the Board to construct and use their harbour so as not to injure the property of third persons. See Moore's 'History of the Foreshore,' 3rd edition, page 660, as to what constitutes acts of ownership on the foreshore. *Hunter* v. *Northern Marine Insurance Company*(1) does not show that a harbour is a natural mode of using land; nor does Bacon's 'Abridgment,' volume VI, 7th edition, page 402, cited in one of the judgments. The forming of a port may be a legitimate use, but it is not a natural one; moreover, here, not only the foreshore but the sea also has been used. There is no question of *jus regale*, or whether the Crown could have been sued if it had not handed over the harbour to the Trust. The Government has delegated its powers to defendants who must be taken to enjoy them subject to the ordinary common law liabilities. *King* v. *Commissioners of Sewers of Bognor*(2) (referred to in a judgment) does not apply. Plaintiff cannot protect himself as he has no foreshore. Defendants cannot plead the "act of God" as they have contributed to the result. The question is whether the act complained of is wrongful: and it is contended that it is, since it is the result of negligence. Even if the act was authorised by the Legislature, defendants were under the same liability to perform it with care: moreover, the harbour is not a protective work like those in *King* v. *Commissioners of Sewers of Bognor*(2); it is a mere commercial venture of Government and must be exercised with care and prudence, and not so as to impose hardship on others. The fact that section 87 was inserted in the Act indicates that Government did not intend to give absolute immunity and unqualified protection, for to enjoy protection under that section there must be *bonâ fides*, which is a limitation. In *The Mersey Docks Trustees* v. *Gibbs*(3), Blackburn, J.'s opinion to the House of Lords, at page 107, shows that in the absence of express enactment, a corporation has the liabilities of a private individual. In *Attorney-General* v. *Tomline*(4), the contention in argument that it is the duty of the Crown to protect the public was upheld on appeal. Companies that undertake the construction of works are liable in damages if these works are improperly carried out. *Lawrence* v. *Great Northern Railway Company*(5), *Reg.* v. *Pease*(6), and *Jones* v.

(1) L.R., 13 App. Cas., 717.
(2) 6 L.J., K.B., 338.
(3) L.R., 1 H.L., 93.
(4) L.R., 14 Ch.D., 58.
(5) L.R., 16 Q.B., 643.
(6) 2 L.J., M.C., 26; 4 B. & Ad., 30.

Festimog Railway Company(1). In the latter case there was no negligence. The real ground of the decision in *Reg.* v. *Pease*(2) is that from the nature of their authority the Legislature must be taken to have known that the permission given was to do an act that was unavoidably and necessarily a nuisance. *Glossop* v. *Heston and Isleworth Local Board*(3) was a case of injunction and was dismissed on that ground. There the defendants had taken over the nuisance complained of and had done no act, and they were charged with omitting to perform a duty imposed by statute. [He also referred to *Cracknell* v. *Mayor, &c., of Thetford*(4).] Here the Act gives the Board no right, even by implication, to maintain a nuisance, as the injury to others is neither necessary nor wholly unpreventible. He referred to *The Queen* v. *The Company of Proprietors of the Bradford Navigation*(5); *Goldsmid* v. *The Tunbridge Wells Improvement Commissioners*(6); *Attorney-General* v. *Colney Hatch Lunatic Asylum*(7), per Lord Hatherley, L.C.; *Attorney-General* v. *The Mayor of Basingstoke*(8); *Attorney-General* v. *Council of Borough of Birmingham*(9); *Nutter* v. *Accrington Local Board of Health*(10); *National Telephone Company* v. *Baker*(11); *Rapier* v. *London Tramways Company*(12); *Bolton* v. *Crowther*(13); *Jones* v. *Bird*(14); *Hammersmith, &c., Railway Company* v. *Brand*(15); *Vaughan* v. *The Taff Valley Railway Company*(16); *London and Brighton Railway Company* v. *Truman*(17), per Halsbury, L.C., at page 49. On the question of common law duty he cited *Clowes* v. *Staffordshire Potteries Waterworks Company*(18), per Mellish, L.J.; *Vernon* v. *Vestry of St. James, Westminster*(19); *Shelfer* v. *City of London Electric Lighting Company*(20).

Mr. *J. H. M. Ryan* and Mr. *Allan Daly* for respondents.—No duty to erect protective sea-walls is to be found in the Act. The cases on common law liability lay down three propositions: (*a*) where the Legislature authorises an Act it is lawful: and being lawful, any damage flowing from it is *damnum absque injuria*.

(1) L.R., 3 Q.B., 733.
(2) 2 L.J., M.C., 26; 4 B. & Ad., 30.
(3) L.R., 12 Ch. D., 102.
(4) L.R., 4 C.P., 629.
(5) 34 L.J., Q.B., 191.
(6) 35 L.J., Ch., 93.
(7) L.R., 4 Ch. App., 146.
(8) 45 L.J., Ch., 726.
(9) 4 K. & J., 528.
(10) L.R., 4 Q.B.D., 375.
(11) [1893] 2 Ch., 186.
(12) [1893] 2 Ch., 588.
(13) 2 B. & Cr., 703.
(14) 24 R.R., 79; 5 B. & Ad., 837.
(15) L.R., 4 H.L., 171.
(16) 29 L.J., Ex., 247; 5 H. & N., 679.
(17) L.R., 11 App. Cas., 45 at p. 49.
(18) L.R., 8 Ch. App., 125 at p. 139.
(19) L.R., 16 Ch. D., 449, at p. 464.
(20) [1895] 1 Ch., 287 at p. 298.

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Brand v. *Hammersmith, &c., Railway Company*(1), and *London and Brighton Railway Company* v. *Truman*(2); (*b*) but persons so authorised will be liable if they go beyond the powers given by the Legislature. *Hammersmith, &c., Railway Company* v. *Brand*(3) and *Metropolitan Asylum District* v. *Hill*(4); (*c*) whatever is done in pursuance of the authority must not be done negligently. *Geddis* v. *Proprietors of Bann Reservoir*(5), per Lord Hatherley, L.C. Here, there is no suggestion that the harbour trust has gone beyond its statutory powers; and so far from having done anything negligently it has done nothing; nor was it under any duty to protect plaintiff by the erection of independent works. *Vaughan* v. *The Taff Valley Railway Company*(6) and *Reg* v. *Pease*(7) are cited as showing that all possible precautions must be taken. But when that phrase is considered, it only means that the corporation must do what is reasonable; see *Harrison* v. *Southwark and Vauxhall Water Company*(8) per Vaughan Williams, J., who cites *Reg* v. *Pease*(7) and other cases; also *Simkin* v. *London and North-Western Railway Company*(9); *Hammersmith, &c., Railway Company* v. *Brand*(3) and *Vaughan* v. *The Taff Valley Railway Company*(6). So that negligence must be taken in its literal sense and not as insurance against injury. *Hammersmith, &c., Railway Company* v. *Brand*(3) was one for compensation. In *Jordeson* v. *Sutton, Southcoates and Drypool Gas Company*(10), North, J., held that the company had exceeded its powers. *Metropolitan Asylum District* v. *Hill*(4) turned on the question whether the Legislature had intended the Board to erect the hospital at a particular spot. The authority was general, and the Board selected a spot where the hospital was a nuisance, otherwise there would have been no liability. *Geddis* v. *Proprietors of Bann Reservoir*(5) is the only one in which a corporation has been held liable for negligence. There, the defendants were entrusted with the duty of regulating a supply of water; it was a recurring act and the case involved the question whether the corporation had the right to enter on the bed of the river Muddock to cleanse it. The finding was, in effect, that the defendants were under a duty to construct a channel, and having

(1) L.R., 2 Q.B., 223.
(2) L.R., 11 App. Cas., 45 at p. 49.
(3) L.R., 4 H.L., 171.
(4) L.R., 6 App. Cas., 193.
(5) L.R., 3 App. Cas., 430.
(6) 29 L.J., Ex., 247; 5 H. & N., 679.
(7) 2 L.J., M.C., 26; 4 B. & Ad., 30.
(8) [1891] 2 Ch., 409.
(9) L.R., 21 Q.B.D. 453.
(10) [1898] 2 Ch., 614.

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chosen to utilise the Muddock, should have properly maintained it. Their act of allowing a flow of water to pass down the channel that was too great for its capacity, was held to be negligence. See per Lord Selborne at page 450. The decision shows that even if maintenance amounts to an "act," it is not actionable unless it is done in a negligent manner; moreover, the power to cleanse the bed of the stream was ancillary to the duty of the Board as imposed by statute. So, in *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works*(1), the defendants had power to lower the pipes, and the damage accrued from their not having done so. *Attorney-General* v. *Gaslight and Coke Company*(2) and *Harrison* v. *Southwark and Vauxhall Water Company*(3), per Vaughan Williams, J., show the broad distinction between the position of the Harbour Board and the cases relating to Gas Companies, for the Gas Clauses Act does not direct the companies to carry out their work regardless of nuisance arising as a consequence. Moreover, the word "harbour" must be construed as meaning the actual harbour and not all the land comprised in the port; see the definition in the Act, section 3 (2), and consequently the Board has only power to make protective works for the harbour so defined. (He also referred to *Sanitary Commissioners of Gibraltar* v. *Orfila*(4) and *Municipality of Pictou* v. *Geldert*(5) as showing the difference between misfeasance and non-feasance.

Mr. *K. Brown*, in reply, contended that the distinction between misfeasance and non-feasance was not applicable to the present case, the defendants not occupying the position of a highway authority. On this point he referred to *Sanitary Commissioners of Gibralter* v. *Orfila*(4); *Gibson* v. *Mayor of Preston*(6) following *Young* v. *Davis*(7); *Blackmore* v. *Vestry of Mile End Old Town*(8); *Withers* v. *The North Kent Railway Company*(9); *White* v. *Hindley Local Board*(10); *Hamilton* v. *St. George, Hanover Square*(11); *Parsons* v. *St. Mathew, Bethnal Green*(12); and *Cowley* v. *Newmarket Local Board*(13).

(1) [1898] 2 Ch., 603.
(2) L.R., 7 Ch. D., 217.
(3) [1891] 2 Ch., 409.
(4) L.R., 15 App. Cas., 400.
(5) [1893] A.C., 524.
(6) L.R., 5 Q.B., 218.
(7) 31 L.J., Ex., 250; 7 H. & N., 760.
(8) L.R., 9 Q.B.D., 451.
(9) 27 L.J., Ex., 417.
(10) L.R., 10 Q.B., 219.
(11) L.R., 9 Q.B., 42.
(12) L.R., 3 C.P., 56.
(13) [1892] A.C., 345.

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On 6th March 1900, the Court delivered the following judgments:—

BODDAM, J.—In this appeal, the only question argued was whether the plaintiff had by his plaint and particulars disclosed any cause of action against the defendants.

The defendants are the trustees of the Madras harbour, who were called into being by the Madras Harbour Trust Act, 1885, (Act II of 1886).

Prior to the date of this Act, the Government had erected in the port of Madras a harbour consisting of two groynes run out into the sea from the foreshore eastward. This became vested in the trustees of the harbour of Madras by the Madras Harbour Trust Act, 1885, (Act II of 1886), which received the Governor-General's assent on the 20th February 1886. The question turns upon the duties and obligations of the defendants to persons who are injured by the existence of the harbour and it is necessary therefore to examine the Act.

The preamble to the Act says.—"Whereas it is expedient to "make provision for the regulation, conservancy and improvement "of the harbour of Madras"; by section 3 (2) "port" means the port of Madras within such limits as may, from time to time, be defined by the Governor in Council for the purpose of the Act by notification in the 'Fort Saint George Gazette,' and until a notification is so issued within such limits as may have been defined by the Government under the provisions of Act XII of 1875 (The Indian Ports Act).

The notification under this section appeared in the 'Fort Saint George Gazette' on the 4th June 1886 as follows:—

Notification No. 11.—Under clause 2, section 3 of the Madras Harbour Trust Act (II of 1886), the Right Honourable the Governor in Council hereby notifies that, from and after the 1st June next, the limits of the port of Madras for the purposes of the said Act will be as follow:—

To the north.—A line running due east from the pillar which marks the extreme north-western limit of the said port to ten fathoms water;

To the south.—A line running due east from the pillar which marks the extreme south-western limit of the said port to ten fathoms water;

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To the east.—A line running from north to south and connecting the easternmost points of the two before-mentioned lines, defining the northern and southern limits of the said port; and

To the west.—Within the limits of the artificial harbour a line marked by boundary pillars running from north to south and connecting the shore ends of the harbour groynes abutting on the municipal road, and without the limits of the artificial harbour a line running parallel to the water's edge between the northern and southern limits at 50 yards above high-water mark, spring tides, provided that, between a line running due east from the military boundary pillar near Messrs. Parry & Co.'s office on the north and the mouth of the Cooum river on the south, the western limit shall be the water's edge itself.

A plan exhibiting the boundaries as above defined has been prepared and deposited at the offices of the Quartermaster-General and the Master Attendant, where it can be inspected at any time during office hours.

By section 3 (3) "harbour" means "the artificial harbour at "Madras consisting of the enclosing groynes and the enclosed space "and the corresponding foreshore east of the beach road, and all "buildings, structures or appliances provided by the Governor in "Council or the Trust Board for the purposes of the harbour and of "the vessels using it, together with the moorings therein laid down "by the Governor in Council or the trustees."

By section 4 it is enacted that "the duty of carrying out the "provisions of this Act shall, subject to such conditions and limit-"ations as are hereinafter contained, be vested in a Board to be called "'the Trustees of the Harbour of Madras' and such Board herein-"after referred to as 'the Board' shall be a body corporate, &c." The Act then proceeds to deal with the constitution of the Board, its proceedings, officers and servants; then by section 25 it says "on the issuing of the second notification mentioned in section 2 "of this Act, there shall vest in the Board the several properties "specified in schedule A to this Act annexed, &c." Section 26 and the following sections authorise the Board, with the sanction of the Governor in Council, to acquire and hold moveable or immoveable property within the limits of the port or town of Madras. The mode of employing the income is governed by section 33, which is as follows:—"Subject to any specific appropriation by the "Legislature, the rents, income and other proceeds of any property

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"vested in the Board under this Act and acquired by them there-"under, and all moneys acquired by the Board under or by virtue "of this Act, shall be applied by the Board as follows:—(*a*) the "payment of officers and servants employed by the Board under "this Act; (*b*) the remuneration of the chairman and the trustees; "(*c*) the execution and maintenance of works undertaken; (*d*) the "payment of any interest which is from time to time owing by the "Board; (*e*) the repayment by instalments of moneys from time to "time owing by the Board; and (*f*) generally for the purposes of "this Act."

Then follow provisions for borrowing,—revenue and expenditure, power to levy and recover rates. Then by section 60, "The "Board may execute such works as they determine to be necessary "or expedient for the purposes of the said harbour," and by section 61 "such works may include—

"(*a*) wharfs, quays, docks, stages, jetties and piers within "the harbour or on the foreshore of the harbour, with all necessary "and convenient arches, drains, landing places, stairs, fences, roads, "railways and approaches;

"(*b*) tramways, warehouses, sheds, engines and other appli-"ances for conveying, receiving and storing goods landed, or to be "shipped or otherwise;

"(*c*) laying down moorings for carrying out the purposes of "this Act, and the erection of cranes, scales and all other necessary means and appliances for loading and unloading vessels;

"(*d*) reclaiming, excavating, enclosing and raising any part of the foreshore of the harbour which may be necessary for the execution of the works authorised by this Act or otherwise for the purposes of this Act;

"(*e*) the construction and application of dredges and other machines for cleaning, deepening and improving any portion of the harbour or foreshore;

"(*f*) the construction of such breakwaters and other works without the limits of the harbour as shall be expedient for the protection of the said harbour and all such other works and appliances as may be, in the opinion of the Board, expedient for carrying out the purposes of this Act."

Then later on comes section 68 which says:—"If, at any time, the Board allow any work constructed by them or vested in them under this Act to fall into disrepair" . . . . "the

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"Governor in Council may cause such work to be restored or com-"pleted, or such repair to be carried out" and may recover the cost—and by section 69 Government may in certain circumstances take possession and revoke the powers of the Board.

The only other part of the statute to which reference need be made is schedule A, which specifies the property that vests in the Board. It is as follows:—

"The north and south arms of the harbour with the area "enclosed therein and all the foreshore lying within the limits "of the port as defined in this Act excepting only, &c. . . . . "2. The pier, the jetties constructed and the moorings laid down "by Government and any line of railway constructed by the "Government for the purposes of the harbour within the aforesaid "limits."

At the time of this Act coming into force, there was, on the foreshore to the north of the harbour, a railway laid down on a revetment or stone barrier within the limit of the port as laid down by the notification in the 'Fort St. George Gazette' under section 3 (2) of the Act between the sea and the plaintiff's land. This became vested in the defendants. It appears that the result of building the groynes constituting the harbour was to cause the sea to encroach on the land to the north of the harbour and this encroachment had been going on and was going on when the defendants' Board was first constituted. The defendants prior to 1891 extended the groynes of the harbour somewhat and in 1895 the result of the continuous encroachment of the sea was that a part of the railway and stone barrier between the plaintiff's premises and the sea was washed away and the sea encroached upon and injured the plaintiff's land and the buildings upon it.

The plaintiff now sues the defendants to recover damages for the injury so occasioned.

The cause of action as disclosed by his plaint and particulars appears to be maintaining and extending the groynes of the harbour as erected, when the defendants' Board was created, without taking steps to erect such buildings as would prevent the sea from encroaching upon and injuring the plaintiff's land. It is stated in paragraph 3 of the plaint that the arms or groynes of the harbour were causing the encroachment of the sea when the defendants took over the harbour and that the negligence of the defendants consisted in their maintaining and permitting to

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continue the arms or groynes " without constructing sea-walls or " other walls upon the foreshore to the north of the harbour for the " purpose of resisting the said encroachment and protecting the said " foreshore from the inroads of the sea " ; and the particulars filed by the plaintiff say :— " The defendants acted negligently and " were and are in default, in that they maintained and permitted " to continue the said arms or groynes without constructing such " sea-walls or other walls as would have efficiently resisted the " said encroachment and protected the foreshore to the north of " the harbour from the inroads of the sea " (particulars, paragraph 1).

In the second paragraph of the particulars, the plaintiff says the negligence consisted in, after having taken over the arms or groynes, " extending them and maintaining them so extended " without constructing sea-walls, &c.," as in the first paragraph.

From this, it appears that the plaintiff's claim is that there was a duty cast upon the defendants, when they took over the harbour and when they extended the groynes, to insure the plaintiff from any encroachment by the sea on his land.

Paragraph 4 of the plaint does not allege any cause of action : it merely states that the defendants did not maintain their revetment or stone barrier—without suggesting that by so doing the encroachment would have been prevented ; or take measures necessary to prevent the injury—repeating in effect the cause of action alleged in paragraph 3, viz., that the defendants did not prevent the mischief.

The complaint of the plaintiff is therefore not of any act of commission, but merely of omission to take preventive measures such as would insure the plaintiff's land and premises from injury.

This, it was urged, was a common law obligation imposed upon the defendants. It was not suggested, but on the contrary the plaintiff's Counsel expressly stated that he did not allege any breach by the defendants of any statutory duty, but merely relied upon the plaintiff's common law right to be indemnified from injury caused by that which the defendants were in possession of under their statute and were responsible for maintaining and extending, namely, the groynes of the harbour, inasmuch as the groynes caused the encroachment of the sea and without them there would have been no encroachment and no injury to the

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plaintiff. In other words, that the harbour was a nuisance, when taken over by the defendants, that they have continued the nuisance and that damage, having been thereby caused to the plaintiff, he is entitled to recover from the defendants. The plaintiff does not say that extending the groynes caused the nuisance, but merely that the nuisance existed and that the defendants have extended the groynes which caused the nuisance. He does not even say that in extending the groynes the nuisance was increased.

The question, therefore, is whether a public body, which under an Act requiring its continuance takes over that which by its existence is at any time liable to cause injury, is under a liability at common law to erect such works as will ensure all the world from the threatened injury ; and if injury is caused to any one from the omission to erect such works, whether damages may be recovered from that body.

The argument is based upon the statement of the law by Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir*(1), where he says :— " I take it, without citing cases, . . . that no action will lie " for doing that which the Legislature has authorised, if it be done " without negligence, although it does occasion damage to any " one ; but an action does lie for doing that which the Legislature " has authorised, if it be done negligently. And I think that if " by a reasonable exercise of the powers, either given by statute to " the promoters, or which they have at common law, the damage " could be prevented it is, within this rule, 'negligence' not to " make such reasonable exercise of their powers." Other cases also in which similar words appear were also cited. If these words are to be taken as meaning that in every case where a body created for the purpose of doing anything under an Act of Parliament has power to execute any works, irrespective of the purposes of its Act, which will prevent damages accruing, in consequence of carrying out the duties imposed upon it by the statute, it must execute those works or pay damages to any one who suffers injury, in consequence of its carrying out the duties imposed by the Act, it may be that the plaintiff may have a cause of action. The words as they stand are no doubt wide enough to cover the defendants or any other public body which has no other *raison d'etre* than to

(1) L.R., 3 App. Cas., 430 at page 455.

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maintain that which has been already erected, even if it has been guilty of no act of commission at all, but has merely omitted to do anything to prevent injury from accruing, in consequence of the existence of the erection, which is the cause of the injury and which the public body is by the statute bound to maintain. I do not think the words either bear, or were intended to bear, any such construction. They were used in connection with the particular case then in question and must be considered and construed with reference to that case. There the defendants had discharged water down a stream in greater quantities than in the then state of the stream it would carry and had thus caused it to overflow its banks so that the plaintiff's land was flooded. It was held that, as the defendants had power given them by their statute and it was a part of their duty under their Act to widen, deepen, cleanse and keep proper and sufficient conduits, &c., they had power and it was a duty imposed upon them to deepen and cleanse the stream in question, so as to be sufficient for the water carried into it; and having neglected that duty before sending water down it, they were liable for the damage caused. There also, as in all the other cases cited, except *Cracknell* v. *Mayor, &c., of Thetford*(1), the neglect was part and parcel of an act done in pursuance of the power given by the statute, viz., sending water down the stream, without which no damage would have been done. Here nothing has been done which has caused the damage. The defendants have merely maintained that which caused the damage, viz., the harbour groynes; and it is not suggested that the damage has been caused by any act of the defendants done in the course of maintaining it. It is not alleged that extending the groynes has caused the damage, for the encroachment of the sea was going on before that was done and the plaintiff does not say even that it was thereby increased.

It seems to me that the law applicable to acts of commission and omission may be stated thus:—

In the former case, if anything is done in pursuance of the powers given by statute, and in the doing of it the promoters are guilty of any negligence, the result of which is to cause damage to another, the promoters are liable and the definition given by Lord Blackburn is that which constitutes negligence in such a case. If,

(1) L.R., 4 C.P., 629.

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however, the promoters do nothing except take possession of that which they are bound by their statute to take possession of and to maintain, there is no legal obligation imposed upon them to take active steps to prevent injury occurring from the existence of that which they have to maintain, unless the statute contains provisions directing or compelling them to do so. This is the effect of the decision in *Cracknell* v. *Mayor, &c., of Thetford*(1), where the defendants were empowered by their Act of Parliament to make navigable the river Brandon and to take tolls for its navigation. They erected certain staunches for improving the navigation, but these staunches produced the effect of collecting the weeds and soil so that the river overflowed its banks. There being no provision to compel or direct the defendants to cut the weeds or dredge the accumulated silt, unless it was necessary to do so for the purposes of the navigation, they were held not liable to an action for damage occasioned by the water overflowing, though it really arose from that accumulation. In commenting upon this case, Lord Hatherley (in *Geddis* v. *Proprietors of Bann Reservoir*(2)) says:—"If a company in the position of the defendants there, has "done nothing but that which the Act authorised—nay, may in a "sense be said to have directed—and if the damage which arises "therefrom, is not owing to any negligence on the part of the com-"pany in the mode of executing or carrying into effect the powers "given by the Act, then the person who is injuriously affected "by that which has been done must either find in the Act of "Parliament something which gives him compensation, or he must "be content to be deprived of that compensation, because there has "been nothing done which is inconsistent with the powers conferred "by the Act, and with the proper execution of those powers." These words, I venture to think, are a more exact statement of the law as applicable to the case before us than the more general statement of the law as laid down by Lord Blackburn above referred to.

Much stress was laid upon the decision in *The Mersey Docks Trustees* v. *Gibbs*(3), as showing that acts of omission which result in damage give a good cause of action, but there the omission was in the performance of the duty imposed directly by the statute—a totally different case to the present case, where it is not suggested

(1) L.R., 4 C.P., 629. (2) L.R., 3 App. Cas., 430 at p. 438.
(3) L.R., 1 H.L., 93.

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that the defendants' statute imposes any duty upon the defendants to erect preventive works except for the security of the harbour. The case of *Attorney-General* v. *Tomline*(1) was also relied upon by the plaintiff's Counsel. He contended that the defendants were by maintaining this harbour removing the foreshore and therefore that the plaintiff has a cause of action against them. That case decides no such thing, and, if it did, it cannot in any way apply to the present case, for the defendants are not removing the foreshore. That is the consequence of the existence of the harbour, which the defendants have no power to remove, but, on the contrary, are obliged to maintain.

It was further contended on behalf of the plaintiff that the harbour is a nuisance, and that, in the absence of express words in the statute authorising a nuisance and giving compensation to any persons thereby affected, it must be held that the plaintiff has a right at common law to recover damages for any injury caused by the maintenance of the nuisance, and *Jordesan* v. *Sutton, Southcoates and Drypool Gas Company*(2); *Metropolitan Asylum District* v. *Hill*(3); *Clowes* v. *Staffordshire Potteries Waterworks Company*(4) and other cases were cited in support of this contention. In these cases, the statutes contained no compulsory powers to do what the defendants had done. The defendants were told that they might do certain things, but the statutes contained no authority directing them to do those things, if the things themselves constituted a nuisance. There being no compulsory powers given to do what they had done, they were held to be in the position of ordinary persons, who are entirely responsible for their acts. The *ratio decidendi* being that powers given in matters of this sort must be strictly followed and are not to be extended in favour of those on whom they have been conferred. The principle upon which these cases turn is, as I understand it, that though a statute may confer a power to do an act, the promoters have an option as to how they will exercise that power and, if the power is not compulsory, they need not do it at all. If the power is compulsory, it lies upon the promoters to show that they could not do it in any way other than they have done it. If they prove that, then, unless compensation is provided by the Act,

(1) L.R., 14 Ch. D., 58.
(2) [1898] 2 Ch., 614.
(3) L.R., 6 App. Cas., 193 at p. 198.
(4) L.R., 8 Ch. App., 125 at p. 139.

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persons injured by the act done have no remedy. These cases do not, in my opinion, apply to the present case for two reasons. In the first place, the defendants have done no act in pursuance of any powers given to them, which has caused injury to the plaintiff. They have merely omitted to take precautionary measures to prevent injury occurring as a consequence of the existence of the harbour; and, secondly, if maintaining the harbour as erected and extending the groynes can be said to be doing an act in pursuance of the powers conferred by their statute, they had no option, but were compelled to maintain and improve the harbour as it existed, when it came into their possession, irrespective of any consequences which might be caused by the existence or extension of the harbour.

It is obvious from the analysis of the Act given at the commencement of this judgment that the purpose of the Act is the "regulation, conservancy and improvement of the harbour of "Madras." The harbour of Madras existed at the time of the passing of the Act and was then causing the encroachment of the sea on the north of the existing harbour. The definition clause shows that the harbour, the groynes (which cause the damage), the enclosed space and the corresponding foreshore as well as the buildings, structures and appliances provided, existed (already) for the purposes of the harbour. Section 4 imposes upon the defendants the duty of carrying out the provisions of the Act. By section 25, there is vested in the defendants the properties set forth in schedule A consisting of "the north and south arms of the "harbour" with the area enclosed therein and all the foreshore lying within the limits of the port. Section 33 indicates how they are to expend their income (*a*) for the execution and maintenance of the works undertaken and (*b*) generally for the purposes of the Act. Their powers are limited by section 60 to executing such works as they determine to be necessary and expedient for the purposes of the said harbour and section 61 sets out what the works "may include" and it is nowhere indicated that they have power to do away with the groynes or enter upon any fresh works or expend any funds except for the purposes of the harbour and for carrying out the purposes of the Act, which is, as I have said above, to regulate, conserve and improve the existing harbour. They are, therefore, bound by their statute to maintain it and improve it. It is not said that they have done

anything else or that they could have done it in any other way than they have done. All that is alleged is that they have not executed such works for the protection of the foreshore between the plaintiff's land and the sea as would prevent the sea from encroaching upon the plaintiff's land. It is not suggested that such a work was necessary for the purposes of the harbour or was necessary or usefu lfor carrying out the purposes of the Act, but only that it is required for the protection of the plaintiff's land. Moreover, the Act provides that (section 68) "if at any time the "Board allow any work constructed by them or vested in them "under this Act to fall into disrepair," the Government may step in and restore or complete the work, and by section 61 power is reserved to the Government to interfere and retake possession and revoke the power of the Board, if the works are not being properly carried out and maintained.

In these circumstances, it seems to me that the defendants had no option, but were compelled by the statute to maintain the groynes and improve the harbour, as it existed when it came into their possession. If the damage to the plaintiff is the consequence of the existence of the harbour as a harbour and as it existed when the defendants took it over, he has no cause of action against the defendants for omitting to protect him from any consequences resulting from the existence of the harbour. If any stress is laid —though in fact no stress was laid—upon the extension of the groynes of the harbour, then I am of opinion that, in extending the harbour groynes, the defendants were not guilty of any negligence. The extension did not cause any nuisance and, even if it did, there was no duty or obligation upon the defendants to protect the plaintiff from any consequences that might result from their extension.

Moreover, I am of opinion that there was no obligation upon the defendants to maintain the revetment or stone barriers carrying the railway on the foreshore, which lay between the sea and the plaintiff's land. The fact that they had power to maintain it under their Act is not sufficient to impose a duty upon them to do so, and unless it was required for the purposes of the harbour and for the purposes of the Act, there was no duty upon them to maintain or strengthen it (compare *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works*(1)). It was for

(1) 1898] 2 Ch.. 603.

the plaintiff to have alleged this if he relied upon it, and he has not done so. Moreover, he has not even alleged that, if defendants had maintained it or strengthened it, his land would thereby have been protected. The cases cited, where it was held that no action lay for non-feasance, apply only to highways and have no application to the present case.

For these reasons, I am of opinion that the decision of Mr. Justice Shephard is right, and that the plaintiff has disclosed no cause of action against the defendants, and I would dismiss this appeal with costs.

BENSON, J.—I entirely concur in the judgment of Boddam, J., which I have had the advantage of perusing.

The cause of action alleged by the plaintiff is the omission of the Harbour Board to erect such works as would have protected him from the injury resulting from the encroachment of the sea which took place in 1895.

The harbour was constructed by Government prior to 1886, and in that year erosion of the foreshore was in progress in consequence of the existence of the harbour, though it had not then reached the plaintiff's land. The Harbour Board was created by statute in that year expressly for the purpose of protecting, maintaining and improving the harbour, and it was given adequate powers to carry out works for that purpose. The nature of the works that might be carried out and the objects on which expenditure might be incurred are specified in much detail, but no provision is made for executing works for the protection of persons liable to be injured by, or in consequence of, the existence of the harbour, or for compensating them for any injury actually sustained. There is not, and, indeed, there cannot be, any contention that the statute imposes any liability on the Board to execute such works as the plaintiff demands. The contention for the plaintiff is that the common law imposes a liability on the Board, and as the statute does not, in express terms, exempt the Board from liability or limit its liability, the common law attaches the same liability to the Board that it would attach to a private person who caused any injury to his neighbour by erecting or maintaining any work on his own property. I do not think that any of the cases which have been cited in the argument are sufficient to sustain this proposition. Counsel for the plaintiff relies chiefly on the *dictum*

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of Lord Blackburn in the case of *Geddis* v. *Proprietors of Bann Reservoir*(1), but that *dictum* must be understood with reference to the facts of the case then under discussion. In that case, the defendants had sent water down a channel in such quantity that it overflowed the banks and injured the plaintiff's land, and the defendants were held liable. Their liability, however, was due to the fact that, under their statute, they were empowered, and were, therefore, under an obligation to maintain channels of sufficient capacity to carry off the water and their act in discharging so much water without cleansing and deepening the channel was an act done negligently in execution of the powers conferred upon them. In the present case it is not contended that the Board has done an act negligently. The complaint is that the Board has done nothing, has taken no active steps to prevent the sea from encroaching on the plaintiff's land.

The statute under which the present defendants act, makes no provision for the execution of such works as the plaintiff says they ought to have executed for his protection.

As to the defendants' alleged failure to maintain the revetment of the railway, it was not their duty under the statute to maintain it, unless it was expedient to do so for the purpose of maintaining or protecting the harbour, but this is not alleged.

The principle, therefore, which underlay the decision in *Geddis* v. *Proprietors of Bann Reservoir*(1) is not applicable to the present case.

Neither in *Geddis* v. *Proprietors of Bann Reservoir*(1), nor in any other case that has been cited at the bar was the statutory body held liable to execute works other than those contemplated in their statute in order to insure the rest of the world against injury which might result from doing the very thing which the statute enjoined, provided the thing enjoined was itself done without negligence and in the manner enjoined by the statute.

The facts in the case of *Cracknell* v. *Mayor, &c., of Thetford*(2) were essentially similar in character to those now before us. In that case, the defendants were empowered to make a river navigable and in so doing they placed stanchions in the bed of the river whereby silt was accumulated and weeds grew which caused the water of the river to overflow and injure the plaintiff's land. The

(1) L.R., 3 App. Cas., 430 at p. 455. (2) L.R., 4 C.P., 629.

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defendants were held not to be liable, since they only did what was necessary in order to render the river navigable and it was not shown that they could have done so in any other way which would not have caused the injury, and there was no provision in their Act which directed or allowed them to clear away the weeds and silt unless that were necessary for the purpose of improving the navigation of the river. In referring to that case, Lord Hatherley laid down what appears to be the law applicable to the present case in these words :—"We must look carefully not into "all the individual cases, but into the class of decided cases turning "upon the point whether or not a company, authorized by Act of "Parliament to execute a work that in its operations may do "damage to others, has exceeded the powers it possessed, or whether "the company has negligently exercised those powers which had "been granted to it . . . If a company in the position of "the defendants there, has done nothing but that which the Act "authorized—nay, may in a sense be said to have directed—and "if the damage which arises therefrom, is not owing to any negli- "gence on the part of the company in the mode of executing or "carrying into effect the powers given by the Act, then the person "who is injuriously affected by that which has been done must "either find in the Act of Parliament something which gives him "compensation, or he must be content to be deprived of that "compensation, because there has been nothing done which is "inconsistent with the powers conferred by the Act, and with the "proper execution of those powers" (*Geddis* v. *Proprietors of Bann Reservoir*(1)). That appears to be the whole law applicable to the present case. The Harbour Board has done nothing but that which the statute authorized and directed it to do, viz., to maintain and improve the harbour. The Board has not in maintaining and improving the harbour done any act negligently or acted in any manner in excess of, or inconsistently with, the powers conferred by the statute. The fact that the foreshore near plaintiff's land was vested in the defendants for the purpose of carrying out their duties under the Act, viz., for maintaining, protecting and improving the harbour, could not impose on them a duty (protecting the plaintiff) not provided for or contemplated by the Act. The plaintiff must therefore find something in the statute

(1) L.R., 3 App. Cas., 430 at p. 438.

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which gives him compensation, or he must be content to be deprived of that compensation, for he cannot obtain compensation by way of action against the defendants who have done no wrong in carrying out the duties imposed on them by the statute.

I am therefore of opinion that the decision of Shephard, J., is right and I would dismiss this appeal with costs.

DAVIES, J.—On the plaintiff's case as put, I am of the same opinion. Had the plaintiff alleged that the revetment or the stone barrier referred to in paragraphs 2 and 4 of his plaint was a protective work erected by Government in connexion with the construction of the harbour for the purpose of protecting the foreshore where his property was and that it was made over to the defendants as such, I think he would have shown an undoubted cause of action against the defendants for negligence in not maintaining it, if he had thereby suffered loss. But that is not the plaintiff's real case. I observe that at the original trial Mr. Justice Shephard states that the non-maintenance of that revetment was not treated in the argument before him as a substantive cause of action. What the plaintiff then required and requires now is not merely the maintenance of such protective works as were in existence when the Board of Trustees was incorporated, but the improvement of those works, and the construction of others for the same purpose. That this is his case appears from the plaint read with its subsequent particulars as set forth by Mr. Justice Boddam and from the remarks of Mr. Justice O'Farrell, who, on the plaintiff's appeal, proposed to remand the suit for determination as to "whether the damages complained of could have been obviated or "materially mitigated by a reasonable expenditure on the con- "struction of sea-walls on the foreshore or on other remedial or "precautionary works of a like nature." Now assuming in plaintiff's favour that as a fact there was in existence one particular work, which was intended for the protection of his property and which the trustees were bound to maintain, then, to put the plaintiff's case at the highest, all that could be urged on his behalf would be that that obligation implied the further obligation on the trustees to protect his property from injury in every possible way. The obvious answer to such argument would be that the liability of the trustees, in the absence of any statutory duty cast upon them to insure plaintiff from loss, was confined to the maintenance of the particular work they took over, and, if there was any general

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obligation to protect the plaintiff's property, it lay on the Government, who constructed the harbour, the Legislature not having imposed it on the trustees. To these observations, I have merely to add that, without repeating the facts or reviewing decided cases, which have been fully dealt with by my learned colleagues, I quite agree with them that the judgment of Mr. Justice Shephard should be affirmed and this appeal dismissed with costs.

Messrs. *Barclay, Orr & David*—Attorneys for appellant.

Messrs. *H. C. King & John Josselyn*—Attorneys for respondents.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1898. November 2.

CHIDAMBARAM CHETTI AND ANOTHER (PLAINTIFFS NOS. 3 AND 2), APPELLANTS,

v.

MINAMMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Religious endowments—Trustee's title barred by adverse possession as against his predecessor—Limitation.

The holder of the office of trustee in a temple succeeded to that office in 1893. His predecessor had remained in office for over twelve years, but had never sued for the recovery of certain lands. A suit being now brought to recover the said lands on the ground that they provided the emoluments of the office of meikaval in the temple:

Held, that the suit was barred by limitation, the adverse possession held during the previous office-holder's time barring his successor.

SUIT to recover lands which provided the emoluments of the office of meikaval in a temple of which first plaintiff had been and third plaintiff was, at the time of suit, the manager, and second plaintiff the meikavalgar. Plaintiffs contended and it was so found by the District Munsif and Subordinate Judge that second plaintiff had succeeded to the office of meikaval in 1893 and that the cause of action had arisen since that date. Defendants pleaded limitation, and the District Munsif found that second plaintiff and his predecessors had been out of possession and that the defendants

* Second Appeal No. 2059 of 1897 against the decree of T. Ramasami Ayyangar, Subordinate Judge of Madura (West), in Appeal Suit No. 145 of 1897, affirming the decree of V. T. Subramania Pillai, District Munsif of Tirumangalam, in Original Suit No. 622 of 1895.

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and their alienees had held adverse possession for a period of upwards of sixty years before suit. He held (following *Radhabai* v. *Anantrav Bhagvant Deshpande*(1)) that the claim was barred. On this point the Subordinate Judge, on appeal, said:—"The limitation, no doubt, begins to run from the date of second plaintiff's succession to the office in December 1893, and a period of twelve years has not elapsed since that date. But it must be remembered that, according to the contention of the first defendant, the land in litigation has not been in the possession of office-holders for seventy years. If this is supported by evidence, then the institution of this suit within ten years from the date of appointment of the second plaintiff will not revive a claim barred even before his predecessor in office was appointed." He held that the possession of defendants was proved and upheld the ruling that the suit was barred.

Plaintiffs Nos. 3 and 2 preferred this second appeal on the ground, among others, that, upon the finding of the Subordinate Court, the plaintiff's claim should have been decreed.

V. Krishnasami Ayyar and *Ranga Ramanujachariar* for appellants.

Narayana Rao for respondent No. 1.

JUDGMENT.—The land in dispute is claimed to be attached to the office of meikaval, in the temple of which the third plaintiff is the trustee and as a person whose duty it is to see that an emolument, such as the land in question is stated to be, is not improperly severed from the office, or the interest possessed by the temple in such property prejudiced otherwise by the way in which it is dealt with, the said plaintiff must be held to possess sufficient interest in the subject of the suit to allow of his joining as plaintiff.

The next question is whether the suit is barred by limitation. There can be no doubt that it is. Though the present holder succeeded to the office in 1893, yet his predecessor, who was entitled to recover possession of the land on the ground now relied on by the plaintiffs, remained in office for over twelve years, but failed to sue for the property. The adverse possession thus held by the respondents during the last office-holder's time clearly bars his successors too. This view, the soundness of which is shown

(1) I.L.R., 9 Bom., 198.

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in the elaborate judgment in *Radhabai* v. *Anantrav Bhagvant Deshpande*(1), has been acted upon in several cases in this Court. *Mahomed* v. *Ganapati*(2), as we understand it, does not lay down a rule to the contrary. Whether *Velu Pandaram* v. *Gnanasambanda Pandara Sannadhi*(3) is quite reconcilable with the rule stated above is doubtful, but as we are informed that the appeal preferred against that decision to the Judicial Committee(4) is likely to be heard shortly, it is not necessary to pursue the point further.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

DORASINGA TEVAR (PLAINTIFF No. 1), APPELLANT,

v.

ARUNACHALAM CHETTI (DEFENDANT), RESPONDENT.*

1899. October 19.

Breach of contract—Agreement to discharge a debt due by debtor to a third party—No time fixed for performance—Failure to perform within a reasonable time—Cause of action—Measure of damages.

Defendant agreed to discharge a debt due by plaintiff to a third party, secured by a mortgage of a village which was held by plaintiff on lease and which had been sub-let by him to defendant after the mortgage to the third party had been granted. The agreement provided that if the defendant failed to discharge the debt he should be liable to plaintiff for any damage which the latter might sustain. No time was fixed for the performance by the defendant of this obligation, and he, in fact, failed to perform it for a period of nearly three years, whereupon this suit was brought:

Held, that the agreement was not a mere contract to indemnify; that defendant was bound to discharge the debt within a reasonable time, and that his failure to do so during three years was a breach of the contract, notwithstanding the fact that the third party had not enforced his claim against the plaintiff. The measure of damages payable in consequence of such breach would be the amount of the debt which defendant had undertaken to discharge.

By an agreement, dated 12th August 1895, the defendant undertook as follows:—"Regarding the hypothecation debt-bond executed

(1) I.L.R., 9 Bom., 198. (2) I.L.R., 13 Mad., 277. (3) I.L.R., 19 Mad., 243.

(4) The judgment of the Privy Council has since been reported in I.L.R., 23 Mad., 271—*Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*.

* Appeal No. 48 of 1899 against the decree of T. Varada Rao, Temporary Subordinate Judge of Madura (East), in Original Suit No. 41 of 1898.

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by you (first plaintiff) for Rs. 1,000 in favour of Aru Ramanathan Chetti of Thevakottai, and the documents executed in my favour for Rs. 12,000 on the 9th instant in the shape of a promissory note for Rs. 3,000 and a deed for Rs. 9,000, I shall pay to the said Ramanathan Chetti the said principal amount with interest thereon from the said date, get back the hypothecation debt-bond executed by you, and give it (to you); and I shall credit in the promissory note and deed executed to me by you (the amount due) out of the lease amount of the Kalari Maghanam leased out to me by you, and shall give you back the said two documents. If I do not accordingly pay the principal and interest of the hypothecation debt-bond executed by you to the said Ramanathan Chetti, get back the document, and give it to you, I myself shall remain responsible for the principal amount and interest of the said document and you can consider this itself as the document therefor. Out of the lease amount of the Kalari Maghanam, I shall credit Rs. 3,000 every fasli, for four faslis in the two documents executed to me, without charging interest thereon, and I shall give back the said two documents."

In 1898, plaintiff filed this suit against defendant, alleging default on the part of defendant in the performance of the acts undertaken to be performed by him in the said agreement, and praying that the defendant should be directed to pay plaintiffs the Rs. 12,000 due to the said Ramanathan Chetti which defendant had undertaken to pay, together with interest thereon. Plaintiffs contended that the cause of action had arisen on the date of the said agreement. Defendant denied that plaintiffs had any cause of action and an issue was framed raising that question. The Subordinate Judge, referring to the agreement, said:—"There is nothing to show that defendant undertook to pay the said sum to the plaintiffs if he committed default in the matter of discharging Ramanathan Chetti's debt. The allegation in the plaint that the defendant undertook to discharge Ramanathan Chetti's debt at once on the 9th August 1895 is not supported by the Varthamana Kaduthasi. Furthermore, no time is fixed within which the defendant should execute his part of the contract. This is not a suit for dissolution of the contract between the plaintiffs and the defendant caused by the breach of the defendant in which case plaintiffs might claim such damages as they have sustained by its breach. There is no allegation in the pleadings that

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Ramanathan Chetti has sued the plaintiffs for the recovery of the debt due to him or that the plaintiffs have themselves discharged the debt. Nor is this a suit for recovery of compensation after putting an end to the contract. The plaintiffs do not seek to obtain a decree for specific performance or an injunction to enforce the promise made by the defendant. Therefore it is unnecessary now to consider whether that form of relief can be afforded or not. Finally, this is not a suit to recover Rs. 12,000 due to the plaintiffs by the defendant under the sub-lease executed to his favour on the 9th August 1895. It is contended for the plaintiffs that the position of the defendant is that of a bailee or a bearer of money belonging to the plaintiffs. There is nothing in the contract itself or authority in law for the proposition advanced. It was further contended that inasmuch as the time for the performance of the contract is not determined by the contract itself, the rule of law gives the creditor or obligee an immediate right to sue as in the case of goods sold without any specific credit, of money lent generally or of money lent under an agreement that it should be payable on demand. But this question can only arise when a suit properly framed for enforcement of the contract is filed. I am of opinion that the plaintiff's suit, as at present framed, is not maintainable inasmuch as there is nothing in the contract to show that in default of paying Ramanathan Chetti the debt due to him by the plaintiffs, the defendant undertook to pay the amount to the plaintiffs directly. Plaintiffs' suit must be and is hereby dismissed with costs."

Plaintiff No. 1 preferred this appeal.

Sundara Ayyar and *Seshachariar* for appellant.

K. Srinivasa Ayyangar for respondent.

JUDGMENT.—The Subordinate Judge held that, according to the proper construction of exhibit A, the contract on which the suit is based, no cause of action had accrued on the date of the suit and dismissed the suit without going into the other questions raised by the parties. Now, under the contract in question the defendant undertook to discharge a debt due by the plaintiff to one Ramanathan Chetti secured by a mortgage of a village held by the plaintiff on lease and sub-leased by him to the defendant after the mortgage to the Chetti was granted. No time was fixed within which the defendant was to pay off the incumbrance which he undertook to discharge. It must, therefore, be held that he was

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bound to pay within a reasonable time. The defendant, however, failed to do so, though nearly three years had expired between the date of exhibit A and the institution of the suit. It is clear, therefore, that the defendant must be held to have broken the contract, notwithstanding that Ramanathan Chetti had not enforced his claim against the plaintiff. We are unable to agree with the contention that exhibit A is merely a contract to indemnify. The provision in the concluding part of the instrument, no doubt, provides that, if the defendant fails to pay Ramanathan Chetti, the defendant will be liable to the plaintiff for any damage which he may sustain thereby. But this provision cannot detract from the absolute promise to pay Ramanathan Chetti contained in the beginning of the document and as that promise was not performed, it would follow that there was a breach for which the plaintiff is entitled to recover damages unless the defendant has some other defence to the suit. The cases of *Lethbridge* v. *Mytton*(1), *Carr* v. *Roberts*(2), *Loosemore* v. *Radford*(3), *Hodgson* v. *Wood*(4), and *Ashdown* v. *Ingamells*(5) are clear authorities in favour of the contention that the measure of damages to which the plaintiff is entitled is the sum payable by the defendant to Ramanathan Chetti. We think we should follow the rule laid down by these authorities in preference to the view suggested in 'Sidgwick on Damages,' volume II, section 789; especially as the Courts in this country can, in one and the same proceedings, give effect to any equitable considerations which in the special circumstances of a case render it necessary to attend to in the interest of persons in the position of the defendant here. No doubt as the plaintiff has not himself paid Ramanathan Chetti, it would be right and proper that, if damages be eventually awarded to the plaintiff, provision should be made in the decree to protect as far as practicable the interests of the defendant as a party who would be affected by Ramanathan Chetti's proceedings against the village of which the defendant is sub-lessee subject to the mortgage. What such provisions should be it is unnecessary to consider now.

With these observations, we must reverse the decree of the Subordinate Judge and direct the suit to be restored to the file and disposed of according to law. The costs will abide and follow the result.

(1) 2 B. & Ad., 772. (2) 5 B. & Ad., 78. (3) 9 M. & W., 657.
(4) 33 L. J., Ex., 76. (5) L.R., 5 Ex. D., 280.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Michell.

PERUMBRA NAYAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SUBRAHMANIAN PATTAR AND OTHERS (DEFENDANTS NOS. 2, 1 AND 3), RESPONDENTS.*

1899. October 24.

Civil Procedure Code—Act XIV of 1882, *ss.* 562, 564—Ex parte *decision in Court of First Instance after hearing plaintiffs' evidence—Order by Appellate Court reversing decree and remanding suit for decision after hearing further evidence —Validity of such an order.*

One of three defendants failed to appear at the final hearing of a case at the Court of a District Munsif, and the other two, though they appeared, adduced no evidence. The District Munsif, after hearing witnesses for the plaintiffs, passed a decree in their favour, as prayed. The absent defendant applied, unsuccessfully, under section 108 of the Code of Civil Procedure, that the decree might be set aside, and then appealed to the Subordinate Judge, who reversed the decree and remanded the suit for decision after taking such further evidence as the said defendants or other parties might produce. On its being contended that, under sections 562 and 564 of the Code of Civil Procedure, the Subordinate Judge had no power to remand the suit for re-trial:

Held, that notwithstanding sections 562 and 564 an Appellate Court has inherent power, in such a case, not only to reverse a decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a re-trial of the case.

SUIT to recover possession of a forest. Before the District Munsit, eight witnesses were examined and various exhibits filed for the plaintiffs. The three defendants put in written statements but only the first and third appeared, and they adduced no evidence. The vakil who had been retained by the second defendant at the first hearing said that he had no instructions. The Munsif decreed as prayed. The second defendant applied under section 108 of the Code of Civil Procedure that the *ex parte* decree against him might be set aside, but this was refused. He then appealed to the Subordinate Judge, who reversed the decision of the Munsif on the ground that it had been formed without taking the second defendant's evidence, and sent the case back for adjudication on the merits after

* Civil Miscellaneous Appeal No. 35 of 1899 against the order of O. Chandu Menon, Subordinate Judge of South Malabar, in Appeal Suit No. 605 of 1898, remanding Original Suit No. 146 of 1897 on the file of the District Munsif of Nedunganad for re-trial.

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taking such evidence as second defendant or the other parties might produce.

Against that order the plaintiffs preferred this appeal, on the ground that the Court had erred in reversing the decree of the Court of First Instance and remanding the suit for a fresh decision when it had not been disposed of on a preliminary point; and that the order was in contravention of sections 562 and 564 of the Code of Civil Procedure.

Appu Nedungadi for appellants.

Sundara Ayyar for respondents.

JUDGMENT.—The appellants' vakil contends that the lower Appellate Court had no power under sections 562 and 564 of the Civil Procedure Code to remand the suit for retrial, and that therefore the order appealed against is wrong. It is true the remand in this case was not made on grounds which come within the language of section 562, Civil Procedure Code, which provides for a case where there has been a decision upon a preliminary point which is reversed by the Appellate Court. But we think that notwithstanding those sections an Appellate Court has inherent power in a case such as the present not only to reverse a decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a re-trial of the case. For it has that power on an appeal against an order passed on an application under section 108 of the Civil Procedure Code refusing to set aside an *ex parte* decree and it can hardly be supposed therefore that if on an appeal against such an *ex parte* decree it considers that the decree ought to be set aside and a re-trial had it has not the same power. We are of opinion therefore that the order of the Subordinate Judge, which does not purport to be under section 562 or any other particular section of the Civil Procedure Code, was within his powers. The appellants' vakil sought in the course of his argument to raise the contention that the lower Appellate Court could not go into the question whether the *ex parte* decree of the Munsif ought to be set aside, because the order of the Munsif made subsequently to his decree and refusing to allow second defendant's application under section 108, Civil Procedure Code, was not appealed against. But this point was not raised in the grounds of appeal to this Court, nor before the lower Appellate Court and we cannot permit it to be raised now. The appeal therefore fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Michell.

SESHAN PATTAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

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

1899. October 30

Civil Procedure Code—Act XIV of 1882, ss. 562, 568, 569—Additional evidence by Appellate Court—Invalidity of order reversing decree of lower Court on account of exclusion of evidence.

A trial took place in the Court of a District Munsif, who heard evidence, decided issues and passed a decree. On an appeal being preferred the Subordinate Judge reversed the decree and remanded the suit for re-trial on the ground that certain documentary evidence which had been tendered by a defendant had been excluded, and plaintiffs' witnesses who had been cited in the list had not been wholly examined. On an appeal being preferred against that order:

Held, that section 562 of the Code of Civil Procedure was inapplicable to such a case; and that the proper and only legal course for the Subordinate Judge to take under the Code of Civil Procedure was to act either under section 568 or section 569, by himself taking the evidence which he considered to have been wrongly excluded, or to direct the District Munsif to take it.

Perumbra Nayar v. Subrahmanian Pattar, (I.L.R., 23 Mad., 445), distinguished.

SUIT for the return of a sum advanced by plaintiffs in respect of goods not supplied, and damages for the non-delivery. The District Munsif decreed in plaintiffs' favour. The defendants preferred separate appeals to the Subordinate Judge, first defendant complaining that certain evidence tendered by him at the hearing had not been taken. It appeared also that the plaintiffs' witnesses cited in the list had not been wholly examined. The Subordinate Judge, considering that he was unable to dispose of the cases unless the evidence were taken by the lower Court, set aside the judgment and ordered the Munsif to receive all the evidence and pass a decision in the suit.

Plaintiffs preferred this appeal.

Anantakrishna Ayyar for appellants.

Subrahmania Sastri and *Appu Nedungadi* for respondents.

* Civil Miscellaneous Appeal No. 130 of 1898 against the order of O. Chandu Menon, Acting Subordinate Judge of South Malabar, in Appeal Suit No. 360 of 1898, reversing the decree and remanding Original Suit No. 356 of 1897 on the file of the District Munsif of Temelprom.

SESHAN PATTAR v. SESHAN PATTAR.

JUDGMENT.—In this case the Subordinate Judge reversed the District Munsif's decree and remanded the case for re-trial, simply on the ground that certain documentary evidence, which first defendant desired to produce, was excluded by the District Munsif, and plaintiffs' witnesses cited in the list were not wholly examined. It was not the case that any issue which ought to have been framed had not been framed, or that any issue framed had not been tried. There had been a trial and adjudication by the District Munsif on the evidence taken and the issues had been decided and decree passed. Section 562 of the Civil Procedure Code was obviously inapplicable to this case. The proper and only legal course under the Civil Procedure Code for the Subordinate Judge to take was to act either under section 568 or section 569 of the Civil Procedure Code by himself taking the evidence which he considered to have been wrongly excluded or directing the District Munsif to take it. This is not a case to which the decision in *Perumbra Nayar* v. *Subrahmanian Pattar*(1), cited to us by the respondents' vakil (in which this Court held that where a decree passed in a suit tried *ex parte* is appealed against, the Appellate Court has the same power to reverse the decree and order a re-trial of the suit as it has in an appeal against an order rejecting an application under section 108 of the Civil Procedure Code) applies. Nor can we accede to the contention of the respondents' vakil that the action of the Subordinate Judge in this case was a mere irregularity within the meaning of section 578 of the Civil Procedure Code. We must therefore allow this appeal and reverse the order of the Subordinate Judge appealed against, and direct that the appeal to him be restored and disposed of by him according to law. Costs will abide and follow the result.

(1) I.L.R., 23 Mad., 445.

APPELLATE CIVIL.

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

VYTHILINGAM PADAYACHI (DEFENDANT), APPELLANT,

v.

SITHARAM AYYAR (PLAINTIFF), RESPONDENT.*

1899. December 15, 18, 19. 1900. January 23.

Transfer of Property Act—Act IV of 1882, *s.* 135(*d*)—"*Judgment of a competent Court*"—"*Actionable claim*"—*Suit by assignee of a foreign judgment—Consideration smaller than amount of judgment-debt—Decree for whole amount.*

The assignee of a judgment for Rs. 12,297 passed against the defendant by the Supreme Court of Mauritius sued in a Court in British India to recover the amount of the judgment with interest. Defendant, amongst other defences, contended that the transfer was not supported by consideration; and the Subordinate Judge, finding as a fact that only Rs. 5,500 had been paid therefor, held that the foreign judgment was an actionable claim within the meaning of section 135 of the Transfer of Property Act, and decreed in plaintiff's favour for that amount only, with interest. On appeals being preferred to the High Court:

Held, that the plaintiff was entitled to recover the whole amount of the judgment. *Semble*, the word "judgment" in clause (*d*) of section 135 of the Transfer of Property Act includes a foreign judgment.

SUIT to recover Rs. 12,297, with interest, due under a decree passed by the Supreme Court of Mauritius against the defendant and in favour of one Nagammal, who had transferred the same to plaintiff. Plaintiff alleged that the husband of the said Nagammal had traded in partnership with defendant in Mauritius, having invested Rs. 8,000 in the business; that upon his death his widow Nagammal sued defendant for her husband's capital and profits and obtained the judgment for Rs. 12,297, now sued upon, which was transferred to plaintiff, the defendant being notified of the transfer. Defendant denied that Nagammal's husband brought capital to the firm, and said that by his fault prior to his death the firm lost large quantities of goods and became insolvent in consequence, its liabilities and those of the partners individually being liquidated with the assets. He further pleaded that the judgment of the Supreme Court of Mauritius was not binding on him as it was not passed on the merits of the case; that it was procured by fraud; and that the transfer was not supported by consideration

* Appeals Nos. 54 and 76 of 1899 against the decree of T. Ramasami Ayyangar, Subordinate Judge of Kumbakónam, in Original Suit No. 10 of 1897.

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and that the suit had been launched as speculative litigation. The Subordinate Judge found that the judgment had been passed upon the merits; that there was no fraud; and that the assignment was supported by consideration to the extent of only Rs. 5,500. The sixth issue was, "if it be proved that plaintiff has paid only a portion of the consideration mentioned in the assignment, whether he can sue for anything more than that having regard to section 135 of Act IV of 1882?" On this he said:—"The judgment sued upon in this case was passed by the Supreme Court of Mauritius, and it is nothing more than a simple money bond in India, and, as such, it is an actionable claim within the meaning of section 135 of the Transfer of Property Act. According to the Full Bench ruling in *Nilakanta* v. *Krishnasami*(1), plaintiff is entitled to recover from defendant only Rs. 5,500, the actual price for the assignment with interest thereon and incidental expenses. It is argued for the plaintiff that the clause (*d*) of section 135 of the Transfer of Property Act renders the provision of that section inapplicable to the assignment of the foreign judgment, and that plaintiff is therefore entitled to realize the whole amount of his claim. I think the argument is not sound. If the word 'judgment' in the clause (*d*) was intended to include judgments of foreign Courts the Legislature would have expressly so stated. Foreign judgments are merely simple contracts for the purpose of transfer in British India. The Transfer of Property Act was passed for British India. In the Act so passed, the Legislature could not have used the word 'judgment' in the sense that it should include foreign judgment. Clause (*d*) of section 135 is, I think, applicable to cases in which the original creditor had, before making the transfer, obtained a judgment upon the actionable claim, or had ecuted the claim up to the stage at which the Court was ready ronounce judgment. As a debt which has become the subject decree is no longer an actionable claim, the word 'decree' is ded, and the word 'judgment' has been used in clause (*d*) ection 135 so as not to include foreign judgments. If the judgment is intended to include foreign judgments, then ion 135 is inapplicable to transfers of foreign judgments, and assignee in such cases will be entitled to recover the entire unt of his claim. In *Sivaraman Chetti* v. *Iburam Saheb*(2), it

(1) I.L.R., 18 Mad., 225.

(2) I.L.R., 18 Mad., 327.

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has been held that a British Court can disallow an item of claim allowed by the foreign Court. It is clear from this that a foreign judgment is not looked upon in British India as a judgment, but only as a simple contract. If it is a simple contract the clause (*d*) would not apply." He decreed in plaintiff's favour for Rs. 5,500 with interest from the date of transfer to that of realisation.

Plaintiff and defendant each preferred appeals.

Sundara Ayyar, (*Ramachandra Ayyar* with him), for defendant-appellant:—Defendant is a British subject domiciled in India, though he was trading in Mauritius. On that ground I contend that the Mauritius Court had no jurisdiction, and its decision is not binding on the defendant. It is submitted that the judgment was not passed on the merits (though the Subordinate Judge finds that it was) and proceeded more like an order for contempt of Court. A judgment passed as a penal process is not one on the merits of the case. The fact that there are so many conditions to be fulfilled under section 14 of the Code of Civil Procedure shows the uncertainty; and the question arises whether that section contemplates Courts that are competent and foreign. Moreover, this judgment is an actionable claim under section 135 of the Transfer of Property Act, and plaintiff is not entitled to recover under it more than he paid. In section 135, the words "Civil Court" do not mean a Civil Court of a foreign country. Throughout the whole chapter "Court" must be taken to mean "Municipal Court" and not a foreign one. Compare the use of the word in section 130 which supports that view. The transaction is such that a Court of Justice will not go into it. *Hawksford* v. *Giffard*(1) shows that a foreign judgment is only evidence of a debt, and not conclusive or enforceable here. Judgments in this country are enforced merely because they are judgments, *i.e.*, on themselves, and the Courts do not look into the merits. They accept them as conclusive and as only removeable if obtained by fraud. But foreign judgments are only evidence of a debt, and are examined to see if they are in accord with natural justice. They may be treated as a species of estoppel from denying a debt, or as evidence of an obligation. The Courts compel a defendant to obey such an obligation if proved, but they do not accept the judgment as conclusive of it. It is further submitted that the judgment is opposed to public policy and

(1) L.R., 12 App. Cas., 122.

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should not be enforced. The transaction was champertous, *James* v. *Kerr*(1). Though it is the technical law of England regarding champerty, the principle exists here that persons must not intermeddle with the litigation of others. *Fischer* v. *Kamala Naicker*(2); *Grose* v. *Amirtamayi Dasi*(3); *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*(4); and though *Siva Ramayya* v. *Ellamma*(5) shows that mere inadequacy of consideration is not necessarily champertous, here the amount paid by plaintiff is very small; moreover, other payments he was bound to make were only contingent. He had to do certain things if he succeeded; which amounts to an interest in the litigation. Injury to others is another element of champerty, *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*(4). The test of champerty is—was it plaintiff's object to acquire an interest in property or an interest in mere litigation, or were the promises to be performed only if the litigation succeeded. *Tara Soonduree Chowdhrain* v. *The Court of Wards*(6) shows that the litigation need not necessarily be unrighteous to establish champerty. See *Chunni Kuar* v. *Rup Singh*(7), and *Grose* v. *Amirtamayi Dasi*(3). Though no single test is comprehensive, the nature of litigation, motive, &c., may be taken together as evidence of it. [SUBRAHMANIA AYYAR, J.—referred to *Walmsley* v. *Walmsley*(8).]

Mr. *W. Barton*, (Mr. *K. Brown* and *Kuppusami Ayyar* with him), for plaintiff-respondent:—With reference to section 135 of the Transfer of Property Act, the section deals with an actionable claim, but a decree is not an actionable claim, *Afzal* v. *Ram Kumar Bhudra*(9). If a foreign judgment is an actionable claim, it cannot be governed by section 135 at all, because of clause (*d*) the word judgment there being equally applicable to a foreign judgment. Regarding the contention that the sale to plaintiff was champertous, the conditional nature of the agreement of sale to plaintiff does not make it so. The agreement really amounted to a novation. It is submitted that plaintiff was entitled to recover the whole amount sued for.

JUDGMENT.—The plaintiff, as the assignee of a judgment passed by the Supreme Court of Port Louis in Mauritius in favour

(1) L.R., 40 Ch. D., 449. (2) 8 M.I.A., 170. (3) 4 B.L.R., (O.C.), 1.
(4) L.R., 4 I.A., 23; I.L.R., 2 Calc., 233 at p. 249. (5) I.L.R., 22 Mad., 310.
(6) 20 W.R., (C.R.), 446. (7) I.L.R., 11 All., 57. (8) 3 J. & L., 556.
(9) I.L.R., 12 Calc., 610.

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of one Nagammal for Rs. 12,297 against the defendant, brought this suit for the recovery of the amount with interest. The defendant contested the claim and the questions raised at the trial were:—(1) Was the judgment one passed on the merits? (2) Was it obtained by fraud? (3) Was the plaintiff entitled to recover the amount due under the judgment without reference to the price actually paid by him for obtaining the assignment? and (4) What amount, if any, was so paid?

The Subordinate Judge decided the first question in the affirmative and the second and third questions in the negative. As to the fourth he found that the plaintiff had paid Rs. 5,500.

He gave a decree for that sum with interest on a part thereof and for the expenses incidental to the assignment.

The plaintiff and the defendant appeal against the decree in so far as it is against each.

It will be convenient to take the appeals together and deal with the questions raised in order.

It was first urged for the defendant that the Court in Port Louis had no jurisdiction to entertain the suit instituted by Nagammal. But, assuming that the defendant was originally not subject to the jurisdiction of that Court, he having appeared in the suit without raising the plea of want of jurisdiction and contested it on other grounds, he must be held to be precluded in the present suit from relying on the present objection.

The next contention on behalf of the defendant was that the Subordinate Judge was in error in holding that the judgment sued upon had been passed on the merits. The important point which arose on the merits before the Port Louis Court was as to the liability of the defendant to account to Nagammal in respect of his management of the business carried on by him in partnership with certain others, of whom Nagammal's deceased husband Nagappan was one. That that point was fully considered and directly decided is manifest from the record of the proceedings exhibited in the present case. And as to the actual relief granted by the judgment in question the amount made payable thereby was not, as suggested for the defendant, in the nature of a penalty inflicted for contumacy on the defendant's part, but awarded as the amount which, in the special circumstances of the case, the Court was entitled to take as due to Nagammal. For, the defendant having failed to file accounts connected with his management

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as ordered by the Court and it having been admitted that Rs. 8,000 had been paid by Nagappan for his share of the capital, it was open to the Court to presume that that amount at least was repayable to Nagappan's representative. Compare *Walmsley* v. *Walmsley*(1). The contention under consideration is therefore unsustainable. And as there is absolutely no ground for suggesting that there was any fraud in obtaining the judgment, it must be held to be valid and supportable on the merits also even if it be a judgment into the merits of which it is open to the Courts of this country to enter on the ground that the foreign Court which passed it was, as urged for the defendant, not a Court of Record established by Letters Patent from Her Majesty or any predecessor of Her Majesty—a point which it is unnecessary to consider.

Passing now to the assignment under which the plaintiff claims, the first question for determination is whether the transaction is opposed to public policy in the manner explained by the Judicial Committee in *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee*(2). It was not suggested that the plaintiff had obtained the assignment from Nagammal by fraud or undue influence. Nor could it be rightly argued that the transaction was entered into for injuring the defendant by stirring up unrighteous litigation, inasmuch as the right transferred by the assignment had, after contest, been established before a judicial tribunal. The fact that the assignee undertook to make certain payments to the assignor and others only in the event of his recovering the money due by the defendant under the judgment would by itself hardly warrant the plaintiff being looked upon as a mere gambler in litigation. The assignment cannot, therefore, be held to be void.

The second important question is whether the assignee is entitled to the whole amount decreed by the Mauritius Supreme Court or only to that which he had paid, if any. This question was argued as though it depended solely on the construction to be placed on clause (*d*) of section 135 of the Transfer of Property Act. It was argued for the assignee that the clause (*d*) is equally applicable to foreign judgments while on the debtor's side it was argued that the Court in section 130 and in section 135, clause (*d*), must refer only to Courts in British India, and if the judgment be not one of a Court in British India, the assignee is entitled under

(1) 3 J. & L., 556.

(2) L.R., 4 I.A., 23; I.L.R., 2 Calc., 233.

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the former part of section 135 only to the amount paid by him together with incidental expenses. In contending thus it seems to have been assumed by both sides that the provisions of the Transfer of Property Act with reference to transfer of actionable claims would be applicable to assignments of the kind here.

The chapter on actionable claims and especially section 135 in it has given rise to many conflicting decisions. It is not clear, when a claim had been adjudicated upon by a Court of competent jurisdiction, whether the right under the judgment is an actionable claim. However, we are bound to start from the position laid down by the Full Bench in *Nilakanta* v. *Krishnasami*(1) that the right under a judgment of a Court in British India is an actionable claim. It would seem to follow *a fortiori* that the judgment of a foreign Court is also an actionable claim.

So far as we are aware, there does not seem to be any express decision determining the rights and liabilities of the parties in a case like the present, *i.e.*, of an assignee of a judgment obtained elsewhere but assigned in this country. The question is not free from difficulty. Now, looking for a moment at the right acquired by Nagammal under the judgment of the Mauritius Supreme Court and considering it as standing in this country on no higher footing than a contractual right with a corresponding obligation on the defendant, it is not clear, when the right was assigned in this country, what the law is which governs the assignment not only between the assignor and the assignee, but also between the assignee and the debtor. While the views of continental jurists are in themselves divided (see Bar's 'Private International Law,' 608 and 609, 2nd edition), the trend of judicial opinion in England seems to be that the validity of the assignment must be regulated by the law of the *lex situs* of the debt and the liabilities of the debtor by the law governing the contract between him and the creditor. See Dicey's 'Conflict of Laws,' rule 141, page 533. In the case of judgment-debts, so far as any locality can be ascribed to them, they are generally deemed to be incurred in the place where the judgments were passed and where they would be executed, and consequently the law of that place must regulate the liabilities of the judgment-debtor, wherever the assignment might have been made and the debtor cannot seek to lessen his

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

liability, as it cannot be increased, by recourse to the law of the place of assignment. In this view, the law of Mauritius would apply and the defendant would be bound to pay the whole amount as decreed by the Supreme Court at Mauritius.

However this may be, we shall assume that the provisions of section 135, Transfer of Property Act, apply to a case like the present. It is difficult to see how, even then, the defendant can escape his liability to pay the full amount of the judgment-debt. Now the ground on which a judgment of a foreign Court is enforced in this country is that a duty or obligation is imposed upon the defendant to pay the sum adjudged which the Courts of this country are bound to enforce. And considering that judgments of foreign Courts cannot be re-opened here on the merits except in certain cases, nor examined except for certain specified reasons, they are, in the absence of any such reasons, conclusive of the merits of the cause of action and of all facts of which a domestic judgment would be conclusive. Such being the effect of foreign judgments under the rules of private international law, we have to see whether, when such a judgment is assigned in this country, there is any thing in the Transfer of Property Act which will relieve the debtor from paying more than the price paid by the assignee of the judgment; in other words, any thing to minimise the effect of foreign judgments. It is true that ordinarily legislation of a country is territorial. But there is also a rule of interpretation that the statute of a country must be so interpreted and applied as not, in the absence of express and clear language to the contrary, to run counter to the recognised rules of international law, and all general terms must be narrowed in order to avoid such a construction (see Maxwell on the 'Interpretation of Statutes,' 3rd edition, page 200). If the words, however, are wide enough and the giving effect to them in their wide sense would be in harmony with rules of international law, there seems to be no reason why the words should not be given such effect. It would follow, therefore, that 'judgment' in clause (*d*) may well include foreign judgments.

Moreover, the foundation on which the rule embodied in section 135 rests, viz., the preventing of commerce in litigation to the detriment of the debtor, is inapplicable to the present case. The partnership was entered into in Mauritius and the business was carried on there. When the suit was brought in the Supreme

Court of Port Louis by Nagammal claiming her husband's share in the partnership property the defendant contested it and did everything to defeat the claim of Nagammal, and a valid judgment was passed by the Supreme Court on consideration. Having taken the chance of a judgment in his favour, the defendant cannot now, by flying to this country, evade the payment of the judgment-debt whether it is to the judgment-creditor or to his assignee. There is nothing oppressive or inequitable to the debtor in calling upon him to pay the full amount of the judgment-debt. We would, therefore, hold that the assignee is entitled to the whole amount.

As, however, this case may not stop here, and, in case the above view is overruled, it would be necessary to go into the fourth issue, *i.e.*, as to the amount actually paid by the assignee, we would state our conclusion as to it also. The only item as to which there is any evidence apparently reliable is the sum of Rs. 2,000 recited in the deed of assignment as paid to Nagammal. As the evidence of the attesting witness called by the defendant himself implies that the said sum was understood to have been paid, the Subordinate Judge seems to be warranted in accepting the testimony of the plaintiff's witnesses who speak to this payment. But as to the item of Rs. 3,500 which also was found by the Subordinate Judge to have been paid, the evidence is altogether meagre and unsatisfactory. Chinnasami Nayak, who is said to have received the money, is the only one that speaks to the payment. His statement that his deceased brother had advanced Rs. 3,000 to Nagammal can hardly be believed, considering that the promissory note said to have been executed by Nagammal's brother in connection with such advance has neither been produced nor its non-production accounted for. And the fact that the vouchers which Chinnasami Nayak says he gave to the plaintiff with reference to the alleged payment have been kept back by the plaintiff throws grave doubt upon this part of his case. That all the sums, other than Rs. 2,000, which the plaintiff agreed to pay under the assignment, inclusive of the Rs. 3,500 in question, were, according to the real understanding come to at the time of the assignment, to be paid by him only in the event of his recovering the money from the defendant, is shown by the evidence of Nagammal herself who was manifestly supporting the plaintiff. It is consequently highly improbable that the plaintiff would

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have paid or made himself unconditionally responsible for any of these sums as now alleged on his behalf. He must, therefore, be held to have paid only the sum of Rs. 2,000 paid to Nagammal and the sum of Rs. 200 which was no doubt disbursed by him on account of the cost of the stamp paper, &c., in connection with the assignment.

Having regard, however, to the view already stated with reference to the contention founded on section 135, clause (*d*), Transfer of Property Act, we modify the decree of the lower Court by awarding to the plaintiff Rs. 12,297, with interest thereon at 6 per cent. per annum from the date of the plaint to the date of payment, allowing, so far, the plaintiff's appeal with costs. We dismiss the defendant's appeal with costs.

APPELLATE CIVIL.

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

1899. December 19, 20, 21, 22. 1900. January 22, 23, 25, 26.

MURUGESA CHETTI (DEFENDANT No. 1), APPELLANT,

v.

ANNAMALAI CHETTI AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 17—*Suit on a foreign judgment—"Carrying on business" within the jurisdiction—Business carried on by the managing member of a Hindu family—"Principal and agent" with reference to section* 17 *of Civil Procedure Code—Application of Civil Procedure Code to non-resident foreigner.*

Plaintiff having obtained judgment against defendant in a suit on a bond in the Civil Court at Pondicherry, sued him on the said judgment in a District Court in British India. The date of the foreign judgment was 20th March 1896, and that of the suit in British India, 9th October 1896; but in the meanwhile, namely, on 20th July 1896, defendant had been declared an insolvent in Pondicherry, and a syndic had been appointed to take charge of and administer his property. The ground of jurisdiction relied on by plaintiff was that defendant was carrying on a business within the jurisdiction of the District Court, the said business being conducted by his cousin; and that, the cousin being the manager of a Hindu family, the presumption was that the business was carried on with the consent of the defendant as well as for his benefit:

Held, that the District Court had no jurisdiction to entertain the suit. Inasmuch as defendant and his cousin had, as a fact, become partially divided

* Appeal No. 21 of 1899 against the decree of W. F. Grahame, District Judge of South Arcot, in Original Suit No. 17 of 1896.

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prior to the commencement of the business, and as there was no evidence of his consent, the presumption contended for could not arise. But even if the facts had been otherwise, and the defendant had been entitled to claim an interest in the business on the ground that it was carried on by one who was the managing member of his family at the time, defendant would not be "carrying on business" within the meaning of section 17 of the Code of Civil Procedure. To bring a principal within the operation of section 17, the person acting as the agent within the jurisdiction should be an agent in the strict and correct sense of the term.

Semble, that a member of a joint family who actually consents to a trade being carried on within the jurisdiction on his behalf, or by his conduct puts himself in the position of a joint trader, carries on business within, though he may live outside, the jurisdiction.

By section 443 of the Code de Commerce the effect of an adjudication of insolvency in French territory is to deprive the insolvent of the possession and management of his property, which is entrusted to a syndic, against whom alone all suits in respect thereof must be brought:

Held, that though the debt of an insolvent might not be extinguished by such a declaration of insolvency, so as to exempt him from future liability in respect of property which he might subsequently obtain, no suit could be brought against him in French territory, and, for that reason, outside French territory, so long as the adjudication of insolvency remained in force. *Quelin* v. *Moisson*, (1 Knapp., 265n), followed.

Whether section 17 of the Code of Civil Procedure should be construed so as to exclude from its operation non-resident foreigners, even though they carry on business in British India through agents; and, if such construction be inadmissible, whether the said section of the Indian Legislature should be held with reference to such foreigners to be *ultra vires*.—*Quære*.

SUIT to recover a sum of money upon a French judgment. Plaintiff alleged that he had instituted a suit against defendants in the Pondicherry Civil First Tribunal or Court in respect of a bond executed to him by first defendant at Pondicherry, in French territory, on 4th January 1896; and for the balance that remained due on 20th February 1896, as per the accounts of dealings between the parties; that the proceedings in the said suit had been conducted by the French Civil Court according to law, and in the end a decree had been passed, on 17th March 1896, directing that defendant should pay plaintiff Rs. 13,968-5-3, being the balance due on the bond, with interest thereon; and Rs. 688-8-0 being the balance as per the settlement of accounts, also with interest thereon, and costs. Plaintiff further alleged that proceedings had been conducted by the French Court to execute the said decree and to collect the said amount, and that a certificate had been issued by the French Court on 27th June 1896 to the effect that defendant had no sufficient funds in French territory for the collection of any portion of the said decree amount. He alleged that

first defendant was collecting the incomes of extensive landed properties belonging to him in Cuddalore and other places in British India and within the jurisdiction of the Court in which the suit was filed; and that he was also carrying on a money-lending business in the said places. At the trial, evidence was adduced to show that first defendant had been carrying on an oil business with his cousin, one Kandasami. The cause of action was described as having arisen at Pondicherry on 17th March 1896, the date of the decree of the French Court.

First defendant contended that the Court had no jurisdiction to entertain the suit and that it was not maintainable, that no part of the cause of action had arisen within the Court's jurisdiction and that defendant had never resided there or carried on trade or worked either by himself or through his agent, or collected income within such jurisdiction. Defendant described himself as a permanent resident of Pondicherry, which was French territory: and claimed that he was not in any way subject to the Court's jurisdiction. He further stated that his properties had been delivered to a receiver and that plaintiff would have been entitled only to a dividend, according to justice administered in French Courts, like other creditors *holding simple debt bonds*. He also said that the decree had been passed on 17th March 1896, *ex parte*, on a promissory note fraudulently obtained by plaintiff; and that the firm of which defendant was a member had been declared bankrupt on 20th July 1896, the insolvency dating as from 8th January 1896. He claimed that according to French law all transactions entered into by an insolvent debtor and all decrees obtained against him from a date ten days prior to the 8th January 1896 had become null and void; and that this suit, which was based on the French decree, which had become null and void, should be dismissed. The second defendant, the receiver of the first defendant's properties, set up a like defence as to the effect of the insolvency under the French law.*

* Article 443 of the 'Code de Commerce' is as follows:—"Le jugement declaratif de la faillite emporte de plein droit, à partir de sa date, dessaisissement pour le failli de l'administration de tous ses biens, même de ceux qui peuvent lui échoir tant qu'il est en état de faillite.—A partir de ce jugement, toute action mobiliére ou immobiliére ne pourra être suivie ou intentée que contre les syndics.—Il en sera de même de toute voie d'exécution tant sur les meubles que sur les immeubles.—Le tribunal, lorsqu'il le jugera convenable, pourra recevoir le failli partie intervenante."

The District Judge decreed in favour of the plaintiff. Issues were framed as follows:—"(i) Is this Court prevented from entertaining the suit by reason of the cause of action not having arisen and defendant not being resident or carrying on business within its jurisdiction? (ii) Did or did not the defendant reside or carry on business within the jurisdiction of this Court on the date when cause of action arose? (iii) Was the French judgment on which the suit has been brought, according to French law null and void on the date of suit, and is the present claim based on the French judgment therefore not sustainable in this Court? (iv) Is it open to the defendant to raise the contention in this suit that the promissory note on which the French judgment was passed was obtained from the defendant by the plaintiff fraudulently? (v) And if so, was the promissory note obtained by the plaintiff from the defendant fraudulently? (vi) What is the relief, if any, that the plaintiff is entitled to?"

The first two issues were alone contested before the District Judge who, in the course of his judgment, said:—"It is not denied that at the time when this suit was instituted first defendant and his cousin Kandasami were undivided, or that the family owned a considerable quantity of immoveable property in the jurisdiction of this Court, of which one-half belonged to first defendant. It was also not denied that a trade in oil was carried on in Cuddalore Old Town, but it was contended that that trade belonged exclusively to first defendant's cousin Kandasami and that first defendant had absolutely no concern in it. It has not been argued that first defendant may not be or is not entitled to a share in the profits of that oil trade. In argument by first defendant's pleader it seemed to me that he failed to make out that first defendant was not entitled to a share in the profits of the oil trade, but he contended that even if first defendant was entitled to a share in the profits that fact, if a fact, did not prove that the trade was carried on for his benefit or by his cousin as his agent. I must hold that if he has been or is entitled to a share in the profits of that trade, first defendant must be held to have carried on a trade within the meaning of section 17, Civil Procedure Code." He held on the evidence that first defendant did carry on business within the jurisdiction of the Court at the time when the suit had been instituted even if he did not himself at any time personally take any part in carrying on that business,

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and that the evidence showed that first defendant did personally sometimes take a part in carrying on the business, and that at other times the business was carried on by his cousin Kandasami, who must be held to be the agent of first defendant with reference to first defendant's share of the business. He relied on *Muthaya Chetti* v. *Allan*(1) and *Girdhar Damodar* v. *Kassigar Hiragar*(2).

Defendant No. 1 preferred this appeal.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*), *V. Krishnasami Ayyar*, *Desikachariar*, and *S. Srinivasa Ayyangar* for appellant.

Hon. Mr. *E. Norton*, *Seshagiri Ayyar*, *Sundara Ayyar*, and *Tirunarayanachariar* for respondent No. 1.

V. Krishnasami Ayyar:—The suit is one *in personam* against defendant, the cause of action being a decree of a French Court. Section 14 of the Code of Civil Procedure contemplates that the suit may be brought on the principal judgment or on the original cause of action. The explanation shows that. See also Explanation VI to section 13. The judgment could, however, be pleaded in bar to a suit on the original cause of action, so the alternative is in practice ineffective. Apart from section 14, it would be competent for a defendant to plead what the section lays down, *i.e.*, that the judgment was obtained by fraud, or not obtained on the merits, or not in accordance with the rules of international law. These rules in section 14 are adopted by the Legislature, and they must be taken in their widest sense as applicable to both parties. The jurisdiction of the Court depends on section 17 of the Code; plaintiff claims it on the ground that defendant carries on business in the jurisdiction, but he fails to prove it. *Modhu Soodun Chowdhry* v. *Cochrane*(3) shows that when the cause of action arises in a Court other than that in which suit is brought, plaintiff must show how the case is within the Court's jurisdiction. The evidence of the plaintiff here shows that a business was being carried on for the family. One Kandasami, who is said to be the managing member of defendant's family, was carrying on a business, and it was alleged that since defendant was a member of Kandasami's family he was "carrying on business" within the meaning of the

(1) I.L.R., 4 Mad., 209. (2) I.L.R., 17 Bom., 662.
(3) 6 C.L.R., 417.

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section. But plaintiff should have shown that defendant himself carried on business or resided within the jurisdiction; and he has not done so. Even supposing Kandasami Chetti was the managing member of defendant's family and was carrying on a business and using family funds, so that defendant had an interest in the business, it is submitted that that would not bring defendant within section 17. A manager dealing with family property is not an agent acting on behalf of the other members, but is a principal, *Chalamayya* v. *Varadayya*(1). The facts do not bring defendant within the cases decided under section 17 with reference to carrying on business through an agent. Defendant's adjudication as a bankrupt having effect as from 8th January 1896 he could no longer be the owner of any business—as it would have vested in his syndic under the French law. At the date of this suit, first defendant was a bankrupt. Regarding the vesting of a bankrupt's property in his syndic, see Westlake's 'Private International Law,' rule 134, page 152, as to the effect in England, and page 142 as to the effect of continental bankruptcies. Also Dicey's 'Conflict of Laws,' rule 108, page 444; and Foote's 'International Law,' page 308. In the case there cited, Lord Romilly considered the domicile as important, but here the first defendant had French domicile—or at any rate he permanently resided in Pondicherry, which amounts to domicile. *Folliott* v. *Ogden*(2) and *Sill* v. *Worswick*(3) shows that since personal law follows the person, the English Courts always recognise foreign assignments in insolvency. See Phillimore's 'International Law,' volume IV, page 616; also *In re Artola Hermanos*(4). The judgment of the Court of the domicile is what is looked to. It is conceded that first defendant did not begin a new business after his insolvency; and whatever interest he might have had in the existing business prior to insolvency must have passed to his syndic. See *Rangayya Chetti* v. *Thanikachalu Mudali*(5). Under section 17, the cases show that where a defendant carries on business by agents he must have an effective control over it to come within the section. In *Chinnammal* v. *Tulukannatammal*(6) (decided under clause 12 of the Letters Patent) defendant sold paddy in Madras by an agent who

(1) I.L.R., 22 Mad., 166. (2) 1 Bl. H., 124, at p. 131.
(3) 1 Bl. H., 665, at p. 690. (4) L.R., 24 Q.B.D., 640 at p. 649.
(5) I.L.R., 19 Mad., 74. (6) 3 M.H.C.R., 146.

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sold it from carts. It was held not to be a carrying on business within the jurisdiction. See also *Subbaraya Mudali* v. *The Government*(1), *Muthaya Chetti* v. *Allan*(2), and *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee*(3) relating to the same words in the Small Cause Courts Act. Also *Khimji Chaturbhuj* v. *Sir Charles Forbes*(4) and *Kessowji Damodar Jairam* v. *Khimji Jairam*(5). *Girdhar Damodar* v. *Kassigar Hiragar*(6), which is apparently inconsistent, does not apply. Where a man carries on business by clerks or agents over whom he has effective control, no doubt he is liable under the section, but where a managing member carries on a business and possibly does so in spite of the wishes of other members of the family, he cannot be properly called an agent. Moreover, it is submitted that section 17 does not refer to foreigners at all, and only relates to persons in British India and regulates whether they are to sue in one Court or another. By international law a person subjects himself to jurisdiction either by domicile or residence—and Legislatures must be taken to legislate solely with reference to matters within their territorial limits. (*Gurdyal Singh* v. *Raja of Faridkot*(7).) I ask leave to file a certificate showing the French Nationality of the defendant. [Mr. *Norton* objected on the ground (1) that the identity of the person mentioned therein was not shown; (2) that under section 568 of the Code of Civil Procedure no substantial reason had been shown for the admission of new evidence; and (3) under section 74 of the Evidence Act.] [The certificate was filed.] Rule 13 of Dicey's 'Conflict of Laws' shows that permanent residence is presumptive evidence of domicile. *Queen-Empress* v. *Natwarai*(8), *Gurdyal Singh* v. *Raja of Faridkot*(7) shows that domicile or residence at the time of action gives jurisdiction. *Nalla Karuppa Settiar* v. *Mahomed Iburam Saheb*(9) shows that the words "carry on business" only refer to British subjects by reason of the rule referred to, namely, that Legislatures legislate only with regard to their own subjects; and their legislative enactments must be construed and regarded only from that point of view; though, of course, if a Legislature

(1) 1 M.H.C.R., 286.
(2) I.L.R., 8 Calc., 678 at p. 685.
(3) I.L.R., 12 Bom., 507.
(4) I.L.R., 4 Mad., 209.
(5) 8 Bom. H.C.R., 102.
(6) I.L.R., 17 Bom., 662.
(7) I.L.R., 22 Calc., 222 at pp. 236, 238.
(8) I.L.R., 16 Bom., 178 at p. 181.
(9) I.L.R., 20 Mad., 113.

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expressly disregards that rule of international comity, its Courts will be bound to follow what is enacted. In *Bhujbal* v. *Nanheju*(1), residence was the ground of the jurisdiction. *Macleod* v. *Attorney-General for New South Wales*(2) shows that the rule of construction of legislative enactments should be that they should be construed as conforming with international law. It is submitted that sections 16, 17 and 18 do not confer jurisdiction upon the Courts. That is done by section 11. Sections 16, 17 and 18 only deal with the distribution of jurisdiction amongst the Courts of British India. And in construing section 17 one must do so by the light of the well-recognised rule of international law. [SUBRAHMANIA AYYAR, J.—Suppose a man resides in every sense outside of the jurisdiction and comes daily to the jurisdiction, would you contend that he would be able to sue and not liable to be sued?] That is so, but a plaintiff submits to jurisdiction by filing his suit. *Le Mesurier* v. *Le Mesurier*(3), *Fritz Ohler* v. *Lavezzo*(4), and *In re Queensland Mercantile and Agency Company*(5) show that such sections as 16 and 17 relate only to the distribution of jurisdiction and do not confer jurisdiction. Moreover, statutes must be construed so as not to conflict with international law. *Russell* v. *Cambefort*(6) is no longer law, because the rule upon which it was decided has been altered, but the principle of the decision remains. It was a case of service out of the jurisdiction, and Cotton, L.J., points out that though an Act can give jurisdiction to a Court as against British subjects, it cannot apply to foreign subjects; and the Court also holds that enactments of Legislatures should be construed according to rules of international law. *St. Gobain, Chauny and Cirey Company* v. *Hoyermann's Agency*(7) (a decision passed on the same point after the rule was altered) follows Cotton, L.J., in the previous case. See also *Comber* v. *Leyland*(8), *In re Busfield*(9), *In re Anglo-African Steamship Company*(10) and *Hewitson* v. *Fabre*(11). The cases cited show that no foreigner is subjected to jurisdiction excepting by residence or domicile. They were decided on the rules of English Courts

(1) I.L.R., 19 All., 450.
(2) [1891] A.C., 455.
(3) [1895] A.C., 517.
(4) I.L.R., 10 Calc., 878.
(5) [1892] 1 Ch., 219 at p. 226.
(6) L.R., 23 Q.B.D., 526.
(7) [1893] 2 Q.B., 96 at p. 101.
(8) [1898] A.C., 524.
(9) L.R., 32 Ch. D., 123.
(10) L.R., 32 Ch. D., 348.
(11) L.R., 21 Q.B.D., 6.

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relating to service out of jurisdiction, but are applicable by analogy. Further, it is submitted that the Indian Legislature had no power to legislate in conflict with the rule of international law referred to. Section 22 of the Indian Councils Act, 1861 (24 & 25 Vict., cap. 67), relates only to persons within Indian territories, and the Amending Act (32 & 33 Vict., cap, 98) extends its application to native Indian subjects. So the Indian Legislature has no power to legislate for persons resident outside: and Ilbert's 'Government of India,' pages 442 to 444, and 451 and 452 shows that the operation of Acts of the Indian Legislature is restricted to persons within British India. In *Empress* v. *Burah*(1), the question was dealt with whether the Indian Legislature was a delegate of the English powers, and it was said that such powers were limited to Acts of Parliament alone, and that the Indian Legislature is not a delegate of British Parliament. Dicey's 'Conflict of Laws,' chapter V, rule 45, page 237, shows there is no jurisdiction when a defendant is not in England at the time of service of writ—subject to exceptions—one of which (exception 3 at page 43) is when a person is domiciled in England. The list of exceptions in Dicey is exhaustive and the present case does not come within it. See also Pigott on 'Foreign Judgments,' pages 233 and 234—*Ram Ravji Jambhekar* v. *Pralhaddas Subkarn*(2), *Cookney* v. *Anderson*(3) as to Order xlviii-A, rule 11, and *MacIver* v. *Burns*(4), also on that rule. As to the bankruptcy, it is contended that the judgment in Pondicherry is rendered void by reason of the bankruptcy which superseded it—Westlake's 'International Law,' page 281, section 240; Code de Commerce, articles 442, 443. By article 443 a bankrupt forfeits all his goods and everything must be done by his syndic. An expert on French Law need not be called to give evidence under the Evidence Act. As defendant paid since date of suit 17½ per cent. of his debts he became ischarged according to the French Law. By article 443 efendant could not be sued at the date of the suit.—*Pigott on* Foreign Judgments,' page 341, citing *Quelin* v. *Moisson*(5). Bank-ruptcy is a complete discharge of debts contracted prior o it—Bar's 'International Law,' page 1036, section 490. In

(1) I.L.R., 4 Calc., 180.
(2) I.L.R., 20 Bom., 133.
(3) 32 L.J., Ch., 427.
(4) [1895] 2 Ch., 630.
(5) 1 Knapp., 236n.

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conclusion it is submitted:—(1) There was no carrying on business within the meaning of the section. (2) Even if Kandasami carried on a business, it was not with family funds and so not binding on first defendant. (3) Even if with family funds—Kandasami was not an agent. (4) All the affairs of defendant were vested in his syndic and so no suit lies. (5) Section 17 must be considered in the light of international law and can apply to foreign subjects only if there is residence or domicile. (6) There has been a discharge and so no suit lies.

Hon. Mr. *E. Norton*.—The promissory note was dated 4th January 1896. Suit was brought by plaintiff by writ of adjournment on 17th January 1896. Decree was passed on 20th March 1896 and on 23rd March 1896, defendant executed an assignment of Rs. 17,000 to his cousin Kandasami at Cuddalore for the conduct of a charity. That was the whole of his property in Cuddalore. The bankruptcy in Pondicherry could not have the effect of passing the property in his immoveable property situated in British India, *Cockerell* v. *Dickens*(1). The right to sue was suspended by the bankruptcy, but not extinguished. Though defendant was a bankrupt in Pondicherry, there was nothing to prevent creditors from going into foreign territory to get the bankrupt's property there, *e.g.*, in British India. Plaintiff's position is precisely within Baron Parke's statement that a declaration or flat in bankruptcy does not pass property in the bankrupt's immoveables situated outside the jurisdiction of the Court making it—*Selkrig* v. *Davies*(2). [DAVIES, J.—That might be a good argument if your suit were against immoveable property.] I am entitled to proceed *in personam*. [SUBRAHMANIA AYYAR, J.—You cite it as showing that the right to sue that was taken away was the right to sue in French territory and not the right to sue as to immoveables abroad.] Yes. Plaintiff's debt against defendant exists in its entirety and is not curtailed or extinguished, so far as the rights of our tribunals are concerned, though no doubt the debt was curtailed if not extinguished in French territory. The French proceedings do not profess to have interfered with the jurisdiction of our Courts: nor does the French Code permit. *Ellis* v. *M'Henry*(3) shows that a discharge of a debt is a discharge throughout the world if it

(1) 3 Moore's P.C., 98 at p. 107.
(2) 2 Dow., 230 at p. 245.
(3) L.R., 6 C.P., 228.

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extinguishes the debt. My contention is that the French Law does not do that. If *Quelin* v. *Moisson*(1) is an authority *Cockerell* v. *Dickens*(2) would not have been decided as it was. Section 11 of the Limitation Act shows that a remedial law of a foreign country is not treated as curtailing or extinguishing a debt in this country, *i.e.*, the Law of Limitation would be Indian Law if a Frenchman came and sued in Madras on a foreign debt. In *Edwards* v. *Ronald*(3), the English discharge was held to be a discharge in Calcutta because the English statute is paramount and governs the dependencies. So in *Ellis* v. *M'Henry*(4) the discharge in England was held to be a discharge in Canada. But a Frenchman's debt is never discharged by bankruptcy in his own country. (He referred to Code Civile, 1265, 1270, Liv. III, Tit. III.) Section 443 of the French Code de Commerce shows that after the declaration of bankruptcy, suits must be brought against the syndic. See Wharton's 'Conflict of Laws,' section 799, as to the effect of bankruptcy on foreign assets. The bankrupt still retains his right to dispose of property in foreign lands—that is settled in France and Germany. Also section 805, as to when foreign bankrupts may sue. Defendant must go the length of arguing that a French bankruptcy has general, namely, extra-territorial effect. The effect of Wharton's rule is that it is desirable to confine territorial jurisdiction to territorial limits, on a review of all the authorities, and this contradicts the ruling in *Quelin* v. *Moisson*(1). Taylor on 'Evidence,' volume I, section 5, shows that questions of foreign law must be proved as facts and cannot be noticed by foreign Courts and that a decision of one tribunal on a point of foreign law is not to be relied on by other Courts, but must be proved again. So in Wharton's 'Conflict of Laws,' sections 771 and 772. Proof of foreign law must be given. [SUBRAHMANIA AYYAR, J., referred to section 38 of the Indian Evidence Act.] The Court may look at books and foreign decisions relating to the matter. I maintain that the decision in *Quelin* v. *Moisson*(1) was one *ad hoc*, relating only to that case and the question there said to be proved must be proved again. Section 443 of the French Code takes away the right of action only in French territory as to such property as vests in the syndic and

(1) 1 Knapp., 265n.
(2) 1 Knapp., 259.
(3) 3 Moore's P.C., 98 at p. 107.
(4) L.R., 6 C.P., 228.

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does not affect ex-territorial moveables. Wharton says it is not decided that the moveable property in foreign territory vests in the trustee. Regarding immoveables in foreign territory, it is conceded that they do not pass to the syndic. Regarding moveables, it is a moot point. It is submitted that the Court cannot take another decision like *Quelin* v. *Moisson*(1) as a guide, the question of fact having to be proved in each case. Our Courts are bound by the same rules as English Courts and as to them see Taylor on 'Evidence,' page 50, 9th edition. I thus distinguish *Quelin* v. *Moisson*(1). On the same point see *Selkrig* v. *Davies*(2). Section 443 of French Code only refers to when bankruptcy is pending. By the comity of nations the rights of trustees are recognised by foreign countries where the foreign law is analogous to ours. The French Law is not analogous—Wharton's 'Conflict of Laws,' section 799. A bankrupt still retains his capacity to dispose of his property in foreign countries notwithstanding bankruptcy. Sections 484, 485 and 486 of the French Code show that the syndic is a mere custodian, and there is nothing in them corresponding to our vesting order. They involve a mere incapacity with administration by the Court. Regarding rule 108 in Dicey to the effect that "assignment in a foreign country operates as an assignment of the bankrupt's property in England," rule 115 shows that a grant of letters of administration of a deceased in a foreign country is local and of no effect in England. I cite that by analogy. The Courts of British India are entitled to claim jurisdiction over a foreigner who trades through an agent, and that is not inconsistent with international law. See Story's 'Conflict of Laws,' sections 760 and 765. [SUBRAHMANIA AYYAR, J.—The English cases seem to draw a distinction between circumstances in which actual process can be served, and those in which only notice of intended process can be given.] The broad proposition is stated that an action will not lie against a non-resident foreigner. That is what I contest. See Dicey's 'Conflict of Laws' at top of page 254, exception 7. That is an invasion of the principle that England repudiates jurisdiction. The proposition cannot be supported. In *Girdhar Damodar* v. *Kassigar Hiragar*(3), Starling, J. (at page 669) differentiates most of the cases cited

(1) 1 Knapp., 265n.
(2) 2 Dow., 230 at p. 245.
(3) I.L.R., 17 Bom., 662 at p. 669.

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against me on the same grounds as I distinguish them. The remedy is against the property of the defendant, if absent, and against his person if present. As Starling, J., points out, it is a question rather of proper service of writ—not of whether England repudiates jurisdiction. *Russell* v. *Cambefort*(1) shows how all these cases should be differentiated. *St. Gobain, Chauny and Cirey Company* v. *Hoyermann's Agency*(2) proceeds on the same principle. *Indigo Company* v. *Ogilvy*(3) shows that the refusal to entertain jurisdiction is not based on international law, in English cases, but on procedure. That case depended really on absence of leave to sue. In *Worcester City and County Banking Co.* v. *Ferbank Pauling & Co.*(4), Davey, L.J., shows that England does not decline jurisdiction on the ground that a defendant is a non-resident foreign subject, but on the ground that he is non-resident merely. A plaintiff's right to sue in India is based on the Indian law. I do not accept the contention that the English law applies. England claims jurisdiction over contracts no matter where made, subject to certain rules of procedure. Parties in British India base their jurisdiction on the Civil Procedure Code. *Parvathi* v. *Mannar*(5). Lastly, a foreign judgment is in itself a cause of action, and upon such a foreign judgment creditors can claim execution on property within the jurisdiction. The effect of a suit on a judgment is to give it execution. A defendant against whom a judgment has been obtained impliedly undertakes to pay it in terms of the judgment, wherever his property may be.

JUDGMENT.—The suit, out of which this appeal arose was brought on a foreign judgment, obtained in the Court at Pondicherry, on a promissory note, executed by the appellant, in favour of the plaintiff-respondent—in Pondicherry. The date of the foreign judgment sued upon is 20th March 1896, and this suit was instituted on the 9th of October 1896. Meantime, that is, on 20th July 1896, the appellant was declared an insolvent in Pondicherry and a syndic was appointed to take charge of, and administer, his property. The present suit was contested by the appellant, but the District Judge decreed in favour of the plaintiff. The main questions raised in appeal are that the District Judge had no

(1) L.R., 23 Q.B.D., 526.
(2) [1893] 2 Q.B., 96 at p. 101.
(3) [1891] 2 Ch., 31.
(4) [1894] 1 Q.B., 784 at p. 790.
(5) I.L.R., 8 Mad., 175.

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jurisdiction to entertain the suit and that, even if he had, the suit was not maintainable against the appellant at the time it was brought. There is no doubt that the parties are French subjects domiciled in French territory. The ground on which the plaintiff contended that the District Court of South Arcot at Cuddalore had jurisdiction over the appellant was that he carried on business within its jurisdiction (section 17 of the Code of Civil Procedure). The business carried on, according to the plaint, was a money-lending business, but at the trial, no attempt was made to support this. Our attention was drawn to exhibit E, which, no doubt, shows that certain mortgages were obtained by Kandasami, the appellant's cousin, for the joint benefit of himself and the appellant between the years 1892 and 1896. This is quite insufficient to establish that there was any money-lending business carried on by them at all, but certainly there was none to prove that any such business was carried on at the time of the institution of the suit, the date of the last mortgage in exhibit E being January 1896. At the trial, the business, which, it was contended, the defendant was carrying on, was a business in oil conducted along with the above said Kandasami. The only two witnesses who had any knowledge of the business done by Kandasami at Cuddalore virtually disprove the allegation that the appellant took any part in the trade. The vague statements of some of the witnesses, that the appellant sometimes visited Cuddalore, cannot be relied on as showing that he carried on business there, Cuddalore being in close proximity to Pondicherry and being a place where the appellant had immoveable property. The ground upon which the District Judge has found that the appellant was carrying on business at Cuddalore, and one of the grounds which was urged in appeal on behalf of the plaintiff, was that Kandasami was the manager of a Hindu family and, therefore, it must be presumed that the business was carried on with the consent of the appellant and for his benefit also; but no such presumption can arise in this case, having regard to the fact that the appellant and Kandasami had already been divided with regard to their moveable property and were in litigation in regard to the division of their immoveable property. The oil business, on which the plaintiff relies, was commenced in 1894, two years after the partial division had been effected, and it is, therefore, unlikely that the appellant would have consented to such a business being carried on as a

joint business. Nor is there any sort of evidence that he did. On the contrary, the conduct of the parties concerned is absolutely inconsistent with the view that the oil business was a business in which the appellant had a joint interest. No reference appears to have been made to the oil business in the insolvent proceedings as a business in which the appellant was interested, and also, in the action taken subsequently by the syndic in regard to the realization of the assets, the oil business was not included. Again, in the final partition proceedings between the appellant and Kandasami, this business was not dealt with as part of the joint family property. Further, the accounts connected with that trade and produced before the Court stand in the name of Kandasami only. These circumstances negative the view that the appellant had any interest in the oil trade, much less that he assisted in carrying it on. Even if it were otherwise, and if the appellant would have been entitled to claim an interest in the oil business on the ground that it was carried on by one who was the manager of his family at the time, it would not warrant our holding that the appellant carried on business within the meaning of section 17 of the Code of Civil Procedure, inasmuch as the person acting as agent within the jurisdiction should, in our view, be an agent in the strict and correct sense of the term, so as to bring the principal within the operation of the said section 17, Code of Civil Procedure, as interpreted by this Court. We do not, however, wish to be understood as saying that a member of a joint family, who actually consents to a trade being carried on on his behalf or by his conduct puts himself in the position of a joint trader, would, while he was living outside the jurisdiction, not be carrying on business within the jurisdiction. Such is not the present case, as we have already stated. We are, therefore, unable to agree with the District Judge in holding that he had jurisdiction over the appellant, and the suit must consequently fail. We must hold that the suit fails also on the second ground urged on behalf of the appellant.

Upon the facts already stated, it is clear that the Pondicherry Court was a Court competent to adjudicate the appellant an insolvent, so as to bind all the creditors, the plaintiff being one of them. The effect of such adjudication in French territory is admittedly that the insolvent is deprived of the possession and management of his property and that the same is entrusted to a

syndic against whom only all suits in respect thereof must be brought (section 443, Code de Commerce *): in other words, the liability of the insolvent to be sued is taken away for the time being. It may be true, as argued by the learned Counsel for the plaintiff, that unlike as in some other countries the debt of the insolvent is not extinguished by the declaration of his insolvency, so as to exempt him from future liability in respect of any property, which the insolvent may obtain subsequently. But it is clear that so long as the adjudication of the insolvency remains in force, no suit could be brought against him in French territory. Such being the insolvent's position in French territory, it must be held to be the same outside that territory in a case such as this. The decision of the Privy Council in *Quelin* v. *Moisson*(1), which was a case on all fours with this is a direct authority in support of the above view. We are unable to accede to the suggestion made by the learned Counsel for the plaintiff that the authority of that case has in any way been impaired by subsequent decisions or otherwise: on the contrary, that case has been cited with approval in *Ellis* v. *M'Henry*(2) where Bovill, C.J., observes, at page 234, "there is no "doubt that a debt or liability arising in any country may be dis- "charged by the laws of that country, and that such a discharge, if "it extinguishes the debt or liability, and does not merely interfere "with the remedies or course of procedure to enforce it, will be an "effectual answer to the claim, not only in the Courts of that country, "but in every other country." The present case is clearly the case of a liability being taken away, and it is not a matter connected with mere procedure, as was urged for the plaintiff. With the decisive authority of *Quelin* v. *Moisson*(1), which is binding upon us, we are not called upon to consider or discuss the other authorities cited on either side. In the view we have taken of these two main grounds of appeal it is unnecessary for us to go into the other questions raised on behalf of the appellant, namely, whether section 17 of the Code of Civil Procedure should be construed so as to exclude non-resident foreigners from its operation, even though they carry on business in British India through agents, and, if such construction be inadmissible, whether the said section of the Indian Legislature should be held to be *ultra vires*,

* *Vide* ante p. 460n.

(1) 1 Knapp., 265n.

(2) L.R., 6 C.P., 228 at p. 234.

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with reference to such foreigners, and also the question whether the District Judge was right in holding that it was not competent for him to enter into the merits of the foreign judgment, on which this suit is based.

The result is, the decree of the lower Court must be reversed and the suit dismissed with appellant's costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1899. November 8.

MUNISAMI NAIDU (PLAINTIFF), APPELLANT,

v.

KRISHNA REDDI (DEFENDANT), RESPONDENT.*

Rent Recovery Act (Madras)—Act VIII of 1865, ss. 9 51—Refusal by tenant to accept patta—"Cause of action"—Period within which summary suit must be brought.

On 17th June 1897 a land-holder tendered a patta to a tenant who, on the same day, refused to accept it. On 5th August 1897 the land-holder brought a suit to enforce its acceptance:

Held, that the suit was brought in time.

SUIT to enforce acceptance of patta. The patta was tendered on 17th June 1897; it was refused by the tenant on the same day; and suit was brought on 5th August 1897. The Acting Head Assistant Collector ordered the patta to be accepted, with some modifications. He held that the suit was not barred by limitation inasmuch as it had been brought within thirty days of the cause of action. On the question of limitation the District Judge, on appeal, held that the cause of action had arisen on the tenant's refusal to accept the patta, and as the suit had not been brought within thirty days from that date it was barred.

The plaintiff preferred this second appeal.

Seshagiri Ayyar for appellant.—It is submitted that the District Judge is wrong in holding that the cause of action arises

* Second Appeal No. 1535 of 1898 against the decree of K. C. Manavedan Raja, District Judge of North Arcot, in Appeal Suit No. 35 of 1898 reversing the decision of J. W. Hughes, Acting Head Assistant Collector of North Arcot, in Summary Suit No. 577 of 1897.

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the moment the patta tendered is not accepted. The object of the Legislature is to give the tenant an opportunity to reconsider his position. He has one month in which to decide. It is his final decision, after the month has elapsed, that the section contemplates. The very limited time given to a tenant by section 9 should not be curtailed. The words "for one month after demand" denote a refusal which continues up to the end of the month. *Papamma* v. *Subbanna*(1) favours my contention. In cases of doubt, a liberal construction should be adopted so as to extend the period of limitation. See *Latifunnessa* v. *Dhan Kunwar*(2) and *Gnanasammanda Pandaram* v. *Palaniyandi Pillai*(3). Section 51 of the Rent Recovery Act provides that the suit should be brought within thirty days of the cause of action. Under section 9, the cause of action does not arise till one month after demand is over. I submit that this suit was brought in time.

Sundara Ayyar and *Subbayya Mudaliar* for respondent.—The cause of action arises the moment that the tenant refuses the patta. If the liberal construction contended for is placed on the section, numerous causes of action may arise within the month. *Papamma* v. *Subbanna*(1) does not decide the particular point, which was not necessary for the determination of that case. No doubt a liberal construction should be placed upon statutes of limitation, but it must also be a reasonable one. It is not what a tenant might have done that determines the cause of action. The question is whether the refusal was not within the rights of the tenant and whether the cause of action did not arise on the refusal.

Seshagiri Ayyar in reply.—If the Legislature intended that the refusal alone was to be looked to, the words "for one month after demand" are meaningless.

BODDAM, J.—The only important question raised in this appeal depends upon the construction of sections 9 and 51 of the Rent Recovery Act (Act VIII of 1865).

The appellant tendered a patta to the respondent on the 17th June 1897, which the respondent on the same day refused to accept. On the 5th August 1897 the appellant brought his suit under the Rent Recovery Act to enforce the acceptance of patta. The Acting Head Assistant Collector, after varying the patta in some particulars ordered the defendant to accept it, holding that

(1) I.L.R., 22 Mad., 318. (2) I.L.R., 24 Calc., 382. (3) I.L.R., 17 Mad., 61.

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the suit was not barred by limitation. On appeal, the District Judge overruled all the objections to the patta except with regard to the rights as to indigo as settled by the Acting Head Assistant Collector, but dismissed the suit on the ground that it was barred, having been brought more than thirty days after the respondent's refusal to accept the patta. He held that the landlord's right to sue arose upon the tenant's refusal to accept the patta, and that the landlord had only one month from the date of the refusal to bring his suit. In other words that the cause of action arose *eo instanti* upon the refusal.

Section 9 of the Rent Recovery Act (so far as is material) says, "when a tenant shall, for one month after demand, have refused "to accept a patta, it shall be lawful for such land-holder to proceed "by summary suit before the Collector to enforce acceptance of "the patta," and section 51 says, "summary suits under this Act "must be brought within thirty days from the date of the cause of "action."

The question therefore is, when does the cause of action arise? Is it upon the refusal by the tenant to accept the patta or at any other time, and if at any other time at what time? This must depend upon the wording of section 9.

I am of opinion that the cause of action does not arise upon the tenant's refusal *eo instanti*. In order to place that interpretation upon the section, it would be necessary to strike out the words "for one month after demand" and read the section without them. This cannot be done. Effect must be given to the whole of the section, for unless it were intended that these words should have some effect they would not have been inserted. Neither can it be read as meaning anything different to what it says. The words are perfectly clear and unambiguous and must be construed as meaning what they say. They say that a landlord may proceed by summary suit if the tenant shall have refused for one month after demand. The landlord therefore is not entitled to proceed by summary suit until the tenant has refused and until a month has elapsed from the date of the demand made by the landlord. He has no cause of action by summary suit until a month after his demand has been made, no matter when the tenant refused to accept a patta.

The object of the section is to give the tenant a *locus penitentiæ*. It gives him a clear month from the date of the demand to determine whether or not he will accept the patta, and even if he did, on demand being made, refuse to accept the patta, the landlord is not allowed to proceed against him by summary suit until he has had an opportunity of reconsidering the matter and, if he should think fit to do so, of changing his mind. The cause of action does not arise until that period has elapsed and the landlord then must bring his suit within thirty days.

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The decision in *Papamma* v. *Subbanna*(1) was to this effect and I think is right. The case was not decided until after the judgment appealed from. I would therefore allow this appeal and reverse the decree of the District Judge except in so far as it relates to indigo, and remand the appeal for disposal of the objections of the tenants raised in he appeals other than those relating to indigo with reference to the observations of the High Court in *Venkatappa Naidu* v. *Munisami Naidu*(2). Costs in the lower Appellate Court and in this Court will be provided for in the revised decree.

SUBRAHMANIA AYYAR, J.—The question raised in this case is not altogether free from difficulty. The language of section 9 of the Rent Recovery Act, on the proper construction of which the point turns is, however, somewhat peculiar and seems to require us to hold that a land-holder is not at liberty to sue a tenant to compel the latter to accept a patta until thirty days from the date of the tender of the patta has expired, even where the tenant has at the time of the tender expressed his unwillingness to accept the patta. If that was not the intention of the Legislature it is not easy to see why the words "when a tenant shall for one month after demand have refused to accept" were introduced in the section. If, as suggested for the respondent, the Legislature meant to lay down that a land-holder is entitled to bring a suit to enforce the acceptance of a patta as soon as the tenant communicates his unwillingness to take the patta and when he does not do so, on the expiry of a month from the date of the tender, there was nothing to prevent such meaning being made plain.

I therefore concur in the order proposed by my learned colleague.

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(1) I.L.R., 22 Mad., 318. (2) Second Appeal No. 201 of 1898 (unreported).

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1899. November, 22. December, 14.

KUNHI MOOSSA (DEFENDANT No. 2), APPELLANT,

v.

MAKKI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1, 3 AND 4), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 276—Kanom granted during a subsisting attachment—Subsequent discharge of judgment-debt, and other later attachments—Claim for rateable distribution—Effect of discharge in rendering first attachment inoperative as against all creditors.

A kanom was executed by the karnavan of a tarwad in plaintiff's favour for valuable consideration for the discharge of judgment-debts decreed against the tarwad. On or before the date of the said kanom plaintiff's father had placed under attachment the properties covered by the kanom deed in execution of one of the said decrees; but the claim having been satisfied no Court-sale followed. While the said attachment was still subsisting, and at a date later than that of the kanom, first defendant and other judgment creditors applied for and obtained orders for the attachment of the same properties. On plaintiff suing to establish the validity of his kanom, it was contended that in consequence of the said attachment first defendant would be entitled to rateable distribution, under section 295 of the Code of Civil Procedure, and that this was a claim enforceable under the attachment within the meaning of section 276:

Held, that the kanom was valid. The attachment subject to which the kanom had been granted ceased to be operative both as regards the attaching creditor and the other judgment creditors when the judgment-debt was discharged, and there could be no sale by the Court and no right on the part of the other creditors, in the circumstances, to apply for such a sale.

SUIT to declare the validity of a kanom right of Rs. 900 on certain properties under a deed, filed as exhibit A in the suit, and executed to plaintiff by his karnavan, third defendant. Plaintiff alleged that the property was the jenm of his and third defendant's tarwad, of which third defendant was the karnavan; that it was held by tenants; that it had been attached in execution of a decree obtained in a civil suit by first defendant against third defendant's predecessor, who was removed from the karnavastanam by suit; that a claim preferred by plaintiff was rejected

* Second Appeal No. 1640 of 1898 against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 306 of 1898, affirming the decree of U. Babu Rao, District Munsif of Cannanore, in Original Suit No. 581 of 1897.

and the property had been purchased by second defendant. First defendant contended that the kanom deed had been executed collusively and without consideration and without adequate tarwad necessity at a time when the property was attached for more decrees than one. The District Munsif found that the kanom deed was *bonâ fide* and had been executed for consideration; and in this he was upheld by the District Judge.

The second issue was whether the kanom deed had been executed while there was an attachment on the property, and if so, whether it was void. The District Munsif set out the facts as follows:—"The plaint kanom mortgage deed (exhibit A) recites that third defendant received from plaintiff Rs. 900 in cash on the date it bears, viz., 24th November 1896, for payment of the judgment-debts decreed in Original Suit Nos. (Tellicherry Munsif Court's file) 305 of 1886, 441 of 1887, 228 of 1890, 60 of 1891, and 276 of 1893 against the mortgagor's tarwad. It is admitted that on or before the date of the said mortgage, exhibit A, plaintiff's father had had placed under attachment the plaint properties covered by the said deed (exhibit A) in execution of the decree in Original Suit No. 228 of 1890 just mentioned. But this attachment was not followed by the usual judicial sale, because plaintiff's father says he received the amount of his decree from third defendant on 29th November 1896. While this attachment at the instance of plaintiff's father was still subsisting, but after the date of the plaint mortgage, exhibit A, first defendant and some other judgment-creditors applied for and obtained orders for attachment of the same properties on and after the 27th November 1896. The actual attachment must have been effected between that date and 14th December 1896 on which date the petition for attachment was struck off the file. In June 1897, plaintiff intervened with his claim petition praying this Court that the sale prayed for by the first defendant might be held subject to his (plaintiff's) mortgage, exhibit A. This Court rejected the claim mainly on the ground that the mortgage appeared to have been executed twelve days before the actual attachment and that the applicant, the judgment-debtor's anandravan, had not shown that he paid off any of the judgment-debts. The Court inferred thence that the mortgage was probably a collusive transaction . . . . It is admitted that the attachment at the instance of first defendant was effected some twelve days after the date of the

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kanom, exhibit A; and hence that is not the attachment which avails defendants Nos. 1, 2, and 4 to avoid the deed, exhibit A. They contend that if the attachment which was put at the instance of plaintiff's father had been followed by a Court-sale and money realised thereunder, the first defendant would have been entitled under section 295 to a rateable share therein. This potential or inchoate interest in the possibly realizable assets, they contend, entitle the first defendant to be ranked as possessor of a 'claim enforceable under the attachment' within the meaning of section 276, Code of Civil Procedure. They quote *Sorabji Edulji Warden* v. *Govind Ramji*(1). Mere attachment of a land by one judgment-creditor does not invest another money decree-holder with any kind of right or interest in the attached property. To invest him with such right and interest, assets must have been realised in such shape as to admit of rateable distribution. Before reduction into that shape the debtor may pay off the attaching creditor and render the attachment ineffectual. When he does so, as third defendant did in this case, the private alienation cannot be objected to. See Telang J.'s observations at page 109 of the case quoted above. In this view it follows that there was no legally subsisting attachment on the plaint property on the date of the mortgage deed, exhibit A." He declared the plaint mortgage to be valid and binding as against defendants Nos. 1, 2 and 4. The second defendant appealed to the District Judge who upheld the decree.

Defendant No. 2 preferred this second appeal.

J. L. Rosario (*Ryru Nambiar* with him) for appellant.—Section 276 of the Code of Civil Procedure prohibits private alienations of attached property and enacts that such alienation "shall be void against all claims enforceable under the attachment." Under the corresponding section in the Code of 1859, section 240, such an alienation was "null and void." This section was interpreted by the Privy Council in *Anund Loll Doss* v. *Jullodhur Shaw*(2) to mean "null and void as against the attaching decree-holder," and the Indian Courts followed this ruling. Section 276 of the Code of 1882 must mean something more than the claim of the attaching decree-holder, or the word "claims" would not have been used. The claim of the attaching decree-holder is one

(1) I.L.R., 16 Bom., 91 at pp. 95, 109. (2) 14 M.I.A., 543.

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of the claims enforceable under the attachment, whatever the others may be. Decree-holders who have applied for execution of a decree against the same judgment-debtor, before his property has been brought to sale, are entitled to share rateably in the proceeds,—section 295 of the present Code. This is a new provision. Under the Code of 1859 the first attaching creditor was entitled to be paid in full, and any balance left was divided rateably among the subsequent attaching creditors. Under section 295 of Act XIV of 1882 all decree-holders have equal rights, whether they have attached the property or not. In *Lakshmi* v. *Kuttunni*(1), it was held that any of such decree-holders could object to the confirmation of a sale under section 311, and the judgment there lays down that the attaching decree-holder could not stop the sale, even if he were paid off in full. In *Mohunt Megh Lall Pooree* v. *Shib Pershad Madi*(2), it was held that a sale of properties of a judgment-debtor could not be stayed after the amount due to the attaching decree-holder was realised, but must go on till the amount due to all decree-holders entitled to share under section 295 was realised or till the property was exhausted. In *Durga Churn Rai Chowdhry* v. *Monmohini Dasi*(3), the High Court appears to have taken the view that the Legislature intended to include the claims of decree-holders entitled to share under section 295 by reason of the words "all claims enforceable"; but that that intention was not carried out. In *Sorabji Edulji Warden* v. *Govind Ramji*(4) Telang, J., held that claims of decree-holders entitled to share under section 295 are "claims enforceable under the attachment" within the meaning of section 276. He holds, however, that if the attaching decree-holder is paid off before the sale, the claims of the other decree-holders must fail. It is difficult to understand how, if such claims are included in "all claims" under section 276, they can fail without the consent of such decree-holders. If the latter have a claim, it cannot fail because of the action of some other person.

Karunakara Menon for respondent No. 1 contended that inasmuch as the attaching decree-holder had been paid off the claim of the appellant failed. He relied on Telang, J.'s observations in *Sorabji Edulji Warden* v. *Govind Ramji*(4) as being conclusive.

(1) I.L.R., 10 Mad., 57. (2) I.L.R., 7 Calc., 34.
(3) I.L.R., 15 Calc., 771. (4) I.L.R., 16 Bom., 91 at p. 109.

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SUBRAHMANIA AYYAR, J.—The question in this case is as to the validity of the kanom obtained by the first respondent when the land compromised in the instrument of kanom was under attachment in execution of a decree against the party who granted the kanom.

Now there is no doubt that the invalidation of a private transfer, made pending an attachment of the property transferred, only results from a subsisting attachment.

In the present case, however, the attachment subject to which the kanom was granted ceased to be operative, in so far as the attaching creditor was concerned, on the third respondent discharging the judgment-debt due to that creditor. *Ramdhan Mitter* v. *Kailas Nath Dutt*(1) and per Mitter, J., in *Anandalal Das* v. *Radhamohan Shan*(2), and on principle it follows that with reference to the other judgment-creditors also, who, had the attachment resulted in the realization of assets, would have been entitled to a rateable distribution, the attachment became inoperative. If authority in support of this view were necessary, reference might be made to the opinion of Telang, J., in *Sorabji Edulji Warden* v. *Govind Ramji*(3). And the view is in no way inconsistent with the observation of Kernan, J., in *Lakshmi* v. *Kuttunni*(4) to the effect that an attaching creditor could not stay the sale even if he were paid in full after the other decree-holder had applied to the Court for execution. That is no doubt true where, as was the case in the instance before Kernan, J., the attachment continues to be in force and effective. For in such circumstances the Court having the control of the proceedings in execution should doubtless, at the instance of the creditor, who, though not the attaching creditor, is entitled, under section 295 of the Code of Civil Procedure to a rateable distribution, sell the attached property if necessary. But whereas in the present case the efficacy of the attachment has, by a payment out of Court, become exhausted, there can be no sale by the Court and no right to apply for such a sale.

The decision appealed against is right. The second appeal fails, and I would dismiss it with costs.

BENSON, J.—I concur.

(1) 4 B.L.R., (A.C.), 20.
(2) 2 B.L.R., (F.B.), 49 at p. 78.
(3) I.L.R., 16 Bom., 91 at pp. 95, 109.
(4) I.L.R., 10 Mad., 57 at p. 59.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subrahmania Ayyar.

THANDAVARAYA PILLAI AND OTHERS (DEFENDANTS NOS. 1, 4 AND 5), APPELLANTS,

v.

SUBBAYYAR AND ANOTHER (PLAINTIFF AND DEFENDANT NO. 3), RESPONDENTS.*

1899. November 6, 7.

Religious endowment—Devastanam committee—Dismissal of dharmakarta by three out of five members of committee without meeting—Legality of such dismissal.

The dharmakarta of a temple was suspended and dismissed from office in the following manner: one member of the devastanam committee consisting of five initiated an enquiry, received petitions and took evidence, submitting the results of his enquiry to two other members successively, the three signing an order calling upon the dharmakarta to present himself at the office for the purpose of an enquiry into certain charges laid against him. No date was fixed for the enquiry, and the two remaining members of the committee took no part in the proceedings. The dharmakarta took no notice of the order, whereupon the same three committee-men signed and issued another resolution dismissing him from his post. This resolution was sent to the other two members of the committee, but was not signed by them:

Held, that the dismissal was illegal. The dharmakarta, being the holder of an office, could only be removed from it by the corporate act of the committee generally. The acts of a corporation (to which the committee might be likened) must be performed at a meeting convened after due notice to all the members of the body; and though there might be exceptions to that rule, a case in which the matter to be decided involved the rights of third parties and a decision to their prejudice was one in which the rule should be enforced.

SUIT by the dharmakarta of certain temples under the control of the devastanam committee of Musiri against three members of that committee, defendants Nos. 1 to 3, and two managers, defendants Nos. 4 and 5 (appointed by the committee to succeed the plaintiff). Plaintiff charged defendants Nos. 1 to 3 with having unlawfully dismissed him and asked for an injunction restraining them from interfering with his management of the devastanam and for damages. The District Munsif decreed in plaintiff's favour

* Second Appeal No. 1530 of 1898 against the decree of L. C. Miller, Acting District Judge of Trichinopoly, in Appeal Suit No. 141 of 1897, modifying the decree of A. David Pillai, District Munsif of Srirangam, in Original Suit No. 377 of 1894.

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as prayed, on the ground that the order dismissing plaintiff was not properly passed by the committee and was of no effect. The procedure adopted by the devastanam committee in the suspension and dismissal of the plaintiff is described fully in the judgment. Defendants Nos. 1, 4 and 5 appealed to the District Court, the third defendant being made a party by the Court, but not appearing. The District Judge, without deciding whether this method constituted a legal course of business, held the order of suspension to be invalid, because it was not submitted to every member of the committee. He held that plaintiff was justified in resisting it and could not be dismissed for so doing. He held that the order of dismissal was illegal and that the decree in so far as it restored plaintiff to his office was right. He also held that the Munsif's Court had jurisdiction to entertain the suit.

Defendants Nos. 1, 4 and 5 preferred this second appeal.

Sundara Ayyar for appellants.

V. Krishnasami Ayyar and *R. A. Krishnasami Ayyar* for respondent No. 1.

JUDGMENT.—We are clearly of opinion that the points of jurisdiction taken by the appellants' vakil cannot be maintained. The suit does not relate to immoveable property, and there is nothing to show that the valuation is wrong. The only question to be decided is whether, upon the facts found, the decision of the District Judge is justified. We have to consider the question not with reference to the substance of the charges made against the plaintiff, but with reference to the manner in which the enquiry was conducted and the resolution of dismissal arrived at. What happened apparently was this:—one member of the committee initiated some sort of enquiry, received petitions and, it is said, took some evidence. The result of his work was submitted to two other members of the committee successively, and the three thereupon signed the yadast of 31st October 1893. By that yadast the plaintiff is required to present himself at the office for the purpose of an enquiry into certain charges laid against him. No date is fixed for the enquiry, and it is not pretended that the other two members of the committee took any part in passing the order.

The plaintiff took no notice of this order, and thereupon another resolution of the 8th July 1894 was issued, signed by the same three members of the committee who signed the previous yadast. The other two members, it is found, had the resolution sent to

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them, but did not sign it. Now it is quite clear that the plaintiff, being the holder of an office, can only be removed from the office by the corporate act of the committee. Generally the acts of a corporation, to which the committee may be likened, must be performed at a meeting convened after due notice to all the members of the body. There may be exceptions from this rule, but the case in which the matter to be decided involves the rights of third parties, and a decision to their prejudice is eminently one in which the rule should be enforced. The fact that no case can be pointed out where a different procedure has been adopted and approved goes strongly to show that this view is the correct one. The object of the meeting, of course, is to bring together the party to be affected and the person entitled to take part in the decision, so that the decision may be arrived at after a full and fair discussion, the party affected having an opportunity of putting before all his judges his view of the case. It is obvious that this object cannot be attained if the business is transacted by a mere circulation of the papers. In the present case it is clear that there was nothing in the nature of a judicial enquiry. If there was any enquiry at all, which is doubtful, there was certainly no enquiry by the committee as a body. Admittedly there was no meeting, and as there was no meeting the plaintiff had no proper opportunity of defending himself. We cannot regard the yadast as a sufficient direction by the committee to appear and answer the charges made against him. The yadast did not proceed from the committee, and it gives no date for the proposed enquiry. On this ground we uphold the decree of the lower Appellate Court and dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1899. October 25. November 10.

VENKATAKRISHNAMMA AND ANOTHER (PLAINTIFF AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

ANNAPURNAMMA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Adoption by widow—Assent of a majority of sapindas—Presumption of bona fides—Degree of relationship of sapindas to husband of adopting widow.

A widow having survived her son, (who died unmarried and issueless), succeeded to his estate, and made an adoption with the assent of three out of the four of her late husband's sapindas who were living at the time and who had been divided from the deceased and from each other. The fourth sapinda, who had refused his consent (apparently without giving reasons for such refusal), now impugned the adoption on the ground that the consent of all existing sapindas was necessary to render it valid, at all events when all stood in the same degree of relationship to the husband of the adopting widow, as was the case here:

Held, that the assent of every existing sapinda in such a case was not necessary: and that that of a majority would suffice.

Collector of Madura v. *Mootoo Ramalinga Sathupathy*, (12 M.I.A., 397), and *Parasara Bhattar* v. *Rangaraja Bhattar*, I.L.R., 2 Mad., 202, referred to and considered.

Adoption being a proper act it will be presumed that when the majority give their assent such assent was given on *bonâ fide* grounds. If, however, it be shown that the majority gave or withheld their assent from improper considerations such assent or dissent will be of no avail to the party relying on it. Any distinction based upon the degree of relationship as to whose assent is or is not essential becomes immaterial.

SUIT for a declaration that an adoption of second defendant by first defendant was invalid. One, Lakshminarasu, died, leaving a widow and a son. The son subsequently died unmarried and issueless, leaving his mother heir to his estate. The mother, first defendant, then adopted second defendant, with the assent of three out of four of the said Lakshminarasu's sapindas who were living at the time, and were divided. The fourth sapinda, who now impugned the validity of the adoption, while admitting

* Second Appeal No. 1472 of 1898, against the decree of M. D. Boll, District Judge of Gódávari, in Appeal Suit No. 325 of 1897, affirming the decree of S. Pereira, District Munsif of Ellore, in Original Suit No. 260 of 1894.

that the consent of the other three sapindas had been obtained, alleged that it had been obtained for a consideration; also that the consent of all existing sapindas was necessary, at any rate when all stood in the same degree of relationship to the husband of the adopting widow, as was the case here. It did not appear that he had given any reason for refusing his consent. The suit was dismissed by the District Munsif whose decree was upheld by the District Judge.

Plaintiff preferred this second appeal.

Sundara Ayyar for appellant No. 2.

Kuppusami Ayyar for respondents Nos. 1 and 2.

SUBRAHMANIA AYYAR, J.—The dispute in this case relates to the validity of the second defendant's adoption by the first defendant, the widow of one Lakshminarasu, the adoption having been made after she had succeeded to the estate of her son, who died unmarried, and with the assent of three out of four of Lakshminarasu's sapindas who were divided and existing at the date of the adoption.

The lower Courts upheld the adoption, being satisfied that there was nothing in the circumstances in which the adoption took place, and the sapindas assented, to show that the widow and those sapindas acted otherwise than properly and *bonâ fide* in the matter.

The present appeal was preferred by the sapinda (since deceased and hereinafter referred to as the appellant) who did not assent to the adoption and who stood in the same degree of relationship to Lakshminarasu as those who gave their assent. In support of the view urged on his behalf that the adoption was invalid the argument was as follows:—The assent of all the sapindas existing at the time of the adoption being essential, the non-assent of one of them, the appellant, rendered the adoption invalid. Even assuming that the assent of every sapinda is not required by law the degree of relationship to the husband of the adopting widow must determine whose assent is essential, and where all the sapindas are of the same degree of relationship then the assent of all is necessary. At any rate the appellant's refusal to give his consent must be shown by the defendants to have been influenced by improper considerations.

Now, even in the case of an undivided family, when a widow of a member thereof makes an adoption without the authority of

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her husband or the assent of her fathers-in-law, it cannot be taken to be the settled law that the assent of all the then surviving members of the coparcenary is absolutely necessary. No doubt in the Ramnad case (*Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(1)), the Privy Council say that the consent of all would probably be necessary. But the tenor of their Lordships' observations shows that they were not expressing a decided opinion on the point. Be this as it may, there can be no doubt that in a case like the present where an adoption is made by a widow of a divided man, and the assent to be obtained is that of sapindas divided from him and from each other, the assent of every existing sapinda is not a *sine qua non*. This was expressly stated by the Privy Council in the Ramnad Case (*Collector of Madura* v. *Moottoo Ramalinga Sathupathy*(1)) at page 442 of the report, and from the observations made later on in the same page it would seem to follow that where a majority of the sapindas give their assent to the adoption, such assent will be sufficient. That seems also to have been the view of Sir Charles Turner, C.J., and Innes, J., in *Parasara Bhattar* v. *Rangaraja Bhattar*(2) cited for the appellant, where they say, "The Ramnad case (*Collector of Madura* v. "*Moottoo Ramalinga Sathupathy*(1)) perhaps decided no more than "that an adoption was valid when the assent of the majority of "the sapindas was accorded; see *Arundadi Ammal* v. *Kuppam-*"*mal*(3), but it has never been decided that an adoption is abso-"lutely invalid by reason of the consent of less than the entire "body of sapindas having been obtained to it."

It should, at the same time, be borne in mind that a mere numerical majority, whether in favour of or against an adoption, will not by itself determine the question. Adoption being a proper act it will be presumed that when the majority give their assent such assent was given on *bonâ fide* grounds. If, however, it be shown that the majority give or withold their assent from improper considerations, such assent or dissent will be of no avail to the party relying on it. If the above view is correct it would further follow that any distinction, based upon the degree of relationship, as to whose assent is or is not essential becomes immaterial.

The question, then, that remains is whether the defendants were bound to show that the appellant's refusal was due to improper

(1) 12 M.I.A., 397 at p. 442. (2) I.L.R., 2 Mad., 202. (3) 2 M.H.C.R., 283.

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considerations. On the contrary, it would follow from what was stated above that it would be for the appellant to establish that the assent of the sapindas who consented to the adoption was not given *bonâ fide*. But *Parasara Bhattar* v. *Rangaraja Bhattar*(1), already referred to, was relied on as an authority in favour of the appellant's contention. The point actually decided by that case, in so far as we are here concerned, would seem to be that when the reasons for a sapinda's refusal to consent are expressed at the time the consent is sought and are improper, the sapinda cannot rely on such refusal as affecting the validity of the adoption made with the assent of others properly given. Supposing, however, that the observations in that case really go further, still they cannot be held to help the appellant, having regard to the peculiar circumstances appearing here. Now the objection under discussion not having been raised in the lower Courts, the reasons which induced the appellant to withhold his assent have not been investigated or considered by the lower Courts; nor does it appear that the appellant, either at the time he was asked to assent or subsequently, communicated to the first defendant what the reasons for his refusal were.

And throughout these proceedings also, he has failed to allege why he did not give his assent. In such circumstances it is difficult to understand what burden of proof lay on the second defendant in the matter. Of course the reason why a sapinda refuses to assent is peculiarly within his own knowledge and the widow seeking the assent cannot compel the person declining to give it to disclose the reasons for the course he adopts. Consequently she, as well as the person adopted by her, must in a case like this be held completely absolved from the duty of proving what they might be obliged to establish in cases where the grounds for the refusal to assent are duly made known. And it would seem only reasonable to say that when a sapinda refuses to assent but withholds his grounds for such refusal, he must be held to be precluded from relying on the refusal as in any way affecting the adoption. The propriety of this view will be clearer still if we remember the reason of the rule which compels a widow, desirous of making an adoption but possessing no authority from her husband in regard to it, to obtain the assent of his sapindas. The

(1) I.L.R., 2 Mad., 202.

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reason is the presumed incapacity of women for independent action in such a matter. And as the position of the sapindas in cases like this is, according to the Judicial Committee, similar to that of a family council that has to decide upon the expediency of substituting an heir by adoption to the deceased husband on a fair consideration of the question, (*Venkata Krishna Rau* v. *Venkata Rama Lakshmi*(1)), a sapinda who, like the appellant, refuses to give his reasons for the opinion why such an heir should not be substituted while other sapindas decide otherwise, cannot be held to exercise properly the discretion confided to him. His opinion against the adoption must be put entirely out of consideration as capricious or prompted by undue considerations.

The decision of the lower Courts is right. The second appeal, in my opinion, fails, and I would dismiss it with costs.

MOORE, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subrahmania Ayyar.

1899. November 7, 8, 13.

SAMIYA MAVALI (DEFENDANT No. 7), APPELLANT,

v.

MINAMMAL (PLAINTIFF), RESPONDENT.*

Court Fees Act—Act VII of 1870, s. 7, IV (c)—Fee payable on appeal—Suit for declaratory decree—Possibility of valuing subject-matter—Original valuation by plaintiff.

A plaintiff was granted a decree, (which was affirmed on appeal to the Subordinate Court), declaring a sale deed invalid on the ground that it had been obtained by fraud, coercion, undue influence and without consideration. The suit had been originally valued by plaintiff at Rs. 800, but by an order of the Munsif's Court that figure was altered to Rs. 2,000, the amount mentioned in the deed. One of the defendants preferred a second appeal to the High Court, where a question arose as to the amount of duty payable on such appeal:

Held, that section 7, IV (c), of the Court Fees Act applied, and that the valuation given by the plaintiff was the valuation to be accepted.

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(1) L.R., 4 I.A., 2 at p. 14.

* Second Appeal No. 1581 of 1898 against the decree of P. Narayanasami Ayyar, Subordinate Judge of Negapatam, in Appeal Suit No. 405 of 1897, affirming the decree of T. R. Kuppusami Ayyangar, Acting District Munsif of Tiruvadi, in Original Suit No. 498 of 1895.

SAMIYA MAVALI v. MINAMMAL.

Whether the reference to an appeal in the sub-section applies to a case in which the subject-matter of the appeal is not co-extensive with the subject-matter of the suit.—*Quære.*

Karam Khan v. *Daryai Singh*, (I.L.R., 5 All., 331), considered.

SUIT to set aside a registered sale deed executed by plaintiff to defendants Nos. 1 to 3, on the ground that it had been obtained by fraud, coercion, undue influence, and without consideration or necessity. Defendants Nos. 4 to 7 were impleaded as persons claiming title under defendants Nos. 1 to 3. The valuation of the suit, as originally fixed by the plaintiff, was Rs. 800, but by an order of the Munsif's Court that figure had been altered to Rs. 2,000, the amount mentioned in the sale deed which it was sought to set aside. The District Munsif declared the document to be invalid and decreed in plaintiff's favour. Defendants Nos. 2 and 7 appealed to the Subordinate Judge, who affirmed the decree of the Court below.

Defendant No. 7 preferred this second appeal.

The appeal first came on for hearing with reference to the question as to the amount of stamp duty payable.

V. Krishnasami Ayyar and *Subbayya Mudaliar* for appellant.

Sundara Ayyar for respondent.

The Court made the following

ORDER.—Two points have been taken with reference to the court-fee stamp payable in this case.

It is said that the subject-matter in dispute is one, the money value of which it is not possible to estimate, and it is said that the decree for which the plaintiff asks is a declaratory decree only without any consequential relief.

On this latter point we are referred to *Karam Khan* v. *Daryai Singh*(1) in which it seems to have been ruled that a suit like the present for the cancellation of a document is a suit for a declaration and not a suit in which substantive relief is asked for.

The report of the case is extremely brief, but, if it was intended to hold that the law, as understood before the Specific Relief Act came into force, was altered by section 39 of that Act, we are unable to agree with the decision. On the other question, as to the possibility of valuing the subject-matter, there are several

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(1) I.L.R., 5 All., 331.

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cases of this Court, deciding that a valuation is possible (*Naraina Putter* v. *Aya Putter*(1) and *Parathayi* v. *Sankumani*(2)).

The only question is which provision of the Act applies to the case.

We think section 7, IV (*c*), must be taken to apply. The case is, therefore, one in which the valuation given by the plaintiff is the valuation to be accepted. It is suggested that in the seventh defendant's appeal he may depart from that valuation, although the subject-matter is identical. This construction of the Act would lead to such anomalies that we are unable to accept it.

The reference to appeal in the last paragraph but one of the sub-section may well apply to the case in which the subject of the appeal is not co-extensive with the subject-matter of the suit, in which case it would be unjust that the party appealing should be bound by the original valuation.

In the present case, the plaintiff valued the subject-matter at Rs. 800, and we direct the court-fee stamp to be paid accordingly on or before Monday next.

The appeal coming on again for hearing (after due payment of stamp duty), the Court, (SUBRAHMANIA AYYAR and BENSON, JJ.), dismissed it on the merits.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Benson.

1899. November 14.

KANNAM NAIDU AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

LATCHANNA DHORA AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Madras Hereditary Village Offices Act (Madras)—Act III of 1895, s. 5—Attachment of growing crop.

By section 5 of the Madras Hereditary Village Offices Act, the emoluments of village offices are not to be liable to attachment:

(1) 7 M.H.C.R., 372. (2) I.L.R., 15 Mad., 294.

* Civil Miscellaneous Second Appeal No. 84 of 1899 against the decree of F. Murray, District Judge of Ganjam, in Appeal Suit No. 268 of 1898, affirming the order of N. Lakshmana Rao, District Munsif of Chicacole, on Miscellaneous Petition No. 404 of 1898 (Original Suit No. 783 of 1897).

Held, that an attachment by a decree-holder of a crop growing on certain lands in a zamindari, which were the inam service lands held by the judgment-debtor as a village servant, had been rightly set aside.

KANNAM NAIDU v. LATCHANNA DHORA.

PETITION filed on behalf of a defendant in a suit to set aside an attachment, which had been made by the decree-holder therein, of the standing paddy crop raised on the Bisarangi Doratanum service inam lands. Bisarangi was stated to be the Doratanum service inam village of the petitioner, who claimed that neither the lands nor the standing crop raised thereon were liable to be attached by reason of section 5 of Madras Act III of 1895. The District Munsif directed the release of the crop attached; and his order was affirmed by the District Judge as follows:—"This is an appeal against the Munsif's order releasing from attachment certain crops on Doratanum service inam lands in Parlakimedi estate. The ground of appeal is that that Court was wrong in holding that section 5 of Madras Act III of 1895 applies to the property attached, as the lands are enfranchised. The decision of the Munsif is however correct; the Government has clearly ordered that all Doratanum service inam lands in the Parlakimedi estate are to remain unenfranchised so as to constitute emoluments of village servants, and they therefore come within the Act quoted."

The plaintiff preferred this second appeal.

Sundara Ayyar for appellant.

V. Krishnasami Ayyar for respondent.

JUDGMENT.—The expression "land" may, we think, be taken to include growing crops and to hold that it does not would seriously affect the object of the Act (Madras Act III of 1895). The object seems to be to protect the source of the village officer's income in his hands till it is actually realised either by reaping of the crops when the inam consists of land, as is the case here, or by collection of the fees when the inam takes the form of fees.

We must dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

1899. October 23.

GODAVARI SAMULO AND ANOTHER (DEFENDANTS Nos. 10 AND 18), APPELLANTS,

v.

GAJAPATI NARAYANA DEO AND OTHERS (PLAINTIFF AND DEFENDANTS Nos. 1 TO 9, 11 TO 17, AND 19 TO 32), RESPONDENTS.*

Appeal—Execution proceedings—Order made in the course of execution proceedings and not appealed against—Right to raise the question as to its propriety in the appeal against the final order.

A decree having, in 1894, been passed in favour of the plaintiff in a suit against a number of defendants for the recovery of land with mesne profits, the amount of such mesne profits was ordered to be fixed in execution. In 1897, an order was passed declaring that all the defendants were liable jointly and severally for such mesne profits, which order was not appealed against. Later in the same year a Commissioner was appointed to ascertain the amount of the said mesne profits, and in due course a final order in execution was passed by the District Court. At the time when the last-mentioned order was passed, certain of the defendants desired to re-open the question of their joint liability, but were not permitted to do so:

Held, that even assuming that the order declaring the defendants to be jointly and severally liable was one from which an appeal could have been preferred,—as to which there might be some doubt,—it was a determination of one of the questions which had to be determined before the particular application for execution could be finally disposed of; and the question of the propriety of the order was one that need not be at once raised by appeal, but could be raised in the appeal against the final order.

Caussanel v. *Soures*, (I.L.R., 23 Mad., 260), referred to.

IN a suit to recover a village from a number of defendants with mesne profits, a decree was passed as prayed in the year 1894, the amount of mesne profits being ordered to be fixed in execution. On 10th March 1897 the District Court passed an order declaring that the defendants were liable jointly and severally therefor, which order was not appealed against. In July 1897 a commissioner was appointed to ascertain the amount of the said mesne profits, and in October of that year the District Court passed a final order in execution in pursuance of the commissioner's report. At the time when the last-mentioned order was passed, certain of the

* Civil Miscellaneous Appeal No. 80 of 1898 against the order of J. G. D. Partridge, Acting District Judge of Ganjam, in Execution Petition No. 48 of 1898 in the matter of Original Suit No. 6 of 1894.

defendants desired to re-open the question of their joint liability, but were not permitted to do so.

Defendants Nos. 1 to 9, 11 to 17 and 19 to 32 preferred this appeal on the ground that the proceedings in the original suit showed that it was not intended to hold all the defendants jointly and severally responsible.

Sundara Ayyar for appellants.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*) for respondents.

JUDGMENT.—The first question is whether the decree makes all the defendants jointly liable for the whole of the mesne profits. We think, having regard to the judgment, that this is not so. The fourth issue distinctly raises the question as to the amount recoverable from each, and in deciding that issue the District Judge says the amount of profits will be reserved for decision in execution and nothing more. This tends to show that the question whether each was liable to pay the whole or a part was not before his mind. Moreover the conduct of the parties throughout these proceedings shows that they have considered the question as undetermined by the decree.

The next question raised is whether there can now be any appeal as to the liability of the defendants to pay the mesne profits jointly and severally. An order having been made in March 1897 in these proceedings and not having been appealed from, it is argued that it cannot be gone into upon appeal on the final order passed in execution, as it is a decree which could have been appealed against. We are not prepared to say without further consideration that this decision was a determination of a question arising in execution and relating to the execution of the decree so as to have been appealable in itself apart from the final order. Even, however, assuming that it could have been appealed against, it appears to us to be the determination of one of the questions which had to be determined before the particular application for execution could be finally disposed of. No authority has been cited to show that in such a case the party affected by such partial determination is bound at once to appeal and is not entitled to wait for the final decision and raise the question of the propriety of the order in appeal against that decision. By analogy with cases in ordinary decrees where parties are at liberty to appeal against a preliminary order, *e.g.*, for accounts, &c., or to raise the question

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in the appeal against the final decree, we see no reason why a similar course should not be permissible in cases such as this. If the question of balance of convenience is to be considered, it is all in favour of the view we take. Our attention has been called to *Causanel* v. *Soures*(1), but it is doubtful if that is reconcilable with the case of *Sankaralinga Mudali* v. *Ratnasabhapati Mudali*(2). However that may be, the reasoning upon which that case goes does not apply to the present case.

On the merits we think clearly the appellants are not liable for the mesne profits of more land than they have had possession of respectively. No reason is given for holding that they are all jointly and severally liable for the mesne profits of the whole of the lands in question, and as throughout it is admitted that they each severally held separate portions of the lands mentioned in their written statements, they can only be held liable for the mesne profits in respect thereof.

We must, therefore, modify the order of the lower Court and make the tenth defendant liable for Rs. 680, and the eighteenth defendant for Rs. 160 instead of the amount mentioned in the order. The appellants are entitled to be paid their costs by the first respondent in this and the lower Appellate Court.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Benson.

1899. October 27.

MANICKA MUDALIAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

GURUSAMI MUDALIAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 626—Order for review—Omission to record reasons for granting—Validity of order.

An order intended to operate as an order for review is not invalidated by an irregularity in its form by reason of which it purports to be an order made on an application to set aside a decree and restore a suit for trial.

The provision in section 626 of the Code of Civil Procedure that a Judge granting an application for a review "shall record with his own hand his reasons for such opinion," is directory and an order is not necessarily invalidated by the fact that the reasons are not recorded, though there may be cases in which it is necessary in the interests of justice that the reasons should be recorded, and in such cases the record would be essential to the validity of the order.

(1) I.L.R., 23 Mad., 260. (2) I.L.R., 21 Mad., 324.

* City Civil Court Appeal No. 8 of 1899 against the decree of P. Srinivasa Rao, City Civil Judge, Madras, in Pauper Original Suit No. 344 of 1897.

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SUIT for a declaration that a certain mortgage was null and void. The first defendant did not appear. The second defendant was represented and applied for an adjournment, which was not granted. The Judge of the City Civil Court made the declaration prayed for. The second defendant then presented a petition praying that the decree might be set aside and the suit restored on the ground that he had been misled by a third party as to the engagement of an attorney to represent him at the hearing. It was accordingly ordered "that the judgment pronounced herein on the 12th July 1898 be set aside as against second defendant; that the suit be adjourned to 2nd November 1898 for trial: and that the second defendant (petitioner) do pay the plaintiffs' costs and pleaders' fees." On the suit again coming on for trial, it was dismissed.

Plaintiffs preferred this appeal.

Sivagnana Mudaliar for appellants.

Mr. *Joseph Satya Nadar* for respondent No. 2.

JUDGMENT.—The lower Court, in the first instance, passed a decree in favour of the plaintiffs. The Court subsequently made an order on the application of the second defendant (the second respondent) which the said respondent contends was in substance an order for review and was valid as an order for review. Upon the re-trial under this order the lower Court dismissed the plaintiffs' suit. On the appeal to us the plaintiffs, as they are entitled to do under section 629 of the Civil Procedure Code, first object to the admission of the application for review, and secondly, appeal against the decree passed in the re-trial dismissing their suit.

As regards the objection to the admission of the application for review, the order made upon the application was no doubt irregular in form. The order made in form purports to be an order made on an application to set aside a decree and restore a suit for trial. There can be no question, however, that the Court intended the order to operate as an order for review, and the order, as an order for review, is not in our judgment invalidated by this formal irregularity.

It has been urged on behalf of the plaintiffs (appellants) that, treating the order as an order for review, the requirements of

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section 626, Civil Procedure Code, which confers the jurisdiction to review, have not been complied with in two respects. First, it is said that the Judge has not recorded with his own hand his reasons for his opinion that the application should be granted. As a matter of fact, the Judge made the order without recording any reasons. In our judgment the words requiring the Judge to record his reasons are directory and an order is not necessarily invalidated by the fact that the reasons are not recorded. There may no doubt be cases in which it is necessary in the interests of justice that the reasons should be recorded, and, in such cases, it might well be held that the record of the reasons is essential to the validity of the order. The present, however, is not such a case. In the case (*Gyanund Asram* v. *Bepin Mohun Sen*(1)) the Court, on the particular facts of that case, held that an order for review was bad on the ground that the reasons of the Judge were not recorded. This decision is not an authority for the proposition that a hard-and-fast rule must, in all cases, be enforced.

Secondly, it is said that the requirements of section 626 (*b*) of the Civil Procedure Code have not been complied with. The proviso in question relates to the granting of the application on the ground of the discovery of new matter or evidence. But, under sections 623 and 626 of the Civil Procedure Code, the Courts have power to grant the application for any sufficient reason. On the facts of the present case we think there was sufficient reason apart from the ground specified in section 626 (*b*), Civil Procedure Code, for granting the application.

We accordingly over-rule the objection to the admission of the application for review.

As regards the merits, it lay upon the plaintiffs to establish affirmatively that the Rs. 300 were advanced by the second defendant to the first defendant for an immoral purpose. The plaintiffs' evidence entirely fails to establish this and there was evidence on behalf of the second defendant to show that the money was advanced for family purposes.

We think the mortgage cannot be impeached and we accordingly affirm the judgment of the lower Court and dismiss the appeal with costs.

The appeal being an appeal *in formâ pauperis*, the Court-fees incidental to the appeal will be payable out of the plaintiffs' estate.

(1) I.L.R., 22 Calc., 734.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Benson.

PONNAMMAL (PLAINTIFF), APPELLANT,

v.

SUNDARAM PILLAI AND OTHERS (DEFENDANTS), RESPONDENTS.*

1900. January 25.

Evidence Act—Act I of 1872, *s.* 74 (1) (iii)—*Document purporting to be a certified copy of a will taken from the Protocol of record in Ceylon—No proof that it had been made from or compared with the original—Inadmissibility of document.*

In support of a claim instituted in a Court in British India for a share in her deceased father's estate, plaintiff tendered in evidence a document which purported to be a certified copy of a will executed by her late father at Colombo, where he was said to have been at the date of the execution of the alleged will. The document was filed as an exhibit in the suit, but the Subordinate Judge held that it was not admissible in evidence. It bore an endorsement purporting to be signed by the Assistant Registrar-General for Ceylon to the effect that it was a true copy of a last will and testament made from the Protocol of record filed in his office. No evidence was tendered before the Subordinate Judge that the copy had been made from and compared with the original. On the question of the admissibility in evidence of the said document:

Held, that it was inadmissible; that it was not a public document within the meaning of section 74 (1) (iii) or (2) of the Evidence Act, and that in the absence of evidence that it had been made from and compared with the original, the provisions of that Act relating to secondary evidence of public documents were inapplicable.

Whether section 35 of the Evidence Act applies to an entry in a public register or record kept outside British India—*Quære*.

SUIT to recover a half share in certain property with mesne profits and for an account. Plaintiff said that her deceased father Chinnathambia Pillai had had four wives, the first being the mother of first defendant, the second the mother of second defendant, and the third the mother of plaintiff; that her father had gone from Sivaganga to Colombo with plaintiff's mother about fifty years previously, remaining there about twenty-five years and acquiring extensive property. The third paragraph of the plaint was as follows:—"The said Chinnathambia Pillai returned from Colombo to his native place Sivaganga at the close of 1872. Before his return to India, he gave plaintiff and defendants Nos. 1 and 2

* Appeal No. 30 of 1899 against the decree of T. Varada Rao, Temporary Subordinate Judge of Madura (East), in Original Suit No. 4 of 1898.

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each one-third share of the moveable and immoveable properties he possessed then under a will which he had executed on 28th February 1872." Chinnathambia Pillai died at Sivaganga in 1889. Plaintiff asked to be given possession of one-third of his property, with mesne profits and for an account. Most of the defendants were impleaded in consequence of their laying claim to or being in possession of some of the properties. In support of her case at the Subordinate Court a document purporting to be a certified copy of the will referred to in paragraph 3 of the plaint was tendered in evidence by the plaintiff, and filed as exhibit A. The document bore an endorsement, purporting to be signed by the Assistant Registrar-General for Ceylon, to the effect that it was a true copy of a last will and testament made from the Protocol of record filed in his office and that the same was issued to a person named. A number of issues were framed, the second relating to the genuineness of the will. On this the Subordinate Judge said—"Exhibit A has not been, in my opinion, properly proved. It purports to be a true copy of the last will and testament made from the file and record in the office of the Assistant Registrar-General of Ceylon. I do not think that it comes under the category of public documents. *Public records, kept in British India, of private documents*, are public documents within the meaning of section 74. But it does not seem that public records, kept in a foreign country, of private documents, can be called public documents. Even if exhibit A is considered to be a public document, it wants the certificate of a notary public and of a British Consul or diplomatic agent that the copy is duly certified by the officer having the legal custody of the original (section 78, clause 6). It has not been argued before me that exhibit A is admissible under section 82 of the Evidence Act. Taylor on 'Evidence' enumerates the particular documents which are, in England or Ireland, admissible without proof of authentication. It does not appear that copies of wills come under any one of the classes mentioned by Taylor. I, therefore, hold that exhibit A is not admissible in evidence."

In the result he held that the will was not genuine, and dismissed the suit.

The plaintiff preferred this appeal on the ground, among others, that exhibit A was a public copy, and should have been held admissible in evidence.

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Sundara Ayyar and *Anantakrishna Ayyar* for appellant.—It is submitted that the document (exhibit A) is admissible in evidence as proof of the will made by plaintiff's father in favour of plaintiff, on three distinct grounds; first, it is a public document and comes within either section 74 (i) or (iii) of the Evidence Act. It is a record of the public officers, judicial or executive, of a part of Her Majesty's dominions, to wit, Ceylon. The appellant now produces before this Court a fresh copy of the will, bearing a certificate signed by the Governor of Ceylon that the copy of the will was signed by the Assistant Registrar-General of Ceylon. Secondly, section 65 of the Evidence Act applies. The original will is deposited with the Registrar-General of Ceylon, and so is in the possession of a person out of the reach of and not subject to the process of the Courts in British India. The duly certified copy now produced is therefore admissible in evidence. Thirdly, section 35 of the Evidence Act applies. That section is not confined to entries in a public register or record kept in British India. It is general in its terms and applies to entries in public records whether kept in British India or not. There is no doubt that this will was entered or registered in a public register or record by a public servant in the discharge of his official duty. That is the effect of the certificate now produced. The will was certified and attested (as the copy filed shows) by a notary public, who also states with the certificate that the will was signed by the testator and by the said witnesses thereto, all of whom were known to him, in the presence of one another. On these grounds it is submitted that the will is duly proved.

V. Krishnasami Ayyar for respondents Nos. 1 to 8, 12, 15 and 18.—Exhibit A is not a public document. A will is a private document and it is only records of private documents kept in British India that are deemed to be public documents. Section 75 of the Evidence Act enacts that all other documents are private documents. Record of a will kept in Ceylon is not a public document. It is only in the case of public documents that duly certified copies are admissible as secondary evidence. But here, exhibit A is not a public document. So, plaintiff cannot rely on secondary evidence. Moreover it is only entries in a public register kept in British India that can be proved by a certified copy. Section 35 of the Evidence Act applies only to British India. It is submitted that it does not apply to cases of entries in public registers kept outside British India.

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Ayya Ayyar for respondent No. 9.
Mahadeva Ayyar for respondent No. 10.
Ranga Ramanujachariar for respondents Nos. 13 and 14.
K. Srinivasa Ayyangar for respondent No. 17.

JUDGMENT.—Before dealing with this appeal generally it will be convenient to dispose of the question as to the admissibility of exhibit A. This document was tendered in evidence on behalf of the plaintiff in support of the allegation contained in paragraph 3 of the plaint.—"Before his return to India, he gave "plaintiff and defendants Nos. 1 and 2 each one-third share of the "moveable and immoveable properties he possessed then under a "will which he had executed on 28th February 1872."

Before the Subordinate Judge, no other evidence was tendered in proof of this allegation. The Subordinate Judge marked this document and filed it as an exhibit in the case, but in giving judgment he held that it was not admissible in evidence. The document purports to be a copy of a will executed by a person of the name of Chinnathambia Pillai. The copy contains an endorsement purporting to be signed by the Assistant Registrar-General for Ceylon to the effect that the copy was a true copy of a last will and testament made from the Protocol of record filed in that office, and the same was issued to M. R. M. A. Narayanan Chetti on his application at Colombo on the 8th day of March 1897.

The Subordinate Judge held this document inadmissible on the ground that it was not a "public document" and that if it was a public document, there was no certificate "under the seal, &c." (section 78 (6) Evidence Act). After the delivery of the judgment by the Subordinate Judge the plaintiff obtained a certificate which purported to be signed by the Governor of Ceylon to the effect that the person who signed the endorsement on exhibit A was the Assistant Registrar-General for the island of Ceylon.

In our judgment the will is not a public document within the meaning of section 74 (1) (iii) or (2) of the Evidence Act. It has been argued that if the original will is not a public document, it is a document to which section 65 of the Evidence Act applies, and that inasmuch as it is in the possession or power of a person out of the reach of, and not subject to, the process of the Court, secondary evidence may be given of its contents. By section 63 of the Evidence Act "secondary evidence" is defined as meaning and including (1) certified copies under the provisions

hereinafter contained, that is to say, in the case of public documents, (2) copies made from and compared with the original. No legal evidence was tendered before the Subordinate Judge that this copy had been made from, and compared with, the original, and the appellant cannot rely on the provisions of the Evidence Act which apply only to public documents where the document of which secondary evidence is sought to be given is not a public document. We do not think that the document is admissible under section 35 as an entry in a public register or record. It seems doubtful whether this section applies to an entry in a public register or record kept outside British India. In any case the entry, even if admissible under section 35, would not be proof of the allegation contained in paragraph 3 of the plaint.

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Even if admissible, the document would only be evidence of the fact that a man of the name of Chinnathambia Pillai made a will in 1872 disposing of his property in a certain way. There is no evidence forthcoming to identify the maker of this will with the plaintiff's father.

We have been asked that an opportunity should be given to the plaintiff to give legal evidence, if she is in a position to do so, of the will of 1872. We do not think she is entitled to any such indulgence. There is no reason why she should not have produced the necessary legal evidence to establish her allegations with regard to the alleged will of 1872 when the case was tried before the Subordinate Judge. In our judgment the Subordinate Judge rightly held that exhibit A was inadmissible, and we must decline to allow the case to be re-opened.

[Their Lordships then dealt with the facts, and dismissed the appeal.]

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Benson.

1899. December 6, 7.

KANNI AMMAL (PLAINTIFF), APPELLANT,

v.

AMMAKANNU AMMAL AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Purchase by stranger from one of two daughters jointly entitled to their father's property—Decree for partition.

A purchaser, having purchased certain property from one of two sisters jointly entitled to their deceased father's property, under the Hindu Law, re-sold it, whereupon the other daughter sued for a declaration that such sales were invalid as against her, and that the property might be restored to her and her sister, or that there might be a partition of it:

Held, that while one of two daughters cannot by any alienation alter the character of the daughters' estate so far as the right of survivorship or that of the reversioners is concerned, she may alienate her interest in the property, or have that interest taken and sold in execution of a decree against her. Also that, subject to the same condition, she may demand a partition of the property.

SUIT for a declaration and for possession of immoveable property, with mesne profits. One Munisami Mudali, having had two wives who predeceased him, died leaving a third wife him surviving. Plaintiff was the daughter of his first wife; his second wife left a daughter, who had also predeceased her father; first defendant was the daughter of the third wife, the latter having died prior to the commencement of the suit. Plaintiff's case was that a certain house, the subject of the suit, had belonged to her father; that at his death, sonless, it devolved upon his third wife, and that upon the death of the latter, the property came to the daughters, namely, to plaintiff and first defendant. First defendant had, however, sold it to second defendant, who in turn had sold it to third defendant. Plaintiff contended that both sales were void, the property having been inherited by herself and her step-sister jointly. She asked for a declaration to that effect and for possession of the house for herself and first defendant jointly or for a partition of it. First defendant was *ex parte*. Second defendant made formal defences, the suit being contested by third defendant alone. This defendant said that the house was the property, not of

* City Civil Court Appeal No. 7 of 1899, against the decree of P. Srinivasa Rao, City Civil Judge, Madras, in Original Suit No. 235 of 1898.

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Munisami but of his third wife, and that, in consequence, it had been inherited, not jointly by plaintiff and first defendant, but solely by first defendant. She claimed a right to it by her purchase and denied that plaintiff had any right at all. Though the sale-deed was drawn up in Munisami's favour, it was contended that the house had been really purchased benami for his third wife, and with the proceeds of her jewels. The City Civil Judge found, upon the evidence, that the plaintiff's case had not been established, and that she had no interest in the property. He held that the sales by first defendant to second defendant and by second defendant to third defendant were valid. He dismissed the suit.

Plaintiff preferred this appeal.

Seshagiri Ayyar (*V. Krishnasami Ayyar* and *Balamukunda Ayyar* with him) for appellant.—The City Judge is wrong in holding that the property was not Munisami's at the time of his death. The burden of proof is clearly upon those who contend that the transaction is not what it appears to be on the face of it. The latest cases upon the point are *Ranga Ayyar* v. *Srinivasa Ayyangar*(1) and *Ram Narain* v. *Muhammad Hadi*(2). The evidence to prove that the transaction was benami is inconsistent and unreliable. [He dealt with the evidence.] It is further contended that the plaintiff is entitled to recover the *entire* house. The plaintiff and the first defendant are the only persons entitled to the property. It is clear upon the authorities that each of the daughters is entitled to enjoy every portion of the property. It is not like the case of sons where each has a vested right to his share which he can alienate to a stranger (see Mayne's 'Hindu Law,' sections 510 and 515). Daughters, like widows, only take a life interest (see Mayne's 'Hindu Law,' paragraph 568, and *Kattama Nachiar* v. *Dorasinga Tevar*(3).) The earliest case in Madras wherein the texts of Hindu Law bearing upon the question were fully examined is that of *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*(4). It was there held that widows were not entitled to partition. [SHEPHARD, J.—Is it your contention that two or more co-widows cannot divide the property of their husband at all?] They have no right to partition and Courts

(1) I.L.R., 21 Mad., 56.
(2) I.L.R., 26 Calc., 227.
(3) 6 M.H.C.R., 310 at p. 338.
(4) 2 M.H.C.R., 424.

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of Law will not decree partition at their instance. But they may arrange among themselves to divide the property and to enjoy the portions separately. The observations in *Jiyoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*(1) are in point. The same point was decided in *Sri Gajapathi Nilamani Patta Mahadevi Garu* v. *Sri Gajapathi Radhamani Patta Mahadevi Garu*(2). It was again raised in *Kathaperumal* v. *Venkubai*(3), and the decision in that case is conclusive. *Bhugwandeen Doobey* v. *Myna Baee*(4) is to the same effect. Nor is the case of *Ariyaputri* v. *Alamelu*(5) against this contention. There, the mortgage was by both the widows, and both the widows were consenting parties to the arrangement. The principle of estoppel was applied. In *Sri Gajapati Radhamani Garu* v. *Maharani Sri Pusapati Alakarajeswari*(6), where the alienation by one of the widows had been effected for purposes binding upon the estate, their Lordships of the Privy Council said:—"that necessity did not render a mortgage by one widow binding upon the joint estate so as to affect the interest of the surviving widow;" compare also *Ram Piyari* v. *Mulchand*(7). The decision of the Privy Council in *Mussammat Sundar* v. *Mussammat Parbati*(8) was really based on the ground that one of the widows was seeking the aid of the Court to carry out the arrangement entered into between the widows and acted upon; otherwise *Mussammat Sundar* v. *Mussammat Parbati*(8) is inconsistent with *Sri Gajapati Radhamani Garu* v. *Maharani Sri Pusapati Alakarajeswari*(6). Under any circumstances the case in *Mussammat Sundar* v. *Mussammat Parbati*(8) does not decide that, at the instance of an alienee from one of the widows, the Courts will decree partition. The Calcutta cases (especially *Janoki Nath Mukhopadhya* v. *Mothuranath Mukhopadhya*(9)) have no bearing, as they were decisions under the Dayabhaga Law. It is submitted that (*a*) the daughters are not entitled to alienate the properties in which they have the mere right of enjoyment during their joint lives; (*b*) that they have no right to claim in a Court of Law to partition the properties, especially if all the daughters do not agree; and (*c*) that under no circumstances can an alienee of one

(1) 3 M.H.C.R., 424.
(2) L.R., 4 I.A., 212; I.L.R., 1 Mad., 290.
(3) I.L.R., 2 Mad., 194.
(4) 11 M.I.A., 487.
(5) I.L.R., 11 Mad., 304.
(6) L.R., 19 I.A., 184; I.L.R., 16 Mad., 1.
(7) I.L.R., 7 All., 114.
(8) L.R., 16 I.A., 186; I.L.R., 12 All., 51.
(9) I.L.R., 9 Calc., 580 at p. 585.

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of the daughters compel a partition and allotment to him of his alienor's share. Under any circumstances, plaintiff is entitled to a half of the house.

K. Srinivasa Ayyangar (with him *Sundara Ayyar*) for respondents Nos. 2 and 3.—(after referring to the evidence for the purpose of showing that Munisami was only benamidar for his wife the mother of the first defendant, and therefore that the first defendant alone was entitled to the house):—If the plaintiff and the first defendant jointly succeeded to the house as the heirs of Munisami, the question is whether the vendee of first defendant is entitled to any share of the house. As to this it is submitted that the real question is whether the first defendant was entitled to sell her portion of the estate and not whether there could be compulsory partition between the two daughters. If the two daughters jointly succeeded to their father's property, they are entitled to enjoy the properties during their joint lives; and if one of them dies, the survivor of them, as the heir of the father, succeeds to that portion enjoyed by the deceased daughter and after the death of both daughters, the other heirs of the father will succeed. There is nothing in Hindu Law or in any enactment which prevents the alienation of the estate vested in one of the daughters. Alienation by a widow of her life estate to a stranger is of common occurrence and the daughter's estate is similar. The alienee of a daughter is entitled to all the rights of that daughter. He is entitled to enjoy the property jointly with the other daughter during the lifetime of the alienor and the appellant has not contended that the estate of the first defendant was an inalienable estate. As to the question of partition, a distinction has to be drawn as to the sense in which that word is used. The daughters, no doubt, succeed jointly; and if one of them dies the other daughter or daughters succeed to the portion of the deceased sister. This is commonly, though not accurately, spoken of as occurring by right of survivorship. The surviving daughters succeed because they are the nearer heirs of the father. All that is involved is that the estate of the daughter is not stridhan estate and on the death of one daughter, her heirs do not succeed, but the succession has to be traced from the last male holder, the father. Partition in the case of joint property is used in the sense of getting rid of the right of survivorship and creating an estate in severalty. Partition is also used in the sense of dividing for more convenient

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enjoyment without affecting any rights of survivorship and without creating an estate in severalty. In *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*(1) all that the Court decided was that there could not be compulsory partition so as to defeat the rights of the other co-widows, *i.e.*, one widow could not have a decree for partition so as to let in her own heirs after her death and during the lifetime of the co-widows. Partition there is used in the first sense. So also in the cases cited as authorities by the other side. If this distinction as to the sense in which 'partition' is used in the reported cases is borne in mind, there is no conflict. An example of a division for the convenient enjoyment of the estate without affecting the rights of the co-widow is found in *Sri Gajapati Radhamani Garu* v. *Maharani Sri Pusapati Alakarajeswari*(2). Similarly in *Ariyaputri* v. *Alamelu*(3) the two senses in which 'partition' is used are clearly shown, and the distinction between the two kinds of partition pointed out. In *Mussammat Sundar* v. *Mussammat Parbati*(4) the Privy Council expressly decides that co-widows are entitled to partition. The case of *Sri Gajapathi Patta Mahadevi Garu Nilamani* v. *Sri Gajapathi Radhamani Patta Mahadevi Garu*(5) supports my contention. Their Lordships approve of *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*(1), and say there could be no absolute partition, *i.e.*, such a partition as would defeat the rights of the co-widow or co-heir. But that case itself clearly shows that all the widows (and by analogy, all daughters) are jointly and equally entitled to their husband's property and the Courts would decree partition for more convenient enjoyment. The case of *Janoki Nath Mukhopadhya* v. *Mothuranath Mukhopadhya*(6) which strongly supports my contention was decided under the Dayabhaga Law, but there is no difference on this point between the Mitakshara and Dayabhaga. The Privy Council decisions are distinguished at page 585. If, therefore, the first defendant is not solely entitled to the house but takes it jointly with plaintiff, my client, as the vendee of the first defendant, is entitled to a division and the plaintiff is entitled to recover only her half share. This, of course, would not affect her right, if any, to succeed after the first defendant's death.

1) 3 M.H.C.R., 424. (2) L.R., 19 I.A., 184; I.L.R., 16 Mad., 1.
3) I.L.R., 11 Mad., 304 at p. 306.
4) L.R., 16 I.A., 186; I.L.R., 12 All., 51.
5) L.R., 4 I.A., 212; I.L.R., 1 Mad., 290. (6) I.L.R., 9 Calc., 580.

Tiruvengadasami Pillai for respondent No. 3.

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JUDGMENT.—On the main question in this case, viz., whether the house was the property of Munisami at the time of his death, we are clearly of opinion that the judgment of the City Civil Judge is against the weight of evidence. The two witnesses, who, at the trial, said that the house was bought in the name of Munisami benami, told a contradictory story at the previous trial and it is quite beside the point to say that the precise question now in issue was not then at issue. The two stories are irreconcilable.

The recital in the sale-deed of 29th March 1897 refers to the debts contracted by the vendor's father and makes no reference to any claim to the house as the property of the vendor independently of her father.

The burden of proof was on the defendants and we are of opinion that the alleged title of Munisami's vendor has not been proved. The question then arises as to the terms of the decree to which the plaintiff is entitled.

It is argued on her behalf that the purchaser who has bought from one of two sisters jointly entitled to their father's property under Hindu Law takes nothing by his purchase and cannot ask for a partition against the other sister. This statement of the law, which would practically place widows or daughters enjoying property inherited from a husband or father on the footing of the members of a Malabar tarwad is not in accordance with the law as laid down in several cases: *Ariyaputri* v. *Alamelu*(1), *Janoki Nath Mukhopadhya* v. *Mothuranath Mukhopadhya*(2) and *Mussammat Sundar* v. *Mussammat Parbati*(3). Having regard to those authorities we must hold that, while one of two daughters cannot by any alienation alter the character of the daughters' estate so far as concerns the right of survivorship or the rights of reversioners, she may alienate her interest in the property or have that interest taken and sold in execution of a decree against her. She may also, subject to the same condition, demand a partition of the property.

It is obviously desirable that there should be a partition between the plaintiff and the purchaser, who is a stranger to the family.

(1) I.L.R., 11 Mad., 304 at p. 306. (2) I.L.R., 9 Calc., 580.
(3) L.R., 16 I.A., 186; I.L.R., 12 All., 51.

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The plaintiff asks for partition and there must be a decree accordingly.

We must direct the City Civil Judge to find on the evidence on record to what amount the plaintiff is entitled on account of mesne profits and submit his findings within one month from the date of the receipt of this order. Seven days will be allowed for filing objections after the findings have been posted up in this Court.

APPELLATE CIVIL.

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

1899. December 18

MADHAVI AMMA (PLAINTIFF No. 3), APPELLANT,

v.

KUNHI PATHUMMA AND OTHERS (DEFENDANTS NOS. 1 TO 11, AND PLAINTIFFS NOS. 1 AND 2), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, ss. 83, 84—Deposit in Court to the account of the mortgagee of amount remaining due on mortgage—Deposit to credit of persons not entitled in addition to persons entitled.

A mortgagor before bringing a suit for redemption deposited the mortgage money in Court to the credit of persons who were not entitled to it in addition to that of persons who were entitled to it:

Held, that he was not entitled to claim the benefit of sections 83 and 84 of the Transfer of Property Act, inasmuch as the persons really entitled to the money could not draw it.

SUIT for redemption. Plaintiffs sued to redeem, for third plaintiff, a kanom granted by second plaintiff to defendants Nos. 1 to 3 and to the deceased mother of defendants Nos. 4 to 6. Third plaintiff further contended that she had duly deposited the mortgage money in Court as provided by section 83 of the Transfer of Property Act and was, in consequence, entitled to future rent under section 84, inasmuch as, by the terms of the kanom, the mortgagees took the rent of the property in lieu of interest. Defendants denied third plaintiff's claim to future rent. The payment under section 83 had in fact been made to the credit of defendants Nos. 1 to 7. Defendants Nos. 1 to 3 claimed the whole amount. Defendant No. 7 also made a claim. The District Judge found that defendants Nos. 1 to 3 were entitled to

* Appeal No. 69 of 1899 against the decree of A. Thompson, District Judge of North Malabar, in Original Suit No. 45 of 1898.

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three-fourths of the kanom amount and the tarwad of which defendant No. 7 was karnavan was entitled to one-fourth. An issue having been framed on the question, the District Judge held that the deposit made by third plaintiff was not unconditional, and was, in consequence, ineffectual. Plaintiff No. 3 had, after depositing the money, caused the notice under section 83 of the Transfer of Property Act to be served not only on defendants Nos. 1 to 6 but also on the seventh defendant, the karnavan of the tarwad, who also claimed the kanom. As a result, neither defendants Nos. 1 to 6, nor defendant No. 7 could draw the kanom amount. Third plaintiff's claim to rent from date of plaint was disallowed on the ground that she had not done all that had to be done to enable the mortgagee to take the amount out of Court, within the meaning of section 84.

Plaintiff No. 3 preferred this appeal.

Sundara Ayyar for appellant.—This was a good tender under section 83 of the Transfer of Property Act. The deposit was, in effect, to the credit of such of the defendants as should be entitled to take it. The section only provides that the amount remaining due upon the mortgage may be deposited "to the account of the mortgagee," that is, in this case, such of the defendants who may be found to be entitled. The amount was paid to the credit of defendants Nos. 1 to 7, and the finding is that defendants Nos. 1 to 3 and 7 are entitled. A mortgagor should have the benefit of section 84 without being compelled to determine who is entitled to take the money out of Court. The defendants might have decided that among themselves, but in consequence of their disputes the difficulty arose. [DAVIES, J.—You deposited the money to the credit of two persons, who were mortgagees, and two who were not.] The question is whether under section 83 the mortgagor is bound to decide who the mortgagee really is.

J. L. Rosario, for respondents Nos. 1 to 3, referred to *Barber Maran* v. *Ramana Goundan*(1). Respondents Nos. 1, 2 and 3 had signified their willingness to accept the amount of the kanom if it were duly deposited,—which, he contended, had not been done.

Mr. *C. Krishnan* for respondents Nos. 4 to 7.

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(1) I.L.R., 20 Mad., 461.

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JUDGMENT.—The third plaintiff deposited the mortgage money to the credit of persons who were not entitled to it in addition to persons who were entitled to it. This prevents her from claiming the benefit of sections 83 and 84 of the Transfer of Property Act, inasmuch as the persons really entitled to the money could not draw it. The appeal therefore fails and is dismissed with costs.

The two memoranda of objections by the defendants Nos. 1, 2, 3 and 7 as to the proportion in which they have been assessed in costs are also dismissed with the costs of the third plaintiff.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Boddam.

1900. January 26. February 1.

VAIKUNTAM AMMANGAR (PLAINTIFF), APPELLANT,

v.

KALLAPIRAN AYYANGAR (DEFENDANT), RESPONDENT.*

Hindu Law—Liability of undivided brother of deceased Hindu to defray expenses of his niece's marriage—Improper refusal—Performance by widow— Maintainability of suit brought by widow—Contract Act—Act IX of 1872, s. 69—"Person who is interested in the payment of money."

The defendant having improperly refused to perform the marriage ceremony of his niece, the daughter of his undivided brother (deceased), the widow of the latter herself performed the ceremony, borrowing money for the purpose, and sued her late husband's said brother (the defendant) to recover the amount expended on the marriage. On its being contended that defendant was under no obligation to provide for the expenses of his brother's daughter's marriage:

Held, that defendant was liable, the marriage having been properly performed.

Held, further, that the suit was maintainable though it had been brought by the mother of the bride and not by the bride herself.

Semble, that the mother was, within the meaning of section 69 of the Indian Contract Act, interested in making the payment which had given rise to the action. It was not necessary for her to prove that she had been compelled to make it, or that she had made it at the defendant's request.

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* Second Appeal No. 21 of 1899 against the decree of K. C. Manavedan Raja, Acting District Judge of Tinnevelly, in Appeal Suit No. 538 of 1897, reversing the decree of C. Krishnasami Rao, District Munsif of Srivaikuntam, in Original Suit No. 307 of 1897.

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SUIT to recover the costs incurred in performing the marriage ceremonies of plaintiff's daughter. Defendant and his brother, (plaintiff's deceased husband), were undivided, when the latter died leaving a daughter of marriageable age and plaintiff, his widow, him surviving. Defendant, as the District Munsif found, improperly refused to perform the daughter's marriage, in consequence of which refusal plaintiff borrowed money and herself performed it. She now sued defendant (her husband's brother) to recover the amount so expended. The District Munsif decreed in her favour for the amount claimed. On appeal, the District Judge agreed with the Munsif as to the defendant's refusal to perform the ceremony and as to the reasonable nature of the expenses claimed, but he held that the defendant was under no legal obligation to perform the ceremony, and that the suit was in consequence not sustainable. He relied upon *Seshammal* v. *Munisami Mudaliar*(1), 1 Strange's 'Hindu Law,' page 230, and Bannerjee on 'Marriage and Stridhan,' page 51, and dismissed the suit.

Plaintiff preferred this second appeal.

Kasturiranga Ayyangar (for *Sivasami Ayyar*) for appellant.—The case of *Seshammal* v. *Munisami Mudaliar*(1) on which the District Judge has relied applies only to Sudras. Here the parties are Brahmans, among whom there is a recognised duty to marry their daughters; moreover, that suit was against the husband, whereas this suit is against the husband's brother. Though the obligation was only a moral one during the father's lifetime, it became legally enforceable at his death, *Janki* v. *Nand Ram*(2); see also *Kamini Dassee* v. *Chandra Pode Mondle*(3) and *Rangammal* v. *Echammal*(4). Moreover, it is usual to make provision for marriage expenses in partition deeds. The exact point has never been decided, but it is dealt with in West and Bühler's 'Hindu Law' in a note at page 754. He referred to *Tulsha* v. *Gopal Rai*(5), Trevelyan on 'Minors,' page 258; Colebrooke's 'Digest of Hindu Law,' volume II, page 294, *et seq.*, and also at page 438; 2 Macnaughten's 'Hindu Law,' page 47, quoted at page 501 of West and Bühler's 'Hindu Law'; 'Dayabhaga,' chapter III, section II, paragraphs 36–40; 'Smriti Chandrika,' page 54,

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(1) Referred Case No. 40 of 1896 (unreported).
(2) I.L.R., 11 All., 194.
(3) I.L.R., 17 Calc., 373.
(4) I.L.R., 22 Mad., 305.
(5) I.L.R., 6 All., 632.

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paragraphs 18–36. The Mitakshara discusses whether one-fourth share should be given or merely the marriage expenses. The allotment of one-fourth share is now obsolete, but the duty to defray the expenses still subsists. See also the analogous case of daughters of disqualified heirs, 'Mitakshara,' part II, chapter II, section X, placitum 13.

V. Krishnasami Ayyar for respondent.—The suit should have been brought by the daughter; she being the person in whose favour the right existed. In *Tulsha* v. *Gopal Rai*(1) both mother and daughter sued. The question is whether the obligation on a father is a legal or only a moral one: it is submitted that it is the latter. If the father is not bound to give in marriage he is not liable for the costs incurred in respect of it. See Mayne's 'Hindu Law,' 5th edition, paragraph 81. In *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani*(2) the Privy Council held it to be a religious obligation, and the same view was taken in *Namasevayam Pillay* v. *Annammai Ummal*(3); such a duty is not legally enforceable, and if not legally enforceable there can be no legal obligation to pay the expenses. Among Brahmans it is only optional to marry daughters, though it is considered meritorious from a religious point of view. *Janki* v. *Nand Ram*(4) does not touch the present question, as it was a case of property self-acquired and inherited. The word "interested" in section 69 of the Indian Contract Act refers to pecuniary interest; the principle of that section is that a person is interested, and (as shown in the illustration) is unable to pay, and permits payment to be made by another person. See also Leake on 'Contracts,' 1st edition, page 85. The obligation cannot be a general one to pay any one the expenses. Moreover, the obligation ceases when the marriage has been performed, and no duty can be afterwards enforced in relation to it. The minor might possibly have had a right of action prior to the marriage and to enable her to get married. But there must be a legal and not merely a moral liability to support an action, section 69 being based on the English Law; *Jumoona Dassya Chowdhrani* v. *Bamasoonderai Dassya Chowdhrani*(2) was cited to the Court in *Seshammal* v. *Munisami Mudaliar*(5). Moreover, Bannerjee, J.'s,

(1) I.L.R., 6 All., 632.
(2) L.R., 3 I.A., 72; I.L.R., 1 Calc., 389.
(3) 4 M.H.C.R., 339 at p. 344.
(4) I.L.R., 11 All., 194.
(5) Referred Case No. 40 of 1896 (unreported).

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judgment at page 47 is not a correct interpretation of *Namasevayam Pillay* v. *Annammai Ummal*(1).

Kasturiranga Ayyangar, in reply, contended that section 69 of the Indian Contract Act is wider in its terms than the English Law, and inasmuch as the word "interested" is not restricted in its meaning, the interest need not be only pecuniary; that is shown by section 25 of the Contract Act which expressly refers to love and affection.

SHEPHARD, J.—The plaintiff, a widow, seeks to recover from her husband's brother money expended by her on the celebration of her daughter's marriage. The plaintiff's deceased husband and the defendant were members of an undivided family, the property of which is in the hands of the defendant. It is found that the defendant, though he professes to have been ready to get his niece married, did not in fact take any steps to that end, but, on the contrary, improperly refused to perform the girl's marriage. Accordingly the girl was married at her mother's cost, and it must be taken that the marriage was a proper one.

In the Court of First Instance no question was raised by the defendant, except as to the alleged refusal of the defendant to have the marriage performed and as to the amount spent by the plaintiff.

The District Judge dismissed the suit on the ground that the defendant was under no obligation to provide for the expense of his brother's daughter's marriage. In support of this opinion he refers to some observations made in *Namasevayam Pillay* v. *Annammai Ummal*(1). The point decided in that case is that a brother in the position of the defendant in this case is not, as against his widowed sister-in-law, entitled to the absolute and exclusive right of giving the latter's daughter in betrothal. In the order of succession of the persons who should give a girl in marriage he comes before the mother, but the right or duty which devolves on him is not one which can be exercised independently of the mother. The case decides nothing with regard to the question whether the brother or the property of the family in his hands is chargeable with the cost of a marriage properly performed by the mother. There is an observation to the effect that the obligation laid on the girl's relatives is not an enforceable legal obligation,

(1) 4 M.H.C.R., 339 at p. 340.

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but it is also said that if the mother improperly declines to accept a suitable bridegroom she might be compelled by suit to provide means for the celebration of the marriage. It was in effect argued before us that if the defendant was not compellable to give the girl in marriage himself, he could not be called upon to pay the cost incurred by anybody else. This was evidently not the view taken by this Court in 1869, for if the brother could not be chargeable neither could the mother be. There is nothing inconsistent in holding that the person possessed of family property and chargeable in respect thereof with the maintenance of unmarried girls is also chargeable with the cost of their marriages, though he himself does not choose to give them in marriage. The object of specifying several persons who may give a girl in marriage is to ensure the celebration of her marriage: it has no reference to the question upon whom the expense of the marriage is to fall.

That the expenses are to be borne by the family property just in the same way as the cost of maintenance there seems no doubt upon the authorities (see *Tulsha* v. *Gopal Rai*(1); 'West and Bühler', 754; Mayne's 'Hindu Law,' sections 81, 408). The common practice of providing in partition decrees for the marriage expenses of daughters can hardly be accounted for except on the hypothesis that such expenses are properly chargeable on the family property.

For these reasons I hold that the defendant can be made liable for the expenses of his niece's marriage, the same having been properly incurred. But, it is argued, that the girl herself, not her mother, ought to have been plaintiff in the action. This is a new point not taken in the Court of First Instance. It is argued that although the defendant may be liable for the expenses of the marriage the plaintiff's daughter is the person in whom the corresponding right resides just as it would be if the daughter's maintenance were in question. I think there is a clear distinction between the two cases. The right to maintenance is purely personal, and in point of law exists solely for the benefit of the person to be maintained. In the case of marriage, on the other hand, it is not only the bride that is concerned. Marriage, according to Hindu Law, involves the idea of gift, and the mother may be a party to the transaction in giving her daughter in marriage.

(1) I.L.R., 6 All., 632.

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When the mother has lawfully undertaken this part and in consequence has incurred expense, she can, as I conceive, claim the advantage of the obligation which the law recognizes. The object which the law has in view, namely, the procuring of the marriage of the daughter would be frustrated if the obligation to provide means for it could not be enforced by the member of the family on whom the duty of giving the girl in marriage devolves. In addition, I think, the plaintiff was, within the meaning of section 69 of the Indian Contract Act, interested in making the payment which has given rise to the action. It is not necessary that she should prove that she was compelled to make it or that she made it at the defendant's request.

I think the appeal should be allowed and the District Munsif's decree restored with costs in this and in the lower Appellate Court. The memorandum of objections is dismissed with costs.

BODDAM, J.—I agree.

APPELLATE CIVIL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

ABDUL RAHIMAN SAHEB AND ANOTHER (GUARDIANS AND COUNTER-PETITIONERS), APPELLANTS. 1900. January 30.

v.

GANAPATHI BHATTA (PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *ss.* 492, 503—*Guardians and Wards Act—Act VIII of* 1890, *ss.* 33, 43, 47, 48 *and* 49—*Appeal—Order purporting to be passed under appealable section—Appeal entertained though Judge had no power to pass orders under the section as he purported to do.*

By section 43 (4) of the Guardians and Wards Act, 1890, in case of disobedience to an order passed under sub-sections (1) and (2) of that section, in relation to the conduct or proceedings of guardians, the order may be enforced in the same manner as an injunction granted under section 492 or section 493 of the Code of Civil Procedure. On a petition being presented to a District Court, asking that the guardians of certain minors, who had been appointed by the

* Civil Miscellaneous Appeal No. 71 of 1899 against the order of F. H. Hamnett, District Judge of South Canara, in Civil Miscellaneous Petition No. 299 of 1899.

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Court under the Guardians and Wards Act, might be removed, the Judge passed an order in which he purported to issue an injunction under section 492 of the Code of Civil Procedure for the attachment of the estate of the minors and to appoint a receiver to manage the estate. On an appeal being preferred against the said orders it was contended that the Judge must be taken to have acted under the Guardians and Wards Act, 1890, and that inasmuch as no appeal was provided by that Act in respect of such an order, no appeal lay:

Held, that though both orders were passed without jurisdiction, the Judge purporting to have acted under section 492 of the Code of Civil Procedure as regards the issue of an injunction, and under section 503 as regards the appointment of a receiver, inasmuch as orders under either of these sections were appealable, the fact that the Judge had no power in this case to pass orders under them did not bar the High Court from treating the orders as having been passed thereunder for the purpose of entertaining an appeal against the orders, since there was no provision of law under which the Judge could pass orders attaching property or appointing a receiver without such orders being subject to appeal.

Hurrish Chunder Chowdhry v. *Kali Sundari Debia*, (L.R., 10 I.A., 4; I.L.R., 9 Calc., 482), referred to.

ON 2nd March 1899 an order was passed by the District Judge of South Canara in connection with the management by the guardians, the appellants, of the estate of the late Haji Kassim Saheb. On 11th July 1899 a petition was filed in the same Court by the present respondent on which the District Judge passed an order, the material portion of which is as follows:—

"For the reasons stated in my proceedings, dated 2nd March 1899, I consider that the guardians of the minor children of the late Haji Kassim Saheb of Udipi are quite unfit to act as managers of the minors' property. In the interest of the estate I gave them time twice to submit accounts of their management. This was done not because I had any doubt as to their incapacity and the necessity for their removal, but because I thought it desirable that they should be made to put in accounts in the interests of the minors with a view to these accounts being verified and their mismanagement being clearly brought to light and steps taken to recover from them any loss proved to have accrued from their mismanagement. The petitioner in Miscellaneous Petition No. 299 of 1899 now brings to notice that the guardians, so far from utilising the time allowed them to prepare true and correct accounts, have colluded with Kalinga Hebbara, a man who at first came forward to give information against the guardians, and whom the guardians described as acting against them through enmity, because they pressed him for payment of a

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debt due by him to the estate. This man unaccountably withdrew after a time from giving the Court or the Commissioners originally appointed by my predecessor any information, and there were reasonable grounds for suspecting him of having been won over by the guardians. This suspicion is now proved to be true. There can be no doubt that the guardians have no intention of furnishing true accounts, but have induced this man to join them in the preparation of false accounts. This conspiracy can only be broken up by prompt action, and I resolve under section 492, Civil Procedure Code, to issue an injunction for the attachment of the entire estate of the minors and all the accounts and documents and other moveable and immoveable property connected therewith. The minors have only a share in the estate and the attachment of their share in the lands and jewels must therefore be only a constructive one, but inventories must be taken of all the property. Further, as this is a case where there are strong grounds to suspect fraud, I order that all the accounts and documents in possession of the guardians or elsewhere having connection with the estate to be immediately attached and I appoint a receiver to manage the estate. . . . ."

Against that order the guardians preferred this appeal, on the ground, among others, that the order issuing an injunction under section 492 of the Code of Civil Procedure for attachment of the estate was illegal and passed without jurisdiction.

Mr. *N. Subrahmaniam* and *Narayana Rao* for appellants.

Sankaran Nayar, for respondent, took the preliminary objection that no appeal lay under the Guardians and Wards Act (VIII of 1890), unless it was given by section 47 of that Act, and that section 47 did not provide for an appeal from such an order as that now before the Court. By section 48, all other orders passed under the Act are declared to be final, subject only to revision under section 622 of the Code of Civil Procedure. He contended that the appointment of a receiver was a step preliminary to the disposal of the case, and that the only remedy was under section 622 of the Code of Civil Procedure, under which procedure the High Court would not necessarily interfere, even though it might not approve of the manner in which the discretion of the lower Court had been exercised. The effect of section 47 was to curtail the general right of appeal. That the Judge was acting under the powers conferred by the Guardians and Wards Act,

1890, was evident, since section 43 gave him power to make orders for regulating the conduct or proceedings of guardians and to enforce those orders, and by section 39 he was empowered to order the removal of a guardian.

Mr. *N. Subrahmaniam*, for appellants, referred to the order, in which the District Judge purported to act under section 492 of the Code of Civil Procedure, from which an appeal lies under section 588. He contended that the order might be upheld under one provision or the other.

JUDGMENT.—A preliminary objection has been taken to the hearing of these appeals that no appeal lies. The order which is sought to be set aside is an order dated July 14th, 1899, which purports to have been made on a miscellaneous petition presented in the Court of the District Judge by one Ganapathi Bhatta. The petition appears to ask that the guardians of certain minors who have been appointed by the Court under the Guardians and Wards Act should be removed. In the order of July 14th, which the guardians now seek to have set aside, the District Judge purports to issue an injunction under section 492 of the Civil Procedure Code for the attachment of the estate of the minors and to appoint a receiver to manage the estate. In making this order the Judge seems to have acted under a misconception of his powers under section 43 of the Guardians and Wards Act. That section provides that when an order made under sub-section (1) is disobeyed, the order may be enforced in the same manner as an injunction under sections 492 and 493 of the Civil Procedure Code. The section does not confer jurisdiction to issue an injunction, but gives jurisdiction in the case of disobedience to an order made under the Guardians and Wards Act, to proceed in the same manner as if an injunction had been issued under section 492 of the Civil Procedure Code and the injunction had been disobeyed. The order appointing a receiver seems to have been made by the Judge as consequential on the order for an injunction. Both these orders were made without jurisdiction. It is contended, however, that the Judge must be taken to have acted under the Guardians and Wards Act, and that no appeal being provided by that Act in the case of such an order an appeal does not lie. We do not think this contention is well founded. The learned Judge purported to act under section 492 of the Civil Procedure Code as regards the issue of an injunction and apparently under section 503 of the

Civil Procedure Code as regards the appointment of a receiver. Orders made under either of these sections are appealable under the Civil Procedure Code. The fact that the District Judge had no power in this case to pass an order under these sections does not bar this Court from treating the order as having been passed thereunder for the purpose of entertaining an appeal against the order, seeing that there is no provision of law under which the Judge could pass an order attaching the property or appointing a receiver without such order being subject to appeal. This view is supported by the ruling of the Privy Council in *Hurrish Chunder Chowdhry* v. *Kali Sundari Debia*(1).

The preliminary objection is overruled.

We set aside the order under appeal on the ground that it was made without jurisdiction without prejudice to any proceedings which are being taken under the Guardians and Wards Act. The costs of these appeals will be dealt with by the District Judge in any order he may make, in proceedings under the Guardians and Wards Act, with reference to the removal of the present guardians.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

VENKATA KRISHNA AYYAR (DEFENDANT No. 6), APPELLANT,

v.

THIAGARAYA CHETTI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 TO 5), RESPONDENTS.*

1899. November 20, 21.

Transfer of Property Act—Act IV of 1882, s. 93—Application for sale of mortgaged property on default of mortgagor to redeem—Court in which application should be made.

In a suit for the redemption of mortgaged property, the District Munsif passed a decree which was, on appeal, modified by the District Court. The mortgagor not having paid the decree amount, the mortgagee applied to the District Court under section 93 of the Transfer of Property Act for an order that the mortgaged property might be sold:

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

* Civil Miscellaneous Appeal No. 85 of 1898 against the order of J. Hewetson, District Judge of Chingleput, in Miscellaneous Application No. 588 of 1897.

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Held, that the application should have been made to the Court of the District Munsif.

Oudh Behari Lal v. *Nageshar Lal*, (I.L.R., 13 All., 278), referred to.

PETITION by a mortgagee under section 93 of the Transfer of Property Act for an order that certain mortgaged property might be sold. In a suit by the mortgagor for redemption, the District Munsif had previously passed a decree directing petitioner (who was the sixth defendant therein) to take Rs. 362-6-0 from the plaintiff, the first counter-petitioner, and hand over the mortgaged property. Against that decree petitioner had appealed to the District Judge, who directed that petitioner should give up possession of the property on payment within three months of Rs. 2,088, and on failure of payment the mortgaged property was ordered to be sold. The money not having been paid, petitioner filed this petition in the Court of the District Judge. A preliminary objection was then taken that the application was one for execution and should have been made to the District Munsif's Court. The District Judge referred to *Oudh Behari Lal* v. *Nageshar Lal*(1), and, upholding the preliminary objection, dismissed the petition.

Against this order petitioner preferred this appeal.

Sundara Ayyar and *Ranga Ramanuja Chariar* for appellant.

Ramachandra Rao Saheb for respondents.

JUDGMENT.—The question for decision in this case is whether an application for an order for sale under paragraph 4 of section 93, Transfer of Property Act, should be made to the Court of First Instance or to the Appellate Court in a case where it was the Appellate Court that made a decree for redemption under section 92 of the Transfer of Property Act, modifying the decree of the Court of First Instance.

We have not been referred to any statutory provision which lays down the procedure to be followed. The question, therefore, has to be decided with reference to principle and analogy. The decree of the Appellate Court must be taken to be the decree which the Court of First Instance should have passed if it had decided the case correctly. Had the decree been duly passed by the Court of First Instance, the application for an order under section 93 of the Transfer of Property Act would have been made to that Court. The same course should, in our opinion, be followed when the Appellate Court passes the decree which ought to have been passed

(1) I.L.R., 13 All., 278.

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by the Court of First Instance. We are unable to accept the contention that when the Appellate Court passes a decree under section 92 of the Transfer of Property Act the suit should be regarded as still pending in that Court until the order absolute under section 93 has been passed. The more reasonable view is that the proceedings in the Appellate Court have terminated with its decree under section 92, and that any further order which the parties require in order to give effect to the rights of the parties, as settled by the decree, should be obtained from the Court of First Instance on which would have devolved the duty of making such order if a correct decree had been passed in the first instance. This procedure is manifestly more convenient than to throw the duty on the Appellate Court.

It is also in accordance with the policy on which the rules in sections 15 and 583 of the Code of Civil Procedure proceed.

Our conclusion is in accordance with what we believe has been the uniform practice of this Court ever since the Transfer of Property Act came into force, and it is also in accordance with the view adopted by the Allahabad High Court (*Oudh Behari Lal* v. *Nageshar Lal*(1)), though we do not wish to be understood as accepting all the reasoning on which that decision is based.

The result is that the order of the District Judge is right and we dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

THE MUNICIPAL COUNCIL, TANJORE (DEFENDANT), PETITIONER,

v.

UMAMBA BOI SAHEB (PLAINTIFF), RESPONDENT.*

1899. November 24.

District Municipalities Act (Madras)—Act IV of 1884, ss. 71(2), 262(2)—Notice of intended insertion of name or property on assessment books—Substantial compliance with Act—Action to recover money paid in respect of tax.

By section 71 of the Madras District Municipalities Act, 1884, the chairman may, at any time, amend the assessment book in manner therein provided, but

(1) I.L.R., 13 All., 278.

* Civil Revision Petition No. 139 of 1899, praying the High Court to revise the decree of C. G. Kuppusami Ayyar, Acting Subordinate Judge of Tanjore, in Small Cause Suit No. 1891 of 1897.

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no person's name or property shall be inserted, nor any increase of assessment made unless notice thereof has been served on such person not less than thirty days previous to a day to be specified in such notice as the day upon which such notice will be revised. By section 262, no assessment made under the authority of the Act shall be impeached and no action shall be maintained in any Court to recover money paid in respect of any tax levied under the Act provided that the directions and provisions of the Act shall have been substantially complied with. A notice which was served upon plaintiff by a municipal council purported to be issued under section 71(2) of the Madras District Municipalities Act, 1884, and was as follows :—"I have the honour to forward herewith a list showing the amount of land and water taxes due for 1895–1896 on devastanam lands within the limits of this municipality, and to request that you will be good enough to cause the amount to be remitted to this office at your earliest convenience:"

Held, that the notice was bad, that the terms of section 71(2) had not been substantially complied with, and that consequently section 262(2) had no application.

Municipal Council, Nellore v. *Rangayya*, (I.L.R., 10 Mad., 10), explained.

PETITION asking the High Court to revise a decree of a Subordinate Judge. Plaintiff had brought a suit for Rs. 448–11–6, being the amount recovered from her by the defendant municipal council on account of land and water taxes, with interest. The money had been paid under protest, plaintiff complaining that the assessment was new and illegal. Defendant contended that the amount had been properly and legally levied from the plaintiff under Madras Act IV of 1884, which was then in force, that the plaintiff was not entitled to recover the amount, that due notice under section 71 of Madras Act IV of 1884 had been given to plaintiff, that no appeal had been preferred to the council against the revision made by the chairman though due notice to pay the assessment had been given under section 71 of Madras Act IV of 1884, that the plaintiff was debarred from bringing this suit for the recovery of the amount, that she was not entitled to interest, and that the Civil Courts had no jurisdiction to entertain the suit under Madras Act IV of 1884.

The Acting Subordinate Judge decreed for plaintiff remarking as follows:—"The first and most important objection relates to the want of notice. The evidence adduced by the plaintiff clearly shows that no notice was issued to the plaintiff under section 71 of Madras Act IV of 1884. The defendant has not adduced counter-evidence to show that a notice was duly issued and served upon the plaintiff of the intended assessment providing thirty days for the revision of the same by the chairman. The so-called notice

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which the defendant produces is exhibit I which runs as follows:—'I have the honour to forward herewith a list showing the amount of land and water taxes due for 1895–96 on devastanam lands within the limits of this municipality and to request that you will be good enough to cause the amount to be remitted to this office at your earliest convenience.' This document is no notice, but a demand calling upon the plaintiff to pay the assessment referred to in a list appended thereto, which had been imposed by the defendant. The alleged said list is not now forthcoming. This procedure appears to be arbitrary, as the provisions of the said Act have not been duly complied with and as the assessment was actually imposed upon the plaintiff without her knowledge and without giving her an opportunity of urging what she had to submit to the municipal chairman. I, therefore, hold that the levying of the assessment from the plaintiff was not legal. There were several protests made by the plaintiff, but to no purpose. The amount of the assessment was paid at last under protest. I think it is fair that the plaintiff should expect a due compliance with the provisions of the Act."

Against this decree the municipal council preferred this civil revision petition.

Sivasami Ayyar for petitioner.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*) for respondent.

JUDGMENT.—In this case the chairman of the municipal council of Tanjore, professing to act under the authority of section 71 of Madras Act IV of 1884, inserted the name of the respondent as liable to pay a portion of the land and water taxes which had previously been levied from other parties who had an interest in certain land within the limits of the municipality. The Subordinate Judge found that the chairman had omitted to give the respondent the notice prescribed by sub-section (2) of section 71 of the Act and gave the respondent a decree for the amount of the taxes paid by her under protest. The municipal council now asks us to revise this decree on the ground that "the provisions "of the Act relating to the assessment and levy of the taxes . . " . . have been in substance and effect complied with" and that, therefore, section 262(2) of Madras Act IV of 1884 is a bar to the maintainability of the suit in a Civil Court.

We are unable to admit the validity of this contention. Section 71(2) requires that "no person's name . . . . . shall be

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"inserted . . . . unless notice of such intended insertion . " . . . has been served on such person . . . . not less "than thirty days previous to a day to be specified in such notice "as the day upon which such assessment will be revised by the "chairman."

The only notice given to the respondent was that contained in the following letter from the chairman to the respondent:—

"I have the honour to forward herewith a list showing the "amount of land and water taxes due for 1895-96 on devastanam "lands within the limits of this municipality, and to request that "you will be good enough to cause the amount to be remitted to "this office at your earliest convenience." This notice is obviously on the face of it not such a notice as is prescribed by the section. It does not state that the respondent's name will be inserted at a future date specified in the notice, so as to give her an opportunity, if so advised, of appealing against the assessment. It is merely a demand for a tax assumed to have been already properly assessed on the respondent and due by her. It follows that the provisions of the Act have not only not been substantially complied with, but have been completely ignored. Consequently section 262(2) has no application.

Our attention has been called by the petitioner's vakil to the decision of *Municipal Council, Nellore* v. *Rangayya*(1), but we are unable to accept his contention that that decision is opposed to the view we have taken in this case. Even the somewhat general language used in that case by Mr. Justice Shephard was not, in our opinion, intended to cover neglect to comply with the express provisions of the Act such as we find in the present case, nor can we agree with the vakil's contention that section 262(2) refers only to defects in regard to the first imposition for the year of a tax throughout the municipality, and not to the provisions of the Act relating to its subsequent assessment on individuals, for the section refers to such assessment in express terms.

The failure to observe the procedure prescribed in section 71(2) is a defect of an essential character since it deprives the tax-payer of the opportunity provided by the Act of obtaining redress by an appeal to the municipal council whose decision the law declares shall be final.

We dismiss the petition with costs.

(1) I.L.R., 19 Mad., 10.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

RAMACHANDRA RAO AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

VENKATARAMANA AYYAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1899. November 29.

Promissory note—Suit by assignee by invalid endorsement—Claim also on the original debt in respect of which note was given—Maintainability of suit.

The purchaser of the assets of a bank in liquidation, which assets included a debt due by defendants to the late bank and a promissory note given in respect of that debt, sued defendants on the promissory note as well as on the original debt in respect of which the note had been given. The note had not been endorsed until after the bank had been wound up and had ceased to exist, and the endorsement had been held to be invalid:

Held, that plaintiffs were entitled to sue for the original debt even though they were not entitled to sue on the promissory note.

Pothi Reddi v. *Velayudasivan*, (I.L.R., 10 Mad., 94), referred to.

SUIT for money. Plaintiffs alleged that defendants had received the amount represented by the note from the late Coimbatore Swadesa Dravya Sekhara Nidhi, then in course of liquidation, the assets of which had been purchased by the plaintiffs and included the note sued on. The note had not been endorsed until after the bank had been wound up. Plaintiffs also sued on the original debt for which the note had been given. The defendants objected to the maintenance of the suit on the ground that the endorsement had been held by the District Court and the High Court to be bad, and that without the endorsement the suit could not succeed. The District Munsif dismissed the suit, referring to *Basavayya* v. *Subbarazu*(1), *Abboy Chetti* v. *Ramachandra Rau*(2) and *Gopaludu* v. *Venkataratnam*(3). Plaintiffs appealed to the District Court, which confirmed the decree of the Court below.

Plaintiffs preferred this second appeal.

* Second Appeal No. 83 of 1898, against the decree of G. T. Mackenzie, District Judge of Coimbatore, in Appeal Suit No. 50 of 1897, affirming the decree of P. S. Gurumurti Ayya, District Munsif of Erode, in Original Suit No. 543 of 1896.

(1) I.L.R., 11 Mad., 294. (2) I.L.R., 17 Mad., 461.
(3) I.L.R., 18 Mad., 175 at p. 178.

RAMA-CHANDRA RAO v. VENKATA-RAMANA AYYAR.

Kasturiranga Ayyangar for appellants Nos. 2 to 4.

Mr. *John Adam* for respondents.

JUDGMENT.—We think the decrees of the lower Courts should be set aside.

The plaintiffs purchased the assets of a bank in liquidation, which has now been wound up. The assets would undoubtedly include the debts, and among other property the plaintiffs became assignees of certain promissory notes.

These notes were not endorsed until after the bank had been wound up and had ceased to exist and the endorsement was held to be invalid.

The plaintiffs sued for the original debt due, in respect of which one of the promissory notes had been given, as well as upon the note.

Both Courts dismissed the plaintiffs' action, holding that they could not sue on the note, and the District Judge held further, on the authority of *Pothi Reddi* v. *Velayudasivan*(1), that they could not sue for the original debt. This case is in no way similar to, or governed by, *Pothi Reddi* v. *Velayudasivan*(1); for, in that case, the note, not being admissible in evidence, could not be looked at, and the main ground for the decision was that, in the absence of the writing containing the contract arrived at, injustice might be done. Nothing of the sort arises in this case, and we hold that the plaintiffs were entitled to sue for the original debt, even though they were not entitled to sue on the promissory note. We, therefore, reverse the decisions of the Courts below and remand the suit to the District Munsif for trial. Costs to abide and follow the event.

(1) I.L.R., 10 Mad., 94.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

BARCLAY (APPELLANT),

1899. November 20, 29.

v.

PRESIDENT, MUNICIPAL COMMISSION, MADRAS (RESPONDENT).*

City of Madras Municipal Act (Madras)—Act I of 1884, *ss.* 103, 110—*Profession tax—Liability of member of a firm to pay separate tax in respect of a Government appointment, his qualification for such appointment being the profession which he also carries on jointly with the firm—Meaning of "person" under the Act.*

A member of a firm of Attorneys-at-Law and Notaries Public, which paid the profession tax leviable under section 103 of the City of Madras Municipal Act, 1884, also held the appointment of Government Solicitor. He practised no other profession or business than that exercised by his firm; and the duties of Government Solicitor could not be performed by any person other than a practising attorney. The municipality of Madras having demanded profession tax in respect of the appointment of Government Solicitor in addition to the tax paid by the firm of which the holder of the appointment was a member:

Held, that the tax was rightly levied.

THE facts and arguments are set out in the following judgment.

Mr. *K. Brown* for appellant.

The respondent was not represented.

JUDGMENT.—This is a case stated for the decision of the High Court under section 193 of Act I of 1884 (The City of Madras Municipal Act).

The facts out of which the reference has arisen and the questions which we have to determine are stated by the Magistrates in the following terms:—

"On the 6th September 1899, Mr. Ernest Barclay, Govern-"ment Solicitor, Madras, appealed to us against the decision "of the Municipal Commissioners of Madras, assessing him to "profession tax in the sum of Rs. 75 per annum in respect of his "appointment of Government Solicitor.

* Referred Case No. 15 of 1899, stated under section 193, City of Madras Municipal Act I of 1884 (Madras), by B. H. Chester and Sultan Mohi-ud-in Saheb, Presidency Magistrates, Black Town, Madras, in Calendar Case No. 26599 of 1899, on Application No. 5723 of 1899.

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The grounds of appeal were :—" (*a*) That the appellant's firm " of Barclay, Orr & David, Attorneys-at-Law and Notaries " Public, pays the Municipal Commissioners for the City of Madras " the sum of Rs. 250 a year, being the tax leviable under section " 103 of the City of Madras Municipal Act, 1884, for the exercise " in the city of Madras of the said firm's profession of Attorneys- " at-Law and Notaries Public and on the 14th July 1899 paid to " the said Commissioners the sum of Rs. 125, being the amount " payable in respect of such tax for the half-year ending 30th " September 1899. (*b*) That the appellant does not exercise or " carry on any profession or business other than that carried on by " his said firm. (*c*) That even taking it, for the sake of argument, " that because the appellant performs the duties of Solicitor to the " Government of Madras, he, therefore, holds an appointment, in " respect of which he is liable to be taxed; section 110 of the " City of Madras Municipal Act I of 1884 does not provide for the " taxation of a person on his aggregate income from a profession " and also from an office or appointment. (*d*) That the duties " of Solicitor to the Government of Madras cannot be carried on by " any person other than a practising attorney. (*e*) That in carrying " on the duties of Solicitor to the Government of Madras, the appel- " lant does so in the exercise of the profession of an attorney of " the High Court, Madras, in respect of which the annual sum " of Rs. 250 is now paid by the appellant's firm to the said " Commissioners and that part of the monthly remuneration " received by the appellant for carrying on such duties and all " costs recovered by the appellant in carrying on such duties are " received by his said firm. (*f*) That the remuneration received " by the appellant in respect of work done by him as Government " Solicitor is not paid to the appellant in respect of any office or " appointment in which the appellant is employed independently of " the profession of Attorneys and Notaries Public carried on by " his said firm. (*g*) That the salary received by the appellant in " respect of the work done by him for Government does not amount " to the monthly sum of Rs. 1,000 after deducting therefrom the " proportion of such salary received by his said firm. (*h*) That the " Government of Madras to which the appellant is Solicitor is in " the same position as any other client of the appellant, except " that instead of paying for each item of work done by the " appellant for such Government, such Government compounds

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" for all costs earned by the appellant by payment of a monthly " sum.

" The appeal was heard by us on the 20th September 1899. " On the 27th idem, we made the following

" ORDER.—We are of opinion that the members of the firm of " Messrs. Barclay, Orr & David jointly constitute one 'person' " [*vide* section 3 (*c*) of the Municipal Act] and that Mr. Ernest " Barclay, the Government Solicitor, is not the same 'person' " as Messrs. Barclay, Orr & David. We are, therefore, of " opinion that Mr. Barclay in his capacity as Government Solicitor " is separately liable to be assessed to profession tax. As his " salary as Government Solicitor exceeds Rs. 1,000 and is less than " Rs. 2,000 a month, the profession tax of Rs. 75 per annum imposed " on him by the Madras Municipality is correct. The said amount " is confirmed and Mr. Barclay's appeal is dismissed.

" On the 2nd October, Mr. Barclay applied to us to state a " case for the decision of the High Court. We, accordingly, under " section 193 of Act I of 1884, beg to refer the following questions " for decision :—

" (1) Whether the appellant is liable to be assessed under " section 103 of the Act individually and separately as Solicitor to " the Government of Madras, in respect of the salary paid to him by " such Government for performing the duties of such office, seeing " that the firm of Barclay, Orr & David, of which the appellant " is a member, pays to the Municipality of Madras the maximum " tax leviable in respect of the profession of Attorneys-at-Law, that " part of the work of the Government of Madras sent to the " appellant as Solicitor to Government is done by the said firm, " their assistants and clerks and that the said firm in consideration " thereof receives a portion of the salary paid to the appellant by " the Government of Madras and also receives all costs recovered " in suits to which the said Government is a successful party and in " which costs are awarded to the said Government.

" (2) Whether the said tax paid by the said firm of Barclay " Orr & David, in respect of their profession of Attorneys-at-Law, " includes the profession tax which would be payable in respect " of the appointment of Solicitor to the Government of Madras, " an appointment the duties of which cannot be performed by any " person other than an Attorney-at-Law.

"(3) Whether, having regard to the provisions of sections 103 "and 110 of the said Act, a person is liable to be assessed for "profession tax in respect of a profession exercised by him, as well "as in respect of an appointment held by him in the exercise of "that profession."

We are of opinion that the decision of the Magistrates is right. Section 103 enacts that—"Every person who within the city "exercises any one or more of the arts, professions, trades or callings, "or holds any one or more of the offices or appointments, specified in "schedule A, shall pay in respect thereof the sum specified in the "said schedule as payable by persons of the class in which such person "is placed, subject to the provisions of section 110," and the latter section provides that "a person who carries on more arts, profes- "sions, trades or callings, or holds more offices or appointments than "one, and comes under more than one of the designations or classes "mentioned in schedule A, shall be chargeable under any one of "such designations or classes on his aggregate income from all "such sources." The firm of Messrs. Barclay, Orr & David is a "person" within the meaning of the Act (*Davies* v. *President of the Madras Municipal Commission*(1)) and is liable to be taxed as such on the business of the firm. Mr. Barclay is obviously not the same "person" as the firm.

He holds his appointment as Government Solicitor not by virtue of being a member of the firm, but personally and independently of the firm. If the latter should cease to exist to-morrow, Mr. Barclay would not thereby cease to hold his appointment as Government Solicitor. It is clear that if Mr. Barclay had no business save that of Government Solicitor he would be a "person" liable to taxation in respect of such appointment. The fact that he is also a member of a firm which is a different "person" cannot alter his liability, unless the Act so provides, but this it does not do. Section 110 deals only with one and the same "person" who carries on two or more arts, professions, &c., and no other provision of the Act is relied on.

Nor does the fact that Mr. Barclay employs the firm of Messrs. Barclay, Orr & David to do some of his work as Government Solicitor and pays them part of his salary for so doing make any difference, any more than it would if he employed and

(1) I.L.R., 14 Mad., 140.

paid any other firm of Solicitors to do part of the work. The contention of the learned Counsel for Mr. Barclay, viz. :—that because the firm of which Mr. Barclay is a member pays a tax—even the maximum tax—for the business carried on by it, Mr. Barclay is not liable to taxation for the business carried on by him personally, is not supported by any provision in the Act, and to accept it would lead to great difficulties and anomalies. Can it, for instance, be contended that because a Banker or Savukar has a share in the Bank of Madras and that Bank pays a tax as such, the Banker or Savukar is exempt from taxation on his own business as a Banker or Savukar? Clearly we think that it cannot, and the reason is that the Banker or Savukar is not the same "person" as the Bank of Madras, though he is undoubtedly one of the individuals who collectively form that person.

Again, take the case of two mercantile firms in both of which one individual is a partner, it cannot be held that because one firm pays a tax on its business, the other is exempt; nor can it be held that only one tax is to be paid with reference to the total profits of the two firms taken together. The only reasonable course is to assess each firm with reference to its own profits.

Our answer to the first question proposed is in the affirmative and our answer to the second question is in the negative.

Our answer to the third question is that under section 110 a person who exercises a profession and who holds an appointment in the exercise of that profession and who therefore comes under more than one of the designations or classes mentioned in schedule A, is chargeable under any one of those designations or classes on his aggregate income from all such sources. We may, however, point out that this question does not arise on the facts before us. As already stated, Mr. Barclay who holds the appointment is not the same "person" as the firm of Messrs. Barclay, Orr & David which exercises, and is taxed for, the profession of attorneys. It is not suggested that Mr. Barclay pays any separate tax for the exercise of his profession as an attorney.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1899. November 30.

GHANTAYYA (PLAINTIFF), APPELLANT,

v.

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

Post-diem *interest—Amount secured by mortgage bond with interest repayable by three instalments—Whole amount to become due on failure to pay any instalment—No provision for* post-diem *interest.*

By a registered mortgage bond it was stipulated that the mortgage debt secured thereby and interest thereon at one per cent. per annum should be repaid by three annual instalments, the first of which was to become due on a certain date; and it was provided that if default should be made in payment of any instalment, the whole amount secured by the bond should at once become payable. The bond contained no provision for the payment of *post-diem* interest. Default having been made, the mortgagee sued for principal and for *post-diem* interest:

Held, that the covenant must be construed to be one for the payment of interest as long as the principal sum was improperly withheld.

Moti Singh v. *Ramohari Singh*, (I.L.R., 24 Calc., 699), considered.

SUIT to recover money due on a registered mortgage bond. The bond (which was filed as exhibit A in the suit) stipulated for repayment of the debt due thereunder together with interest thereon at one per cent. per annum in three yearly instalments, with a condition that if default should be made in the payment of any instalment, the whole amount due under the bond should become at once repayable. No provision was made for *post-diem* interest. Default was made in payment of the first instalment, on its due date, namely, 6th January 1890. Plaintiff having filed this suit to recover the amount alleged that first defendant had executed a sale-deed of portion of the mortgaged property in his favour in part satisfaction of the first and second instalments, and claimed to recover the balance by sale of the mortgaged property, which was in the hands of the second defendant. The suit was defended by second defendant alone, who contended that under the deed plaintiff

* Second Appeal No. 1621 of 1898 against the decree of M. D. Bell, District Judge of Gódávari, in Appeal Suit No. 95 of 1898, modifying the decree of D. Venkoba Rao, District Munsif of Tanuku, in Original Suit No. 542 of 1896.

was entitled to claim interest only up to the due date of the first instalment, that plaintiff had no right to claim interest after that date, and that the claim for interest in the shape of damages was time-barred, inasmuch as the suit had been brought more than six years after the failure to pay the first instalment. The District Munsif upheld this contention, so far as second defendant was concerned, but he held that *post-diem* interest was recoverable as against first defendant's interest in the mortgaged land. The District Judge, on appeal, held that the claim for *post-diem* interest in the shape of damages was barred by limitation and could not be enforced against either defendant.

Plaintiff preferred this second appeal.

Ayya Ayyar for appellant.

Sundara Ayyar for respondent No. 2.

SUBRAHMANIA AYYAR, J.—The provisions of exhibit A, whereby the mortgagor undertook to pay interest on the mortgage amount, do not in express terms lay down that *post-diem* interest was to be paid. On the other hand, there is absolutely nothing in the other provisions of the instrument which points to the view that *post-diem* interest was not intended to be paid.

The contention on behalf of the respondent that in such circumstances no *post-diem* interest should be taken to be due implies that the dates fixed for the payment of the several instalments, specified in the instrument, were fixed not only for preventing the mortgagee from demanding payment before the arrival of those dates, but also for marking the limit of time up to which alone interest was payable. It is obvious, however, that the object of fixing the dates referred to was merely the former, and that there was no necessary connection between the dates and the question of liability for interest; the determination of that question being entirely dependent upon the language of the provisions properly relating to it. Now to hold that a promise to pay interest in the general words contained in the instrument before us is a promise to pay up to the due date only would be to say that a default in the due performance of the contract was to result in an advantage to the party making the default and a disadvantage to him who was not in fault. This is, of course, not what parties contemplate when they contract with each other. Certainly, it is more reasonable to hold that a promise to pay interest in circumstances like the present is a promise to pay interest as long as the principal sum is improperly withheld. This is not, as urged for

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the respondent, tantamount to raising a legal presumption in the matter. It would be more correctly described as the adoption of a rule of construction, *i.e.*, a rule as Professor Thayer expresses it "designed to aid in interpreting words and conduct." Now, as tersely put by Hawkins,* in a passage quoted by the learned author just referred to, "a rule of construction may always be reduced to "the following form:—Certain words and expressions which may "mean either X or Y shall, *primâ facie*, be taken to mean X. A rule "of construction always contains the saving clause 'unless a contrary "'intention appear' . . . . though some rules are much stronger "than others, and require a greater force of intention in the context "to control them." ('Preliminary Treatise on Evidence at the Common Law,' 316 n; see also 'Pollock on Contracts,' 6th edition, 242 and 243.) And, assuming that an undertaking expressed in general words, as in this case, were capable of being taken in more senses than one, still, having regard to the ordinary intentions of persons entering into such transactions, on which the Judicial Committee lay stress in *Mathura Das* v. *Raja Narindar Bahadur Pal*(1) the *primâ facie* meaning of the words should be held to be that interest shall be payable until the actual liquidation of the principal. With reference to *Moti Singh* v. *Ramohari Singh*(2) cited for the respondents, I prefer the view taken by Trevelyan and Banerjee, JJ., which is substantially the same as that adopted in *Pedda Subbaraya Chetti* v. *Ganga Razulungaru*(3); see also *Sarala Dasi* v. *Jogendra Narayan Basu*(4) where Maclean, C.J., with the concurrence of Banerjee, J., observes "and in a simple "mortgage transaction it is not an unusual intention, that if the "principal money be not paid by the stipulated time interest "should continue to run and run at the stipulated rate."

I would, therefore, allow the appeal and modify the decree of the lower Court by the award of interest at the contract rate up to the expiry of the time granted to the mortgagor for the payment of the amount due by him. As the lower Courts followed rulings of this Court which proceeded on an erroneous view of the matter there will be no order as to costs of this appeal.

MOORE, J.—I concur.

* 'Hawkins on Wills,' Preface p. iii.
(1) L.R., 28 I.A., 138 at p. 145; I.L.R., 19 All., 39.
(2) I.L.R., 24 Calc., 699.
(3) I.L.R. 20 Mad., 140.
(4) I.L.R., 25 Calc., 246 at p. 248.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

NARAYANA AYYAR AND ANOTHER (PLAINTIFFS NOS. 1 AND 2), APPELLANTS.

1899. November 23. December 1.

v.

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

Civil Procedure Code—Act XIV of 1882, *ss.* 15, 539—*Religious Endowments Act—Act XX of* 1863, *ss.* 14, 15, 18—*Suit by a general trustee and a worshipper for removal of trustees.*

A suit was filed in a District Court by the general trustee of a temple and a worshipper therein praying that certain trustees might be declared incompetent and removed, that others might be appointed in their place, that the properties belonging to the endowments of the temple might be vested in them, and that a scheme might be settled for the management of the trust. Leave to file the suit had been obtained under the Religious Endowments Act, 1863, and under section 539 of the Code of Civil Procedure:

Held, that the suit was maintainable.

SUIT for the removal of the trustees of a temple. First plaintiff was the general trustee and second plaintiff the manager of the Sri Kailasanatha Swami temple at Srivaikuntam in the Tinnevelly district. Defendants were trustees of certain lands which had been granted to them for the performance of certain services in the temple. Plaintiffs sued as trustee and manager and also as worshippers in the said temple, and as such having a direct interest in the proper management of its affairs and in the due performance of all the services in connection therewith; they prayed for a declaration that defendants were incompetent to hold office as such trustees, that they might be removed from such office and from the management of the properties belonging to the endowment; that plaintiffs or some other persons might be appointed in their stead, and that a scheme of management might be settled. The suit purported to be brought under sections 14 and 18 of the Religious Endowments Act, 1863. Leave had been obtained under that Act, as well as under section 539 of the Code of Civil Procedure. The District Judge, being of opinion that the suit was

* Civil Miscellaneous Appeal No. 69 of 1899 against the order of J. W. F. Dumergue, District Judge of Tinnevelly, in Original Suit No. 5 of 1896.

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not maintainable either under the Religious Endowments Act or under section 539 of the Code of Civil Procedure, returned the plaint with the following remarks :—"This suit involves the removal of the defendants from the trusteeship, and in *Rangasami Naickan* v. *Varadappa Naickan*(1), the Full Bench of the Madras High Court decided that a suit to remove a trustee will not lie under section 539 of the Civil Procedure Code. In that case the trust was of a charitable nature, but the decision was followed in *Nellaiyappa Pillai* v. *Thangama Nachiyar*(2) with regard to a religious trust. So far, therefore, as section 539, Civil Procedure Code, is concerned, there seems to be no doubt that the suit cannot proceed. There still remains, however, the question whether the suit can be maintained under Act XX of 1863. I have not been able to find, and I have not been referred to, any direct authority in the cases decided by the Madras High Court, but I think the principle enunciated in *Nellaiyappa Pillai* v. *Thangama Nachiyar*(2) with reference to section 539, Civil Procedure Code, applies with equal force to Act XX of 1863. In that case it was pointed out that the general trustee of a temple, such as the first plaintiff is, in this suit, would have been entitled, even before section 539, Civil Procedure Code, was enacted, to resort to the ordinary Courts to enforce the obligations of special trustees and to obtain all appropriate relief for the protection of the interests of the temple and to sue for the removal of such trustees and the appointment of fresh trustees, and that, if section 539, Civil Procedure Code, were held to apply to the case of a general trustee, the rights which he had prior to the enactment, would be seriously restricted. The same argument, as it seems to me, must prevail against a suit proposed under Act XX of 1863 by a general trustee and manager of a temple against a special trustee connected with the temple and the view, I take, is supported by the decision of the Calcutta High Court in *Pudmalav Roy* v. *Ram Gopal Chatterjee*(3). Therein it was held (at page 337) that section 14 of Act XX of 1863 is an enabling section, intended to allow suits to be brought by any person interested in an endowment against the members of the committee of management themselves or any of those who are engaged in managing or superintending the affairs

(1) I.L.R., 17 Mad., 462. (2) I.L.R., 21 Mad., 406.
(3) 11 C.L.R., 333.

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of the endowment, but it is not intended to take from the committee the power which would be inherent in them of their own authority to bring a suit in the ordinary Courts against the manager in respect of moneys misappropriated. No doubt the removal of trustees is a remedy provided by section 14 of Act XX of 1863, while no such remedy is provided in section 539, Civil Procedure Code, but for the reasons I have given, I am of opinion that section 14 of Act XX of 1863 does not authorize persons in the position of the plaintiffs to maintain such a suit as the present one. The plaint must, therefore, be returned, and, under the circumstances, the parties must bear their own costs."

Against that order the plaintiffs preferred this appeal.

Ramakrishna Ayyar for appellants.

Sivasami Ayyar and *K. Srinivasa Ayyangar* for respondents.

JUDGMENT.—We do not think that the order of the District Judge can be sustained.

This is a suit by two persons, one of whom is the general trustee of the temple and the other merely a worshipper, instituted after leave obtained under section 18, Act XX of 1863, and section 539, Civil Procedure Code.

Even assuming that the first plaintiff, as general trustee of the temple, was at liberty to sue for the removal of the defendants in the ordinary Courts, there can be no doubt he is not precluded from suing under section 14, Act XX of 1863. This is clear from the very wide language of section 15 of that Act, which is framed so as to include not only persons having a pecuniary or direct interest in the institution, but also persons having interests of a far inferior character. If the first plaintiff were the sole plaintiff, it would be right that he should comply with the rule laid down in section 15, Civil Procedure Code, and bring his suit in the Subordinate Judge's Court as the Court of the lowest grade competent to try it; but the second plaintiff, being a mere worshipper, could not sue in the Subordinate Judge's Court. It is only the provisions of sections 14 and 15 of Act XX of 1863 which give him a right to maintain a suit for the removal of a trustee, and such a suit by a worshipper lies only in the District Court. It is competent to the two plaintiffs to join in a suit like the present. It follows that the rule in section 15, Civil Procedure Code, cannot be held to apply so as to prevent the first plaintiff from joining with the second plaintiff in instituting this suit in the

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District Court. Nor do we think that the plaintiffs are precluded from claiming in this suit relief by way of appointing a fresh trustee, vesting the property in him, and settling a scheme, because these reliefs are not claimable under Act XX of 1863 but only in a suit instituted under section 539, Civil Procedure Code. If the removal of the defendants in the present suit should be ordered, then, and then only, it would become necessary to consider the claim to these reliefs, at least so far as the first two of them are concerned, and we are unable to see why the plaintiffs should not be at liberty to ask the Court for such reliefs at once, instead of being required to institute a separate suit. To hold otherwise would, we think, be unreasonable, having regard to the fact that the protection of the interests of the institution is the purpose for which both section 539, Civil Procedure Code, and Act XX of 1863, were passed.

We must, therefore, reverse the order of the District Judge, and direct him to receive the plaint and proceed to dispose of the suit according to law. Costs will abide and follow the result.

The memorandum of objections is dismissed.

APPELLATE CRIMINAL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Benson.

1899. December 13, 14.

KANDASAMI CHETTI (COMPLAINANT), PETITIONER,

v.

SOLI GOUNDAN (ACCUSED No. 2), COUNTER-PETITIONER.*

Criminal Procedure Code—Act V of 1898, s. 197—Charge against village magistrate for alleged offence while acting not in a judicial capacity—Sanction.

A village magistrate having been apprised of a disturbance in his village forcibly separated the combatants, one of whom thereupon preferred a charge against him of causing hurt. The complaint was taken by the Sub-Magistrate upon his file without any previous sanction of the Government or other authority mentioned in section 197 of the Code of Criminal Procedure. The village magistrate raised the objection that the prosecution could not legally be proceeded with until such sanction had been first obtained. The Sub-Magistrate held that such sanction was unnecessary and kept the case on his file and commenced to enquire into it. The village magistrate presented a petition to the District Magistrate raising the same ground of objection, whereupon the District Magistrate quashed the whole of the proceedings, holding that the Sub-Magistrate had no jurisdiction to try the case against a village officer without sanction having been first obtained:

Held, that sanction was not necessary under section 197 of the Code of Criminal Procedure. The village magistrate, while preventing an offence, was not acting in the capacity of a Judge, or a public servant not removeable from office without the sanction of Government, and therefore the section referred to had no application:

Held also, that the order of the District Magistrate quashing the proceedings of the Sub-Magistrate was passed without jurisdiction.

Semble, that a village magistrate exercising jurisdiction, and trying an offender under Regulation XI of 1816 is a Judge within the meaning of section 197 of the Code of Criminal Procedure and section 19 of the Indian Penal Code.

* Criminal Revision Case No. 323 of 1899, under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the order of C. H. Mounsey, Acting District Magistrate of Coimbatore, dated 26th July 1899, quashing the proceedings of the Stationary Sub-Magistrate of Udamalpet in regard to accused No. 2 in Calendar Case No. 78 of 1899 on his file.

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PETITIONER had filed a complaint against one Soli Goundan, the Village Magistrate of kasba Udamalpet, and others, on the ground that they had caused hurt to him. He said that while he and others were having an altercation the village magistrate arrived upon the scene and asked them to desist, and though they obeyed, he hit petitioner on the shoulder and told others to do the same. The Stationary Sub-Magistrate of Udamalpet took the complaint upon his file. Objection was then made by the village magistrate that the charge could not be prosecuted against him until sanction should first be obtained under section 197 of the Code of Criminal Procedure. The Stationary Sub-Magistrate held that sanction was not necessary. The village magistrate then presented a petition to the District Magistrate under sections 435 and 528 of the Code of Criminal Procedure, in which he admitted that he had attempted to separate the petitioner from another man, while a disturbance was going on, and in doing so pulled him by his hair. He further contended that as village magistrate it was his duty to so interfere and quell a disturbance. He claimed that the Stationary Sub-Magistrate was wrong in holding that sanction was not necessary under section 197 of the Code of Criminal Procedure and concluded his petition to the District Magistrate as follows:—

"That your petitioner respectfully ventures to point out that section 197, Code of Criminal Procedure, is one meant specially for

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the benefit and protection of public officials, who, in the discharge of their public duties, cannot always please all parties, and that the object of such section is to prevent frivolous and vexatious complaints against public servants in the discharge of their duties, and that some special enquiry must be held before subjecting public servants to criminal prosecutions for acts done in the discharge of their duties. That the officer to whom is delegated the power of deciding whether or not to sanction the prosecution of village magistrates, under section 197, Code of Crminal Procedure, is the District Magistrate, and it is therefore that the petitioner comes to this Court. That ordinarily, a departmental enquiry is held and a report made, so that the Court may have materials to decide whether any and what offences have been committed, and if a prosecution is desirable, or called for. That in this case no such enquiry has been held, and your petitioner has been gravely prejudiced thereby. . . . . Your petitioner, therefore, respectfully prays that under section 435, Code of Criminal Procedure, the records of the case may be called for, and under section 528, Code of Criminal Procedure, the case may be withdrawn to the file of this Court, and if this Court is of opinion that the prosecution of the petitioner should be proceeded with, then that a departmental enquiry should be held, before determining whether sanction should be accorded under section 197, Code of Criminal Procedure, and that in the meantime proceedings may be stayed."

On this petition the District Magistrate passed the following order quashing the Stationary Sub-Magistrate's proceedings:—"The Counsel (Mr. C. V. Narasayya) for petitioner asked that the records in Calendar Case No. 78 of 1899 on the file of the Stationary Sub-Magistrate of Udamalpet be sent for that it might be seen if the trial of petitioner was a legal one in that he was being prosecuted for acts done in his official capacity. Petitioner states that he interfered as village magistrate to prevent a disturbance, seizing a certain man by his top-knot to do so. The man so seized charged petitioner with causing hurt. The Stationary Sub-Magistrate of Udamalpet took cognizance of the case, although a petition was put in before the Sub-Magistrate in which petitioner claimed that he acted as a village magistrate, and therefore that sanction was necessary before he could be tried. The Sub-Magistrate on this petition passed an order saying:—'The question is whether in preventing or repressing crime he can use force . . . .

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in his capacity of a village magistrate.' The Village Officers' Code says:—'It is their duty (village magistrates') to strive by all means to prevent the commission of offences.' This is what the petitioner claims he did. The Sub-Magistrate goes on to say 'if he found the rioting imminent, he ought to have reported to the authorities.' Considering that it is alleged a breach of the peace was going on, this reasoning is futile. For this reason the Sub-Magistrate thinks he did not act in his magisterial capacity. This is not a sufficient reason to take it for granted that petitioner's objection is not a *bonâ fide* one, when the Sub-Magistrate himself states that the question was one of what powers the petitioner could use in 'preventing or repressing crime' which assumes that he did act to prevent or repress crime. The Sub-Magistrate had no jurisdiction, he is trying a case of whether petitioner exceeded his powers as village magistrate, for which he has no sanction. All his proceedings in regard to petitioner are quashed."

Against the latter order, the complainant preferred this petition to the High Court.

Hon. Mr. *E. Norton* and *Kasturiranga Ayyangar* for complainant.

Mr. *J. G. Smith* (for Acting Public Prosecutor) for the Crown.

Sivasami Ayyar for accused No. 2.

JUDGMENT.—The order of the District Magistrate quashing the proceedings of the Sub-Magistrate was clearly passed without jurisdiction. There is no provision of law which gives a District Magistrate power to interfere in this way. His proper course was to have reported the case for the orders of the High Court, if interference was considered necessary. This is indeed conceded, but it is urged on behalf of the accused that the High Court, as a Court of revision, should, while setting aside the District Magistrate's order, also quash the proceedings of the Sub-Magistrate as illegal for want of the necessary sanction under section 197, Code of Criminal Procedure. We might, no doubt, take this course if the proceedings of theSub-Magistrate were illegal, but we do not think that they were so.

The village magistrate was neither a Judge, nor a public servant not removeable from office without the sanction of Government. It may be that a village magistrate exercising jurisdiction and trying an offender under the Regulation (XI of 1816) is a Judge within the meaning of section 197, Code of Criminal

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Procedure, and section 19, Indian Penal Code; but in the present case he was, it is alleged, preventing an offence, not trying an offender and illustration (*d*) to section 19, Indian Penal Code, makes it clear that in such capacity he is not a Judge.

Section 197, Code of Criminal Procedure, therefore, has no application, and it is not suggested that the village magistrate is otherwise protected from prosecution without sanction.

We, therefore, set aside so much of the District Magistrate's order as purports to quash the proceedings of the Sub-Magistrate. The latter should proceed with the case according to law.

APPELLATE CRIMINAL.

Before Sir Charles Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1900. February 2.

QUEEN-EMPRESS

v.

SANKARALINGA KONE AND ANOTHER.*

Criminal Procedure Code—Act V of 1898, s. 161—Examination of witnesses by the Police—Legal obligation to speak the truth—Refusal to answer questions—Liability to punishment under sections 176, 179, and 187 of the Indian Penal Code.

A refusal to answer questions asked by a Police officer under section 161 of the Code of Criminal Procedure is not punishable under sections 176, 179, and 187 of the Indian Penal Code.

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* Criminal Appeal No. 723 of 1899 under Criminal Procedure Code, section 417, against the judgment of acquittal passed on the accused in Calendar Case No. 247 of 1899 by the Stationary Sub-Magistrate of Srivaikuntam.

In *Queen-Empress* v. *Appigadu*, (Criminal Revision Case No. 199 of 1899), relating to the construction of the same section, Sir SUBRAHMANIA AYYAR, OFFG. C.J., and O'FARRELL, J., on 27th July 1899, passed the following ORDER:—"The accused was charged in the alternative with making a false statement to a Police officer investigating under section 161, Criminal Procedure Code, or with making a false statement before the Magistrate on solemn affirmation, the charge being based on the irreconcilability of the two statements. Under the present Criminal Procedure Code, section 161 (2), which reverts to the language of the Code of 1872, a person is no longer bound by law to tell the truth when questioned by a Police officer; (see *Empress* v. *Kassim Khan* (8 C.L.R., 300; I.L.R., 7 Calc., 121). A conviction in the alternative cannot, therefore, be sustained, nor can we consider the suggestion of the Deputy Magistrate that he intended to find that the statement before the Second-class Magistrate was false, looking to the way in which the charge was framed. We set aside the conviction and sentence and order the fine, if levied, to be refunded."

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APPEAL against an order of discharge. A complaint was made against two persons to the effect that the Inspector of Police had been to investigate a case of cattle theft and questioned the accused about the occurrence, and that they had replied that they were not willing to give any statement before the Inspector as they had sent a petition to the Joint Magistrate to try the case himself. It was contended that the accused had committed an offence punishable under section 179, Indian Penal Code, of refusing to answer a public servant authorised to question. The Magistrate by whom the case was tried, after taking evidence, said:—"It is clear that the two accused persons before the Court refused to answer the questions put to them by the Police Inspector. Their action in refusing to answer the questions is very improper and calls for some punishment. The wording of section 179, Indian Penal Code, however, does not permit me to punish the accused persons. The section runs thus:—(he quoted it). Under section 161, sub-section (2), Criminal Procedure Code (Act V of 1898), such persons are bound to answer all questions put to them by a Police officer. They are not legally bound to answer 'truly' such questions. The Procedure Code of 1882 contained such a provision, which has been explicitly omitted in the new Code of 1898. When the Procedure Code was thus amended no corresponding amendment was made in section 179, Indian Penal Code. It has, therefore, to be concluded that a man cannot be punished under section 179, Indian Penal Code, unless he be legally bound to speak the truth. The prosecution has not shown me any other provision of law under which the accused can be dealt with. In these circumstances I consider that no case has been made out against the accused, and discharge them under section 245, Criminal Procedure Code."

Against this order of discharge an appeal was preferred by the Public Prosecutor.

The Acting Public Prosecutor (*C. Sankaran Nayar*) for the Crown.

The accused were not represented.

JUDGMENT.—The question in this case is whether a person who is examined under section 161 of the Code of Criminal Procedure by a Police officer making an investigation under chapter XIV of the Code, and who refuses to answer the questions

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put to him, can be punished under section 179 of the Penal Code as a person "legally bound to state the truth." The Code of 1882 contained the word "truly" after the word "questions" in sub-section (2) of section 161. This word has been omitted in the Code of 1898. Section 118 of the Code of 1872, which corresponds to section 161 of the present Code, did not contain the word "truly." We are of opinion that under the law as it now stands, a person who is examined under section 161 of the Code of Criminal Procedure is not "legally bound to state the truth." The legal obligation to speak the truth when so examined no doubt existed under the Act of 1882; but the effect of the omission of the word "truly" has been to do away with this legal obligation.

In the case of *Empress* v. *Kassim Khan*(1) a Full Bench of the Calcutta High Court decided that the words "shall be bound to answer all questions" in section 119 of the Code of 1872 did not constitute an "express provision of the law to state the truth" within the meaning of section 191 of the Indian Penal Code. The reasoning upon which this decision is based is, in our judgment, clearly applicable to the present case. We do not think that a person who refuses to answer when examined under section 161 of the Criminal Procedure Code can be said to commit an offence either under section 176 (see the case of *The Queen* v. *Luckhee Singh*(2)) or section 187 of the Indian Penal Code.

The appeal is dismissed.

(1) 8 C.L.R., 300; I.L.R., 7 Calc., 121. (2) 12 W.R., (Cr. R.), 23.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Shephard, Mr. Justice Subrahmania Ayyar, Mr. Justice Davies, and Mr. Justice Benson.

SOUNDARAM AYYAR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SENNIA NAICKAN AND OTHERS (DEFENDANTS, NOS. 3 TO 5, 1 AND 2), RESPONDENTS.*

1900. April 11. September 21, 27. October 15.

Civil Procedure Code—Act XIV of 1882, *s.* 586—"*Suit of the nature cognizable in Courts of Small Causes*"—*Suit for rent other than house-rent—Second Appeal.*

A suit for the recovery of rent other than house-rent is a suit of the nature cognizable in Courts of Small Causes, within the meaning of section 586 of the Code of Civil Procedure, and no second appeal lies from a decision therein when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

So *held* (SUBRAHMANIA AYYAR, J., dissenting).

Vedachala Mudali v. *Ramasami Raja*, (I.L.R., 22 Mad., 229), overruled.

SUIT for rent other than house-rent. The District Munsif decreed for plaintiffs. Defendants Nos. 3 to 5 appealed to the District Judge who allowed the appeal and dismissed the plaintiffs' suit.

Plaintiffs preferred this second appeal.

S. Subrahmania Ayyar for appellants.

Desikachariar for respondents Nos. 1 to 3.

The case first coming on for hearing before SHEPHARD and DAVIES, JJ., their Lordships made the following

ORDER OF REFERENCE TO THE FULL BENCH.—As we are both of opinion that the ruling in *Vedachala Mudali* v. *Ramasami Raja*(1) requires re-consideration, we refer to a Full Bench the question whether a suit for rent is a suit of the nature cognizable in Courts of Small Causes, within the meaning of section 586 of the Code of Civil Procedure, it being admitted that the notification required by clause 8 of the second schedule of the Provincial Small Cause Courts Act (Act IX of 1887) has been issued for all the Courts.

* Second Appeal No. 476 of 1899 against the decree of S. Russell, District Judge of Madura, in Appeal Suit No. 192 of 1888, reversing the decree of V. Narayanasami Ayyar, District Munsif of Madura, in Original Suit No. 36 of 1897.

(1) I.L.R., 22 Mad., 229.

SOUNDARAM AYYAR v. SENNIA NAICKAN.

The case then came on for hearing before a Full Bench, consisting of Sir ARNOLD WHITE, C.J., BENSON and MOORE, JJ.

Sir *V. Bhashyam Ayyangar* and *S. Subrahmania Ayyar* for appellants.

Desikachariar for respondents Nos. 1 to 3.

Sir *V. Bhashyam Ayyangar*.—I submit that a second appeal lies. The simple question is—What is the true meaning of the words "of the nature cognizable in Courts of Small Causes"? By the Provincial Small Cause Courts Act, section 15, it is enacted that "(1) 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; (2) Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes . . . . ." By Schedule II, clause 8, "a suit for the recovery of rent, other than house-rent, is excepted from the cognizance of a Court of Small Causes, 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 effect of these sections is that the Legislature has declared primarily that a suit for rent is not cognizable in a Court of Small Causes. But the local Government may declare a Judge to be expressly vested with authority to try such suits. By section 23 of the same Act, a Court has a discretion to return a plaint,—which was done in *Muttukaruppan* v. *Sellan*(1), where it was held that a suit of a nature cognizable by a Court of Small Causes does not cease to be so within the meaning of the Code of Civil Procedure, section 586, because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side under Provincial Small Cause Courts Act, section 23, on the ground that the suit involved questions of title. The decision in *Manappa Mudali* v. *McCarthy*(2 was prior to the Provincial Small Cause Courts Act. *Muttukaruppan* v. *Sellan*(1) was subsequent to it, and the view taken there was also taken in *Kali Krishna Tagore* v. *Izzatannissa Khatun*(3). Both cases were converse to the present one. *Ramchandra Raghunath* v. *Abaji Rastya*(4) decided that a suit for rent was not of a nature cognizable by a Court of Small

(1) I.L.R., 15 Mad., 98.
(2) I.L.R., 3 Mad., 192.
(3) I.L.R., 24 Calc., 557.
(4) 6 Bom. H.C.R., (A.C.J.), 12.

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Causes, and that a second appeal lay, but that was under Act XI of 1865, section 6, clause 4. There is no corresponding enactment in Madras. Under it, a suit could, in Bombay, be tried by a Revenue officer. But section 27 of Act XXIII of 1861, there referred to, corresponds with section 586 of the present Code of Civil Procedure. I submit that the words "a suit of the nature cognizable by Courts of Small Causes" means a suit properly so cognizable by virtue of the Act, and does not include a suit which the local Government has empowered a Court of Small Causes to try. [MOORE, J., remarked that when *Vedachala Mudali* v. *Ramasami Raja*(1) was considered, it was admitted that the power to try suits for rent had not been extended to all District Judges.] That is correct. The Legislature appears to have regarded suits for rent as having a special importance and it will be detrimental if the right of second appeal be taken away.

Desikachariar for respondents Nos. 1 to 3.—The Legislature would not have provided for rent suits being brought in the Revenue Courts in Bombay if it had attached any special importance to them. There being no Revenue Courts in Madras in which such suits may be brought the local Government is empowered to give jurisdiction over such suits in Madras, the Provincial Small Cause Courts Act being a general Act applying to the whole of India. In the report of the Select Committee on the amendment of the Provincial Small Cause Courts Act, it is said: "By our amendment of the schedule we have placed the following suits within the cognizance of Provincial Small Cause Courts, namely, ... (*b*) suits for the recovery of rent of agricultural land in certain circumstances." He referred to *Ramchandra Raghunath* v. *Abaji Rastya*(2), *Manappa Mudali* v. *McCarthy*(3), and *Secretary of State for India in Council* v. *Fischer*(4).

S. Subrahmania Ayyar in reply.

The case came on for re-hearing on 21st September 1900, before a Court constituted as above.

Sir *V. Bhashyam Ayyangar* for appellants—(After dealing with the subject-matter of his previous argument).—Section 586 applies to the whole of India, and the policy of the Legislature

(1) I.L.R., 22 Mad., 229.
(2) 6 Bom. H.C.R., (A.C.J.), 12.
(3) I.L.R., 3 Mad., 192.
(4) Second Appeal No. 598 of 1890 (unreported).

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has been to describe in a compendious manner such suits as it does not consider sufficiently important to be entitled to a second appeal. If nothing be found to the contrary, it must be taken to be a general provision and not local or provincial, and its interpretation should not depend upon any power that may or may not be given to any local Government to invest Judges with jurisdiction to try suits of another nature. In that view it is immaterial whether Small Cause Courts are established or not, and section 586 is independent of whether they are established or not. The sole meaning of the section is to shortly describe a class of cases which the Legislature deals with and it does not depend on whether there are Small Cause Courts in fact or not. It is a mere mode of description. The section in Act IX of 1887 is the definition and it is immaterial whether the local Government have in fact established Small Cause Courts under Madras Civil Courts Act of 1873, section 28, or not, or whether Judges of Small Cause Courts have been endowed with further powers or not. The word "nature" in section 586 means "nature generally." The pecuniary value of a suit does not determine its nature. A suit might be of the requisite "nature," though excluded by reason of the value of its subject-matter. The scheme of the Provincial Small Cause Courts Act is to be seen from, *e.g.*, sections 4 and 5. No Courts have been established under this Act. Section 16 has the words "a suit cognizable"—not a suit of the "nature cognizable." Under section 23, the Judge may decline jurisdiction. Section 32 is the section which really applies the enactment to Ordinary Courts invested by some other law with Small Cause Courts jurisdiction. That has been done by the Madras Civil Courts Act of 1873, section 28. So the Provincial Courts of Small Causes Act need not have been brought into operation. Assuming it not to have been so brought into operation, section 586 would still have barred the suits to which it applies. So it is not a question as to whether a class of suits can be tried by one Court or another. It is only that a certain class of suits are deemed to be of insufficient importance to justify the right of second appeal being accorded them: the question who can try them is immaterial. Suppose the Small Cause Court jurisdiction to have been established by local Government in a single place, such as Bellary, or in a cantonment, the result would be that section 586 would apply to second appeals only from Bellary, and to no others in the Presidency. The view

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expressed in *Muttukaruppan* v. *Sellan*(1) has been taken by other Courts in, *e.g.*, *Kali Krishna Tagore* v. *Izzatunnissa Khatun*(2) and also in Bombay. "Suits of a nature," &c., means suits that are primarily so cognizable and not suits that are made so by the exercise of a power conferred by the Act. The meaning is that which is given by the Act alone and not by the Act and something else in addition. It is a question whether the power of Government should not be exercised with reference to a Judge in person and not to his Court. See clause 8 of schedule II, Provincial Small Cause Courts Act. Section 35 distinguishes between a Court of Small Causes and a Court which has been vested with the powers of Courts of Small Causes. Section 28 of the Madras Civil Courts Act of 1873 enables the local Government to invest any District or Subordinate Judge with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such Courts up to the amount of five hundred rupees. My contention is that "nature" means "unalterable nature." [SHEPHARD, J., referred to section 32 of the Provincial Small Cause Courts Act and the way in which the word "nature" is used there.] *Ramchandra Raghunath* v. *Abaji Rastya*(3) would not be applicable in Madras, because the proviso could not apply here, as Revenue officers cannot try suits for rent. Moreover, section 586 refers to suits of a nature cognizable by any Courts of Small Causes, not by particular Courts; that is, by every Court of Small Causes. Whether they exercise that power or not is immaterial. In any case it is questionable whether the so-called rent paid by many raiyats on zamindaris is rent at all or may come under exception (13) of schedule II. In *Assanulla Khan Bahadur* v. *Tirthabashini*(4), it was held, (upon the objection of the respondents that the suit being one of the nature cognizable by a Court of Small Causes, and valued at less than Rs. 500, no second appeal would lie under section 586 of the Code of Civil Procedure), that as the consideration for the payment of chowkidari tax is the occupation or the holding of the patni tenure, and as the payment has to be made periodically to the zamindar by the patnidar, and the amount agreed to be paid is lawfully payable, it comes within the definition of rent in the Bengal Tenancy Act, and that,

(1) I.L.R., 15 Mad., 98.
(2) I.L.R., 24 Calc., 557.
(3) 6 Bom. H.C.R., (A.C.J.), 12.
(4) I.L.R., 22 Calc., 680.

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therefore, a second appeal lies. In the Madras Presidency all Munsifs and all Subordinate Judges have been invested with power to try suits of small cause nature, but not all have been given power to try suits for rent. *Musa Miya Saheb* v. *Sayad Gulam Husein Mahamad*(1), where it was held that no second appeal lies, is a very strong authority illustrating my contention that the meaning of section 586 does not depend on whether there is a Small Cause Court or not, or whether or not it may try a particular case. That case was held to be cognizable by a Small Cause Court though the jurisdiction had been expressly taken away—which shows that the construction of section 586 does not depend on whether a Small Cause Court can, in fact, try the suit but rather upon its nature. The decision in *Watson* v. *Sreekristo Bhumick*(2) depends on a special provision of the Bengal Tenancy Act, section 153, which provides that no second appeal is to lie where there is no dispute as to the amount of the rent. It was contended that no second appeal lay, but it was held that that section did not apply as the amount of rent was in dispute; and though the amount in dispute was less than Rs. 100, and notwithstanding the provisions of section 153 of the Bengal Tenancy Act, it was held that a second appeal lay. *Rango Roy* v. *Holloway*(3) impliedly recognizes that in a suit for rent a second appeal lies. See also *Khedu Mahto* v. *Budhun Mahto*(4) per Maclean, C.J., at page 510. In *Uma Churn Mandal* v. *Bijari Bewah*(5), the question was whether the rent there in question was "house-rent" or not—it being for "bustoo or homestead land." In *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rau*(6), it was assumed that there would be a second appeal if kattubadi was a charge on the land and the question now raised was not really considered. In *Vedachala Mudali* v. *Ramasami Raja*(7), it was held that 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

(1) I.L.R., 7 Bom., 100.
(2) I.L.R., 21 Calc., 133.
(3) I.L.R., 26 Calc., 842.
(4) I.L.R., 27 Calc., 508.
(5) I.L.R., 15 Calc., 174.
(6) I.L.R., 19 Mad., 329.
(7) I.L.R., 22 Mad., 229.

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15 and schedule II, article 8, of the Provincial Small Cause Courts Act, 1887, and that a second appeal lies from a decision in such a suit though the amount or value of the subject-matter of the original suit does not exceed Rs. 500. That decision has led to this reference.

Kuppusami Ayyar, (for *Desikachariar*), for respondents Nos. 1 to 3.—Before considering the general policy of the section 586 it is more important to construe the section, if it can be logically interpreted. The result of that construction is immaterial. There are three qualifications necessary to render a suit of a "nature cognizable" in Courts of Small Causes: first, it must be for less than Rs. 500; secondly, it must not be excluded by the schedule; and thirdly, it must be cognizable. Inasmuch as suits for rent are permitted by the notification, they are cognizable. Section 15 gives the local Government power to extend the value, and article 8 gives power to extend the subject-matter, of certain suits, and the two powers are consistent. Reading section 15 and article 8 together with the notification, the result is to take rent suits out of the exceptions in schedule II. [He referred to *Vedachala Mudali* v. *Ramasami Raja*(1), *Bank of England* v. *Vagliano Brothers*(2), and *Norendra Nath Sircar* v. *Kamalabasini Dasi*(3).]

Sir *V. Bhashyam Ayyangar* in reply.—The word "nature" may be omitted from consideration—the effect would be the same if it were not used in the section. If a Small Cause Court is established it can take cognizance of a certain class of suits, namely, inherently and by the mere fact of being established under section 5 with the assent of the Governor in Council. Section 586 refers to suits of a "nature," that is, of a "character" cognizable by a Small Cause Court. Suits for rent are not cognizable by a Small Cause Court by virtue of its inherent jurisdiction. Section 586 therefore does not apply to them. The contention that a notification at the pleasure of the Governor in Council affects the meaning of words describing the nature of the suits that are referred to as being cognizable by Small Cause Courts is unscientific and opposed to the general policy of the Code of Civil Procedure, which is a general Act and the meaning of which cannot be said to be varied by or depend upon the notifications of a local Government.

(1) I.L.R., 22 Mad., 229. (2) [1891] A.C., 107. (3) L.R., 23 I.A., 18.

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Sir ARNOLD WHITE, C.J.—In this case, I am unable to agree with the view which was taken by a Division Bench of this Court in *Vedachala Mudali* v. *Ramasami Raja*(1). The question turns upon the construction to be placed upon the words "any suit of the nature cognizable in Courts of Small Causes" as used in section 586 of the Code of Civil Procedure. The object of this section, as it seems to me, is to take away the right of second or special appeal where the value of the subject-matter of the original suit does not exceed Rs. 500 in the case of all suits which as regards their subject-matter would be within the jurisdiction of Courts of Small Causes but which are outside that jurisdiction by reason of the amount claimed being beyond the pecuniary limit of the Small Cause jurisdiction. This section is a re-production of Act XXIII of 1861, section 27, which provided that no special appeal should lie in any suit of the nature cognizable in Courts of Small Causes under Act XLII of 1860 when the debt, damage or demand did not exceed Rs. 500. Under Act XLII of 1860, claims for rent and other matters recoverable before a Revenue officer were expressly excluded from the jurisdiction of Small Cause Courts. Act XLII of 1860 was repealed by Act XI of 1865, the latter enactment providing (section 50) that references to the Act of 1860 should be read as applying to the Act of 1865. The Act of 1865 was repealed by Act IX of 1887. Both the Act of 1865 and the Act of 1887 were Acts of the Governor-General in Council. The scheme of the Act of 1887 is the converse of that of the Act of 1865. Under the Act of 1865, a Court of Small Causes was given jurisdiction over certain specified claims. Under the Act of 1887, the Court has jurisdiction over all suits provided the amount of the claim is within the pecuniary limit of the special jurisdiction, unless the suit is expressly excepted from the cognizance of the Court. Section 6 of the earlier enactment provided that a claim for rent should be cognizable by a Court of Small Causes when the amount claimed did not exceed Rs. 500, but that no action should lie for rent for which, at the time of the passing of the Act, a suit might be brought before a Revenue officer unless, as regards arrears of rent for which such suit might be brought, the Judges of the Court of Small Causes had been expressly invested by the local Government with

(1) I.L.R., 22 Mad., 229.

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jurisdiction over claims to such arrears. Section 7 gave power to the local Government to extend the jurisdiction in suits of the nature described in section 6 "and thereby made cognizable by Courts of Small Causes" to an amount not exceeding Rs. 1,000. Section 15 of the later Act provides that a Court of Small Causes shall not take cognizance of the suits specified in the second schedule to the Act, but that, subject to the exceptions specified in the schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed Rs. 500 shall be cognizable by a Court of Small Causes. The same section empowers the local Government, subject to the exceptions in the schedule and the provisions of any enactment for the time being in force, to direct that all suits of a civil nature of which the value does not exceed Rs. 1,000 shall be cognizable by the Court of Small Causes. Amongst excepted suits specified in the schedule are suits for the recovery of rent other than house-rent, 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 (article 8). By a notification, dated 24th January 1888, the Madras Government has invested all Subordinate Judges and District Munsifs within the Presidency with jurisdiction to try on their small cause side all suits for rent falling within the pecuniary limits of their special jurisdiction. The effect of article 8 and the notification read together is to give a Judge jurisdiction to entertain a suit for rent as a small cause suit provided (i) he is a Judge of a class to whom the notification applies and (ii) the amount claimed is not beyond the pecuniary limits of his special jurisdiction. By reason of the jurisdiction of a Small Cause Court being limited as regards amount, if the amount claimed exceed the limit, although the suit is "of a nature cognizable" by a Small Cause Court, it is not cognizable. If a suit is cognizable it must be of a nature cognizable. But if it is of a nature cognizable it does not follow that it is cognizable. When the claim is within the pecuniary limit, and the Court is within the terms of the notification, no restriction of the right of appeal is necessary, because under the Small Cause Courts Act itself the decision of the Small Cause Court is final. It seems to me that section 586 of the Code applies to cases which as regards subject-matter would be within, but by reason of the amount claimed are without, the jurisdiction of a Court of Small

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Causes. The words "of a nature cognizable" seem to have reference to the subject-matter of the suit as distinguished from the amount of the claim. In the case of *Vedachala Mudali* v. *Ramasami Raja*(1), a Division Bench were of opinion that a second appeal lay in cases where the suits for rent had been made cognizable by the notification and would not have been cognizable but for the notification, on the ground that such suits were not cognizable by virtue of the Act but by virtue of the authority conferred on certain Judges by the local Government. I do not see how it can be said that suits which are rendered cognizable by reason of the notification are not suits which are cognizable by virtue of the Act, since the notification was issued under the express powers conferred by the Act. The words "any suit of the nature cognizable" as used in section 586 of the Code may be paraphrased thus:—Any suit relating to a subject-matter over which a Court of Small Causes would have jurisdiction if the claim were within the pecuniary limits of its jurisdiction. The view that the effect of the notification is to render suits for rent suits "of the nature cognizable in Courts of Small Causes" does not, in my judgment, involve the proposition that, as soon as Government by 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. It does involve the proposition that all suits for rent become "of the nature cognizable"; but whether a given suit for rent ceases to be a suit excepted from the cognizance of a Court of Small Causes must depend, first, upon the question whether the tribunal before which the suit is instituted is included in the notification and, secondly, upon the question whether the amount of the claim is within the pecuniary limit of the jurisdiction of that tribunal. To my mind there is no anomaly in holding that a suit instituted upon the regular side of a Court which has not had small cause jurisdiction conferred upon it may be a suit of a nature cognizable by Courts of Small Causes. The suit would be actually cognizable by that particular Court if the Court was entitled to exercise the special jurisdiction. The fact that it is not so entitled does not prevent the suit being "of the nature cognizable in Courts of Small Causes" or affect the question

(1) I.L.R., 22 Mad., 229.

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of the construction of section 586. So far, I have dealt with the case apart from authority. As regards the case of *Ramchandra Raghunath* v. *Abaji Rastya*(1), Couch, C.J., seems to have overruled the preliminary objection on the ground that "suits of the nature cognizable by Courts of Small Causes must mean without reference to clause 4 of section 6 of Act XI of 1865 and must be cognizable in general." If we turn to section 6 of the Act in question, we find that the section begins by enacting affirmatively that a suit for rent (which, *primâ facie*, includes a suit for arrears of rent) shall be cognizable by Courts of Small Causes. If, then, the words "of a nature cognizable" are to be construed without reference to clause 4 we find that the section expressly enacts that suits for rent shall be cognizable. If they are cognizable it is difficult to see how it can be said that they are not of a nature cognizable.

The very general words "of a nature cognizable" were, no doubt, advisedly used by the Legislature. In *Musa Miya Saheb* v. *Sayad Gulam Husein Mahamad*(2), the Bombay High Court went so far as to hold that, in a suit which, as regards subject-matter, had been expressly removed from the jurisdiction of a Small Cause Court by an enactment (Act X of 1876, section 15) which removed suits to which the Collector was a party from the jurisdiction of Small Cause Courts, no second appeal lay. Sargent, C.J., and Melvill, J., held that the nature of the suit, by which must be understood the jural relations between the parties, remained unaltered and, as the suit was one of a nature cognizable by a Small Cause Court, no second appeal lay. The tendency of the Courts (with the exception of the Bombay case to which I have referred) seems to have been to carry out the intention of section 586 by declining to place a narrow construction on the words "of a nature cognizable." See, for instance, the case of *Harakh* v. *Ram Sarup*(3), the Full Bench decision of this Court in *Manappa Mudali* v. *McCarthy*(4) and the cases of *Mutlukaruppan* v. *Sellan*(5) and *Kali Krishna Tagore* v. *Iszatannissa Khatun*(6).

I think our answer to the question referred to us should be in the affirmative.

(1) 6 Bom. H.C.R., (A.C.J.), 12.
(2) I.L.R., 7 Bom., 100.
(3) I.L.R., 12 All., 579.
(4) I.L.R., 3 Mad., 192.
(5) I.L.R., 15 Mad., 98.
(6) I.L.R., 24 Calc., 557.

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SHEPHARD, J.—In order to see whether any suit is "of the nature cognizable in Courts of Small Causes" it is clear that the Act relating to Small Cause Courts must be examined. Chapter III of the present Act deals with the matter of jurisdiction. By sub-section 2 of section 15 it is declared that all suits of a civil nature not exceeding Rs. 500 in value shall be cognizable by a Court of Small Causes subject, however, to the exceptions specified in the second schedule to the Act. The exceptions are ranged under forty-four heads, one of which, relating to suits for rent contains an exception and a proviso. It is contended on behalf of the appellants that, as the operation of section 586, Civil Procedure Code, *does not depend on the actual institution* of Small Cause Courts in any given place, so its operation is limited to suits other than those specified in the schedule without regard to the question whether action has been taken under the proviso already mentioned. A suit for recovery of rent (other than house-rent) is, as I understand the argument, marked off by the Legislature as a suit not of the Small Cause Court nature. Therefore, the question whether such a suit is or is not actually triable by such a Court is no less immaterial than is the question whether such Court exists to try it. I am unable to follow this argument. It seems to be assumed in the argument that cases cognizable by a Small Cause Court form a class of cases having inherent and distinctive qualities in common. But that is not the fact under the present Act. The Legislature has declined the task of ascertaining affirmatively what suits are to be deemed small causes or even of declaring to what general class such suits belong. Except that they are small cause suits belonging to that category, they may, for aught that appears in the Act, have no qualities in common. It is only by examining the schedule and seeing what is not a small cause that it can be decided that any individual suit is a small cause. This being so, when it is said that a suit is of the nature of suits cognizable by Small Cause Courts, what must be meant is that it is not a suit such as is named in the schedule. When it is a suit the cognizance of which by a Small Cause Court is barred by any enactment for the time being in force, I suppose nobody would assert that it is in the nature of suits cognizable by such Courts, seeing that clause 44 of the schedule expressly provides for the legislative addition of new cases to the exceptions. In the same way, as it seems to me, clause 8 provides for the exclusion

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of certain cases from the list of exceptions or for the cancellation of that particular exception. The mode in which the cancellation is effected is surely immaterial; the result is the same whether it is brought about by the direct Act of the Legislature or by an act of Government authorized by the Legislature. To my mind it is, in the legal sense of the term, absurd to say that a suit for Rs. 400 claimed as rent might, but for the fact that the District Munsif's jurisdiction under the Act was limited to suits not exceeding Rs. 200 in value, be tried as a small cause, and at the same time to deny that such suit is of the nature of suits cognizable by Courts of Small Causes. Some of the cases cited by the Honourable Sir V. Bhashyam Ayyangar had reference to the old Small Cause Courts Acts, the scheme of which is totally different from that which is adopted in the present Act. In those Acts some attempt was made to describe in positive terms the nature of the suits intended to be designated as small causes. There was reason therefore for holding that, when a suit was found to possess that nature, it was intended to be treated as such for the purpose of section 586 of the Code. The case in *Musa Miya Saheb* v. *Sayad Gulam Husein Mahamad*(1) is one which, if it had to be decided with reference to the Act of 1887, must, in my opinion, have been decided in favour of the appellant, because, as I have already shown, clause 44 of the schedule allows for suits which are not within the schedule being added to it. Taking the schedule to the Act as the index by which it can be ascertained what is a small cause, I am of opinion that we must have regard to all the provisions of the schedule and that, if it is found that a suit for rent could legally be tried by a Small Cause Court, that suit is a small cause and, therefore, a second appeal is precluded.

SUBRAHMANIA AYYAR, J.—The provision, contained in section 586 of the Code of Civil Procedure, "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" and those of the Provincial Small Cause Courts Act which relate to the nature of suits that are cognizable by Small Cause Courts as well as those which relate to suits excepted from the cognizance of those Court, are provisions applicable quite generally. It is, therefore, as urged by Sir

(1) I.L.R., 7 Bom., 100.

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V. Bhashyam Ayyangar on behalf of the appellants, almost certain that the words "any suit of the nature cognizable in Courts of Small Causes" in section 586 were intended to comprise suits which are cognizable by any Court of Small Causes by virtue of the provisions of the Small Cause Courts Act itself, but not suits which may become cognizable by Small Cause Courts under special circumstances only, such as under the authority conferred on them by a local Government in pursuance of the discretionary power exercisable by such a Government under the proviso to article 8 of the second schedule of Act IX of 1887. That very singular results would follow from holding otherwise is shown by, among others, the case put by way of illustration by Sir V. Bhashyam Ayyangar in the course of his agrument. Suppose a suit for rent other than house-rent not exceeding Rs. 500 is brought in a Court within the jurisdiction of which the cause of action arose and which Court is competent to entertain the suit as a Court of ordinary jurisdiction, though not as a Court empowered to take cognizance of small cause suits. In such a case, according to the contention for the respondents the suit must, with reference to the question whether a second appeal lies or not, be treated as one not of the nature cognizable in Courts of Small Causes. If, however, a suit for the same rent is instituted in a Court which is empowered to take cognizance of Small Causes and within the jurisdiction of which the defendant resides, though the cause of action did not arise therein, the suit must, for the purposes of determining whether a second appeal lies or not, be held, according to the respondents, to be of the nature cognizable in Courts of Small Causes. In the absence of very clear language pointing to the conclusion that a rule leading to so anomalous a result was intended to be laid down, I find it impossible to uphold the contention on behalf of the respondents. The point, now raised, was substantially raised in *Ramchandra Raghunath* v. *Abaji Rastya*(1) which was decided when the Code of 1859 as amended by Act XXIII of 1861, was in force. Couch, C.J., and Gibbs, J., came there to the same conclusion as that adopted in *Vedachala Mudali* v. *Ramasami Raja*(2). That when the Code of 1877 was passed the Legislature did not think it necessary to introduce any change in the language of section 586 of that Code corresponding to the

(1) 6 Bom. H.C.R., (A.C.J.), 12 at pp. 15, 16. (2) I.L.R., 22 Mad., 229.

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provision with reference to which *Ramchandra Raghunath* v. *Abaji Rastya*(1) was decided, shows that that decision was understood to be right. And when, with reference to the section last referred to, a similar point arose in *Musa Miya Saheb* v. *Sayad Gulam Husein Mahamed*(2), Sargent, C.J., and Melvill, J., decided the point in conformity with the principle on which Couch, C.J., and Gibbs, J., had acted. Sargent, C.J., pointed out that the circumstance that the class of cases to which the one that the Court was there concerned with belonged had been removed by a special enactment from the jurisdiction of Small Cause Courts did not alter the nature of the suit, by which must be understood the jural relations between the parties. That this decision is perfectly correct will be manifest, if the true effect of the enactment—section 15 of Bombay Act X of 1876—is borne in mind. Now, that section makes every suit, to which Government or a public officer in his official capacity is a party, cognizable by a District Court alone and not by a Subordinate Court or a Court of Small Causes. Such an enactment, it is obvious, does not repeal or modify the provisions of the Small Cause Courts Act explaining the nature of suits cognizable by such Courts. The enactment merely creates a privilege in favour of certain classes of parties in all suits inclusive of suits of the nature cognizable in Courts of Small Causes. It is scarcely necessary to say that such a privilege does not affect the nature of suits cognizable by Small Cause Courts, *i.e.*, the character of the legal relation which gives rise to suits ordinarily triable by those Courts. It would be as unreasonable to hold that the privilege referred to does affect the legal relation between the parties as it would be to hold that a legal relation, say that of buyer and seller, would be affected by the circumstance that the buyer chances to be a Hindu, Muhammadan, Christian or Buddhist. If the decision of Sargent, C.J., and Melvill, J., had been different, it would have resulted in the view that, for instance, a suit for the price of goods sold to an officer of Government would, in Bombay, not be of the nature cognizable by Courts of Small Causes, though a suit for the price of goods sold to a private individual would there be of such a nature. It would also have followed that a suit for the price of goods sold to a Government officer would in Madras, unlike in Bombay, be of the nature of suits triable by Small Cause

(1) 6 Bom. H.C.R., (A.C.J.), 12 at pp. 15, 16. (2) I.L.R., 7 Bom., 100.

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Courts as no enactment like section 15 of Act X of 1876 referred to existed in the former Presidency. Surely it must be taken that the Legislature did not intend that the words "of the nature cognizable in Courts of Small Causes" should have one meaning in Bengal, another in Madras, a third in Bombay and so on, but that the intention was that the words should be understood in one and the same sense in all the provinces to which the Civil Procedure Code extended and under all circumstances. How then can it be held that the legal relation which gives rise to a claim for rent is in any way affected by the circumstance that the claim may be taken cognizance of by a particular Court only under certain circumstances? I would only add that the decision of the Calcutta High Court in the recent case of *Rango Roy* v. *Holloway*(1) as to the meaning of section 586 of the present Code proceeds on the same principle as that on which the Bombay decisions rest.

I am therefore of opinion that the construction contended for on behalf of the appellants is the sound construction and that the decision in *Vedachala Mudali* v. *Ramasami Raja*(2) is correct.

BENSON, J.—The question referred for our decision is "whether a suit for rent is a suit of the nature cognizable in Courts of Small Causes, within the meaning of section 586, Civil Procedure Code."

There is no question but that a suit for house-rent is of a nature cognizable in Courts of Small Causes, for it is cognizable in such Courts under section 15 (2) of the Provincial Small Cause Courts Act (IX of 1887). I take it that the reference was intended to refer only to a suit for rent, other than house-rent. The answer to the question so limited is not free from difficulty, but, in my judgment, the correct answer is in the affirmative. The jurisdiction of the Courts in regard to taking cognizance of civil suits is derived from the Legislature. Section 15 of the Provincial Small Cause Courts Act, read with the second schedule attached to the Act, declares categorically and directly that certain suits are, or are not, cognizable by a Court of Small Causes. But with regard to suits for rent, other than house-rent, it declares them to be excepted from the cognizance of a Court of Small Causes unless the Judge of the Court of Small Causes has been expressly invested by the local Government with authority to exercise jurisdiction in respect thereto. If he has been so invested, such suits become cognizable

(1) I.L.R., 26 Calc., 843. (2) I.L.R., 22 Mad., 239.

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by a Court of Small Causes. The cognizability of such suits by a Court of Small Causes is not determined directly by the Legislature, but by the local Government under an authority derived from the Legislature. In other words the Legislature has determined that they are of such a character or nature that the local Government may make them cognizable by a Court of Small Causes.

The suits that are triable by Courts of Small Causes are, speaking broadly, suits of a comparatively simple character and of small pecuniary value. Let us now see how the Legislature deals with appeals against decrees in these suits. If the suit has been actually tried by a Court of Small Causes no appeal at all is allowed, for section 27 of the Provincial Small Cause Courts Act declares that the decree of the Court is final. There are however many suits which would be triable by a Court of Small Causes if one existed with local and pecuniary jurisdiction, but which are in fact tried as original suits by a District Munsif's Court because there is no Small Cause Court with local and pecuniary jurisdiction competent to try them. In these suits a first appeal is allowed by section 540, Civil Procedure Code, but a second appeal is disallowed by section 586, Civil Procedure Code, which enacts that "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."

When the Legislature in this section speaks of suits "of a nature cognizable in Courts of Small Causes," I think it means suits which the Legislature has determined to be suits of such a character or nature that they are, or may be made, triable in a summary fashion in Courts of Small Causes without any further action on the part of the Legislature itself, though further action may be necessary by the local Government in establishing a Small Cause Court or by investing an existing regular Court with small cause powers, or by investing the Judge of the Small Cause Court with power to try suits for rent as small cause suits.

When the Legislature determines that suits of a certain character may be made triable in Courts of Small Causes without further action on the part of the Legislature, I think that those suits are of a nature cognizable in Courts of Small Causes even though the local Government may not establish Small Cause Courts or invest any Judge with power to try small cause suits in general or rent suits in particular as small cause suits. The nature of the suit is,

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I think, determined once for all by the Legislature, but it leaves the local Government to decide whether the suits shall, in fact, be tried as small cause suits or not, and this the local Government does by establishing Small Cause Courts or by investing existing regular Courts with a greater or less degree of small cause jurisdiction. The jurisdiction may be limited as regards local area and the pecuniary value of the suits, and it may, or may not, be extended to suits for rent. These are all matters which depend on the will of the local Government, but do not affect the character or nature of the suits. That was determined by the Legislature when it enacted that such suits might be tried by Courts of Small Causes provided the local Government should take appropriate action to establish the Courts or to invest them with the necessary powers.

If such action be taken, then the suits are not only of a nature cognizable by Courts of Small Causes, but become actually cognizable by those Courts. If, however, such action is not taken, then the suits do not become actually cognizable by such Courts, but their nature or character as originally declared by the Legislature remains unaffected.

Suits for rent are therefore, in my judgment, suits of a nature cognizable by Courts of Small Causes within the meaning of section 586, Civil Procedure Code, and they are so universally and independently of the action which may or may not have been taken by the local Government in establishing such Courts or investing the judges with powers under the Provincial Small Cause Courts Act.

It may be added that this view seems to assign to the Legislature a more consistent policy than the alternative view. It would be strange if the Legislature, when enacting the Civil Procedure Code, regarded rent suits as being of such a character as to be suitable for second appeals, and yet when enacting the Small Cause Courts Act regarded them as suits which might by notification of the local Government be made triable by a Court of Small Causes in which case not even a first appeal in regard to them would be allowed.

DAVIES, J.—I concur in the conclusion arrived at by the majority of the Court, and would answer the reference in the affirmative.

[This second appeal coming on again for final hearing, after the expression of the above opinion of the Full Bench, the Court dismissed it.]

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

VENKATARAMAYYA (PLAINTIFF), PETITIONER,

v.

SUBBANNA (DEFENDANT), RESPONDENT.*

1900. February 7.

Rent Recovery Act (Madras)—Act VIII of 1865, s. 72—Refusal to execute muchalka—Suit for rent.

By section 72 of the Rent Recovery Act, when a judgment is given for the delivery of a muchalka, if the person required by the decree to execute such muchalka shall refuse to do so the judgment shall be evidence of the amount of rent claimable from such person, or a copy of the judgment under the hand and seal of the Collector shall be of the same force and effect as a muchalka executed by the said person. A landholder, having tendered a patta and obtained confirmation of it by summary suit, sued for rent. The tenant in his written statement denied that the patta was a proper one and contended that he was not bound to accept it:

Held, that this amounted to a refusal to execute the muchalka for the delivery of which judgment had been given, within the meaning of section 72, and that the requirements of that section had been complied with.

SUIT for rent. Plaintiff alleged that a patta, which had been confirmed by the Revenue Court, had been duly tendered to defendant, and he filed it and the judgment of the Revenue Court in the suit. Defendant in his written statement denied that the patta had been confirmed, and contended that it was not a proper one, for reasons which he gave. He claimed that he was not in any way bound to accept it. Two issues were framed, namely:—(1) "Whether plaintiff tendered patta to the defendant for fasli 1305, and (2) whether the defendant is liable for the rent sued for." The Subordinate Judge refused to act upon plaintiff's evidence regarding the tender of patta, and held, referring to *Rangayya Appa Rau* v. *Ratnam*(1) that the judgment of the Revenue Court was not binding upon him. He found the first issue against plaintiff and dismissed the suit.

* Civil Revision Petition No. 168 of 1899, under section 25 of the Provincial Small Cause Courts Act, praying the High Court to revise the decree of P. S. Gurumurti Ayya, Subordinate Judge of Kistna, in Small Cause Suit, No. 2011 of 1898.

(1) I.L.R., 20 Mad., 392.

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Plaintiff preferred this civil revision petition.

Kuppusami Ayyar for petitioner.—The question in this case is not one of *res judicata* and the case of *Rangayya Appa Rau* v. *Ratnam*(1) has no application. The point that was decided there was whether the decision of a Revenue Court regarding the propriety or impropriety of a patta arrived at in proceedings to set aside an attachment was or was not *res judicata* when the same question came up for decision in a Civil Court. But the present case is covered completely by the provisions of section 72 of the Rent Recovery Act, *i.e.*, that where a Revenue Court in a suit instituted under section 9 of the Rent Recovery Act settles a patta between the parties, the judgment is conclusive evidence of the amount of the rent, and a copy of the judgment shall have the same force and effect as a muchalka executed by the tenant. The Civil Court in such circumstances has nothing further to decide.

Sivasami Ayyar for respondent.—Section 72 requires as a condition precedent that the tenant shall have refused to execute a muchalka subsequent to the judgment of the Revenue Court. Here there is no such allegation or proof. Further, the contention of the petitioner is in effect to plead *res judicata* and I therefore submit that the case of *Rangayya Appa Rau* v. *Ratnam*(1) is in point.

Kuppusami Ayyar in reply.—The refusal by the tenant is not a condition precedent under the section to the institution of the suit. Such refusal no doubt must be proved before the judgment of the Revenue Court is used in evidence as contemplated by the section. The written statement filed in the case contains the refusal and that is enough for the purposes of that section.

JUDGMENT.—On the hearing of this case by the Subordinate Judge the attention of the Judge does not seem to have been called to the provisions of section 72 of the Rent Recovery Act. That section provides as follows:—

"When a judgment is given for the delivery of a muchalka, if "the person required by the decree to execute such muchalka shall "refuse to execute the same, the judgment shall be evidence of the "amount of rent claimable from such person, and a copy of the "judgment under the hand and seal of the Collector shall be of "the same force and effect as a muchalka executed by the said "person."

(1) I.L.R., 20 Mad., 392.

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If the requirements of section 72 are complied with a copy of the judgment has the same force and effect as a muchalka executed by the person required by the decree to execute the muchalka. It has been argued on behalf of the respondent (the tenant) that the landlord cannot rely on this section inasmuch as one of the requirements of the section, viz., that the person required by the decree to execute the muchalka has refused to execute the same since the judgment was given, has not been complied with. The question we have to determine is, has there been, since judgment for the delivery of a muchalka, a refusal by the tenant to execute the same? In his plaint the landlord alleges a tender of a patta for fasli 1305 and confirmation of this patta by the summary (*i.e.*, the Revenue) Court. The defendant in his written statement denies that the patta tendered was a proper one and alleges that he is not bound to accept it.

We think that this amounts to refusal to execute the muchalka for the delivery of which the judgment was given, within the meaning of section 72 of the Rent Recovery Act, and that the requirements of that section have been complied with. The Subordinate Judge ought to have given judgment for the landlord on this ground. There is nothing left for the Subordinate Judge to try under the second issue and accordingly we do not remit the case to him. We reverse the decree of the Subordinate Judge and give judgment for plaintiff for the amount sued for. In the circumstances we make no order as to costs either before the Subordinate Judge or in this Court.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1900. February 9.

SIVASAMI NAICKAR AND ANOTHER (DEFENDANTS-PETITIONERS), APPELLANTS,

v.

RATNASAMI NAICKAR (PLAINTIFF-COUNTER-PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 2, 244, 588—Application to stay sale in execution proceedings on ground of under-valuation—Order dismissing application—Appeal against order of dismissal—Decree.

An application was made by certain defendants, against whom a decree had been passed, for an order that a sale at the instance of the decree-holder, in execution of his decree, should not be proceeded with, on the ground that in the sale proclamation the value of the property had been under-estimated. The Subordinate Judge held the under-valuation to be immaterial and dismissed the application, whereupon the judgment-debtor appealed to the High Court. On the preliminary objection being there taken that no appeal lay from the order of dismissal:

Held, that an appeal lay, the order having been made with reference to a question which related to the execution, and the question being one arising between the parties to the suit in which the decree was passed and relating to its execution, within the meaning of section 244 of the Code of Civil Procedure.

On a sale of property in execution of a decree the value stated in the sale proclamation is a material fact within sub-section (*c*) of section 287 of the Code of Civil Procedure. Under-valuation of such property is a material irregularity in publishing or conducting the sale.

PETITIONERS, as defendants and judgment-debtors in a suit, petitioned a Subordinate Court for an order that an auction sale at the instance of the decree-holder, in execution of his decree, should not be proceeded with on the ground that in the sale proclamation the value of the property had been under-estimated. The Subordinate Judge passed an order to the effect that the under-valuation was immaterial, since the property would be knocked down to the highest bidder. He dismissed the application.

From this order the petitioners preferred this appeal.

Sundara Ayyar for respondent.—There is a preliminary objection to the hearing of this appeal. It is submitted that no

* Civil Miscellaneous Appeal No. 152 of 1899 against the order of N. Sarvothama Rao, Subordinate Judge of Tanjore, in Miscellaneous Petition No. 2257 of 1899 (in the matter of Original Suit No. 24 of 1898).

appeal lies against the order of the lower Court, the case not coming under section 588 of the Code of Civil Procedure. The only other section which provides for appeals in miscellaneous matters is section 540, read with sections 2 and 244 of the Code of Civil Procedure, and, in fact, this appeal purports to have been presented under these sections. But section 540 applies only to the case of decrees, and the order of the lower Court which is now complained of is not a "decree." Section 2 of the Code of Civil Procedure defines a "decree" as "the formal expression of an adjudication of any right claimed or defence set up." The present case does not come within this definition of a decree. The latter part of the definition is controlled by the former, so that an order determining any question mentioned in section 244 will be a "decree" only when it is a final adjudication of any right claimed or defence set up. The case of *Nihal Chand* v. *Rameshari Dassee*(1) supports this contention. It was not intended to give a right of appeal against every order passed in the executive department.

Sivasami Ayyar for appellant.—The question arises between the parties to a suit, and it relates to the execution of the decree. It is consequently within clause (*c*) of section 244. And section 2, which defines what a decree is, says "that an order determining any question mentioned in section 244, but not specified in section 588" is within the definition of a decree. This case comes under clause (*c*) of section 244, and is admittedly not specified in section 588. So an appeal does lie under section 540 read with sections 2 and 244 of the Code of Civil Procedure. The latter part of the definition of "decree" in section 2 should not be controlled by the former. The two parts are quite independent of each other. It is submitted that an appeal does lie.

JUDGMENT.—A preliminary objection that no appeal lies has been raised. The order appealed against was made on an application by the defendants that an application for execution put in by the plaintiff should be dismissed. In substance, the application was for an order that a sale under an execution should not be proceeded with on the ground that in the sale proclamation the value of the property had been under-estimated. The Subordinate Judge dismissed the defendant's application on the ground that the fact that the value of the property had been under-estimated was

(1) I.L.R., 9 Calc., 214.

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immaterial. The effect of the Subordinate Judge's order would be that the sale would be proceeded with notwithstanding the fact of under-valuation. We think the question raised by the defendant's application was a question arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree within the meaning of section 244 of the Code of Civil Procedure. It has been urged on behalf of the decree-holder (the respondent) that having regard to the definition of "decree" contained in section 2 of the Code, an order determining any question mentioned or referred to in section 244, but not specified in section 588 is not an appealable order unless it amounts to a "formal expression of an adjudication upon a right claimed." Even assuming that the order of the Subordinate Judge is not in substance a formal expression of an adjudication upon a right claimed, it appears to us that so long as the order determines a question referred to in section 244 an appeal lies from such order. The judgment of the Calcutta High Court in *Nihal Chand* v. *Rameshari Dassee*(1), no doubt supports the contention now put forward by the decree-holder, but we are not prepared to place the same construction on the words of the definition of "decree" in section 2 of the Code as the Calcutta High Court seemed prepared to adopt. We are, therefore, thrown back on section 244 and we have to say whether the question raised before the Subordinate Judge related to the execution. Without attempting to lay down any general rule applicable to all orders passed in execution proceedings, it is sufficient to say that the order was made with reference to a question which related to the execution, and consequently the order made is appealable. We accordingly overrule the preliminary objection.

On the merits we think the Subordinate Judge was clearly wrong in his view that the under-valuation was immaterial. The law is now settled by the Privy Council decision in *Saadatmand Khan* v. *Phul Kuar*(2).

We allow the appeal with costs. We reverse the order of the Subordinate Judge and we direct him to ascertain, as far as possible, the value of the property and amend the sale proclamation accordingly.

(1) I.L.R., 9 Calc., 214. (2) L.R., 28 I.A., 146; I.L.R., 30 All., 412.

APPELLATE CIVIL.

Before Sir Arnold White and Mr. Justice Benson.

ORR AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

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

1900. January 24, 26. February 13.

Revenue Recovery Act (Madras)—Act II of 1864, ss. 52, 54—Madras Hereditary Village Offices Act (Madras)—Act III of 1895, s. 21—Emoluments due to village officers—Demand for payment under section 52 of Revenue Recovery Act—Payment under protest—Suit to recover amount paid—Legality of demand—Limitation.

By the custom of a zamindari its tenants brought their produce to the threshing-floor, where it was divided, *inter alia*, among the village servants. The lessees of the zamindari altered this system, directing the tenants to bring their produce direct to the granaries of the lessees, who promised to pay the village servants their fees from the said granaries. These fees having been only partly paid, the village servants complained to the Government revenue officials, who applied to the lessees for payment of the arrears, a demand for the same being ultimately issued under section 52 of the Revenue Recovery Act (Madras), 1864. The lessees thereupon paid the amount of the arrears under protest, and a year later filed a suit against the Secretary of State to recover the money so paid:

Held, that the lessees had made themselves liable for the fees, and the Collector was entitled to proceed under section 52 of the Revenue Recovery Act (Madras), 1864, to recover them.

Held also, that inasmuch as the suit had not been brought within six months of the time when the alleged cause of action had arisen, it was barred under section 59 of the Revenue Recovery Act (Madras), 1864.

SUIT for a declaration and for the recovery of arrears of revenue paid to defendant under protest. The plaint stated that plaintiffs were the lessees of the Sivaganga Zamindari; that there were totties who performed the totti work of the village of Tirupatur, situated therein; that the zamindari was a permanently-settled estate, the Government having reserved only the right of collecting the fixed peishcush under Regulation XXV of 1802; that the zamindar alone had the power to appoint and dismiss servants, and amongst them the totties, and to give them the emoluments due to them (swatantrams); that such swatantrams were allowed in

* Appeal No. 9 of 1899 against the decree of T. Varada Rao, Temporary Subordinate Judge of Madura (East), in Original Suit No. 34 of 1897.

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proportion to the amount of grain harvested, which should be obtained from the tenants before the melvaram was divided; that for these reasons Regulation VI of 1831 was not applicable to the said zamindari, nor were the servants governed thereby. Plaintiffs contended that, under section 52 of Madras Act II of 1864, Government had no power to collect the swatantrams of the said totties as if they were arrears of revenue, there being no arrears of revenue in fact; and that they should be collected from the tenants; yet the Government Deputy Tahsildar had, on 27th July 1896, sent a demand to plaintiffs under section 52 of Madras Act II of 1864, whereupon the sum now sued for (Rs. 219-0-1) was deposited under protest on behalf of the plaintiffs on 5th August 1896. Plaintiffs filed this suit on 4th August 1897 and prayed for a declaration that Regulation VI of 1831 was not applicable to the Sivaganga Zamindari; that under section 52 of Madras Act II of 1864, the Government had no right to collect the swatantrams from plaintiffs as arrears of revenue; and for an order that the amount paid under protest should be refunded. In defence it was denied that Government had no other right than that of collecting poisheush, or that the totties were bound to receive their emoluments from the tenants, and it was claimed that the village servants were entitled to recover their said emoluments from the plaintiffs; that Regulation VI of 1831 and the enactments which repeal it apply to the Sivaganga zamindari and that the said emoluments, if not duly paid, might be recovered under section 52 of Madras Act II of 1864. It was also pleaded that the suit was barred by limitation under section 59 of Madras Act II of 1864.

The Subordinate Judge framed the three following issues:—"(1) Are the totties of the villages comprised in the Sivaganga zamindari, obtained on lease by plaintiffs, entitled to receive the swatantrams, which are due to them, from the raiyats directly, or from the proprietor? (2) If such swatantrams have not been paid, is the defendant bound to collect from those who are found liable the aforesaid swatantrams and disburse the same to the said totties? If so, are the plaintiffs entitled or not to a return of the sum of Rs. 219-0-1 collected from them on 5th August 1896 being the value of undisbursed swatantrams from faslis 1300 to 1302 by the Deputy Tahsildar of Tirupatur? Is plaintiffs' claim to the return of the said amount of Rs. 219-0-1 barred by section 9 of Madras Act II of 1864? (3) Are the plaintiffs, as the lessees of the zamindari, bound to pay swatantrams or their value?"

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On the first issue he found that the totties were entitled to recover the swatantrams due to them from the proprietor and not directly from the tenants; on the second issue he held that plaintiffs were not entitled to a refund of the Rs. 219-0-1 paid under protest. He further held that inasmuch as by section 59 of Madras Act II of 1864, persons aggrieved by any proceedings under that Act may institute suits only within six months from the time at which the cause of action arose, and inasmuch as the suit had been filed a year after cause of action had arisen, the Court could not take cognizance of it. He referred to *Yellaya* v. *Viraya*(1); *Raman* v. *Chandan*(2); and *Kumarasami Pillai* v. *Orr*(3).

Plaintiffs preferred this appeal.

V. Krishnasami Ayyar and *S. Srinivasa Ayyangar*, for appellants, contended that demand could not properly be made against plaintiffs for arrears of swatantrams under section 52 of the Revenue Recovery Act (Madras), 1864. The contention that persons in the position of plaintiffs could be sued because arrears were due was incorrect. If liable at all, plaintiffs' liability was rather for damages as wrong-doers, than for the fees; and such damages were recoverable only in the Civil Courts. He cited *Venkatapathi* v. *Subramanya*(4); *Venkata* v. *Chengadu*(5); and *Narayanan Nambudri* v. *Damodaran Nambudri*(6). The crops were the property of the tenants, who should have been proceeded against under Madras Act III of 1895, and not plaintiffs. He argued that the suit had been wrongly held to be barred by limitation under section 59 of Act II of 1864, inasmuch as no revenue was payable. He referred to *Venkatapathi* v. *Subramanya*(4); and *Venkata* v. *Chengadu*(5).

The Acting Government Pleader (*C. Sankaran Nayar*) for respondent.—The Revenue Recovery Act only directs the procedure and does not refer to the nature of the claim to be enforced. If the totties had brought a suit against the zamindar, the Civil Courts would have had no jurisdiction, and the Collector alone could have decided it. That being the case, plaintiffs cannot now

(1) I.L.R., 10 Mad., 42.
(2) I.L.R., 15 Mad., 219.
(3) I.L.R., 20 Mad., 145.
(4) I.L.R., 9 Mad., 457.
(5) I.L.R., 12 Mad., 168, at p. 175.
(6) I.L.R., 17 Mad., 189.

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sue on account of the alleged illegal levy, the Collector alone being able to decide that question. The cases cited with reference to limitation do not support the proposition put forward. In *Venkatapathi* v. *Subramanya*(1), section 59 of Madras Act II of 1864 was not considered. In *Venkata* v. *Chengadu*(2), Muttusami Ayyar, J., at page 175, lays down that even if the proceedings are defective and irregular and therefore not in strict conformity with the provisions of the Act, they should be taken as being professedly under it, otherwise there could be no grievance at all to be redressed by a Civil Court. The section presupposes that certain proceedings have been professedly taken under the Act, and that there might possibly be a valid claim to redress on the ground that they were not in accordance with the provisions of the Act, and then directs that the claim shall not be adjudicated upon the merits unless it is preferred within six months from the time when the cause of action arose. It is submitted that that is the true construction. The present claim is not in respect of land revenue, but for a fee payable to a village officer. Plaintiffs do not deny that a fee is due, but merely contend that it is payable by some one else. Under Madras Acts II of 1864 and III of 1895, the land may be sold for such arrears. This suit falls within section 21 of Madras Act III of 1895, and if the Collector had decided it under that Act the jurisdiction of the Civil Courts would have been barred. If the suit is brought under Regulation VI of 1831 it is also barred. *Muthayya Chetti* v. *Secretary of State for India*(3) shows that money must be shown to have been paid under illegal coercion to enable a plaintiff to recover it. The payment here was not made by illegal coercion, but by lawful process, and on that ground plaintiffs cannot recover. The Limitation Act does not apply to cases brought under Madras Act III of 1895—see section 25,—except to the extent there provided.

V. Krishnasami Ayyar in reply.—The last clause in section 21 of Madras Act II of 1895 has reference to the emoluments of an office. This suit is not for such emoulments. It is a rule that a statute should not be construed so as to take away the jurisdiction of the Civil Courts. In *Muthayya Chetti* v. *Secretary of State for India*(3), there had been no distress but only a voluntary

(1) I.L.R., 9 Mad., 457.

(2) I.L.R., 22 Mad., 169.

(3) I.L.R., 12 Mad., 168, at p. 175.

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payment. The terms of the warrant under which plaintiffs in this case paid show that the property would have been immediately sold, had they not prevented sale by paying as they did.

JUDGMENT.—The following facts are either undisputed or are proved by the evidence:—

The plaintiffs are the lessees of the Sivaganga zamindari. Prior to fasli 1300 it was the custom for the tenants to bring their paddy, when harvested, to the threshing floor, where it was divided among those entitled to it in the following manner:—First the "common charges" were deducted; that is, the actual cultivator took his expenses of cultivation (kudi swatantram) and the village servants, such as the karnam, ambalagaran, totti, &c., took the shares due to them (pala swatantram). Then the balance was equally divided between the zamindar (or his lessees) (melvaram) and the tenant (kudivaram).

This was done in the presence of the zamindari officials, the tenants and the village servants, and neither the melvaram nor the kudivaram could be taken until the "common charges" had first been appropriated. From and after fasli 1300 the lessees altered this old system which had obtained from time immemorial. They then directed the tenants not to bring the paddy to the threshing floor for division as hitherto, but to bring it direct to the granaries (kalanjiams) of the lessees, and they promised to pay the village servants their fees (swatantram) in a lump from the granaries. The village servants do not appear to have been consulted as to this arrangement; some of them appear to have acquiesced in it, but the totties protested. Their protest was unheeded and they appear then to have accepted the situation and looked to the lessees for payment of their fees. These fees were, in part at all events, paid by the lessees to the village servants, but a part of the fees due to the totties of Tirupatur and Themmapattu for the faslis 1300 to 1302 remained unpaid. The totties are menial village servants who discharged various duties both for the zamindar and for the Government and for the villagers. Their duties include both revenue and police duties, as there are no kavalgars in those villages, their duties being discharged by the totties. They made repeated applications to the lessees' officials for the unpaid fees, but could get no satisfaction. They then sent a number of petitions to the Government revenue officials, who repeatedly pressed the lessees' officials for payment of the

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arrears due. These arrears are shown in exhibit A (1)—a statement furnished by the lessees' Tahsildar to the Government Deputy Tahsildar on the 7th April 1894. It showed the total paddy fees due to the totties for faslis 1300 to 1302 (1st July 1891 to 30th June 1893), the amount which had been actually paid to them in kind from the lessees' granaries and in cash from the lessees' treasury for paddy which had been collected and sold and the balance that was still due, partly in cash by the lessees and partly in kind. The latter was shown as "with parties," meaning apparently, that it was still in the hands of the tenants and had not been collected by the lessees. Further correspondence followed, and at length on the 27th July 1896 the Deputy Tahsildar issued a demand, under section 52 of the Revenue Recovery Act (II of 1864, Madras), on the lessees for the balance shown in exhibit A (1). This was paid by the lessees on the 5th August 1896 under protest, on the ground that they were not liable for any fees which had not been actually collected by them. On the 4th August 1897 the lessees filed the present suit against the Secretary of State to recover the money (Rs. 219-0-1) so paid and for other reliefs. The Subordinate Judge dismissed the suit and the lessees now appeal against that decree.

The fundamental question which we have to decide is whether, in the circumstances of this case, the totties were entitled to demand their fees from the lessees or could recover them only from the tenants. The question is not altogether free from difficulty, but the conclusion at which we arrive is that the totties could demand them from the lessees. It is to be observed that prior to fasli 1300 the question never arose. The crop was taken to the threshing floor by the actual cultivator or the tenant under the supervision of the lessees' officials and the "common charges" including the totties' fees were there and then deducted as a first charge, and handed to the persons entitled thereto, or, in their absence, to the ambalagaran, who took charge of them for the absentees; and it was only after this had been done that either the landlord or the tenant could take their shares of the balance. The village servants could hardly be said to recover their fees from either the tenant or the landlord, but rather from a common fund from which all were to receive a share, and the shares of both landlord and tenant were equally liable to, and equally affected by, the deduction of

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the first charge in favour of the village servants. The fees to the village servants were not at that time entered in the zamin accounts, but from fasli 1300 the tenants were required by the lessees to bring the whole crop, or at least the melvaram and village officers' fees, to the lessees' granaries direct, and the village officers' fees were from that time entered in the zamin "demand, collection and balance" accounts. The reason for the change is not quite clear, but it was probably to enable the lessees to exercise a stronger control over the village servants, for the lessees' Tahsildar says:—"The lessees issued orders not to disburse "the swatantrams if the village servants should show remissness." Whatever the reason was, it is clear that the change was made by the authority of the lessees, and for their own purposes, and on a promise or understanding that they would pay the fees in a lump to the village servants at the granaries (see evidence of first defence witness, uncontradicted). The effect of the change was to deprive the totties of their customary and easy means of recovering the dues as a first charge on the produce and to give them instead the security of the lessees' undertaking that they themselves would pay them the fees. There is nothing to support the present contention of the lessees that they are liable to pay only so much of the fees as were actually collected by them. There is no evidence to that effect, and the plea does not appear to have been put forward by their Tahsildar until quite a late stage. There is no evidence that the lessees have in fact been unable to collect their melvaram to an extent proportionate to the arrears of swatantram. All that appears is that up to the date of exhibit A (1) the totti swatantram not received by the lessees was the amount therein shown. The totti swatantram is a fixed proportion (8 markals in every 35 kalams) of the gross out-turn of the crop, and it is not clear how the lessees' officials could have calculated the exact amount of the fees due to the totties unless the out-turn had been measured or the melvaram paid. Apparently the lessees collected their own melvaram, but not, in all cases, the swatantram. Thus the fourth witness for plaintiffs, the karnam of Themmapattu, says, "some of the big raiyats, ambalagarans and others, without paying swatantram, only paid the melvaram." Thus the effect of the change, if the lessees are not liable to the totties for their fees, is to enable the lessees to apply in satisfaction of their own melvaram the grain first received from each tenant, depriving the totties

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of their first charge on the crop, and leaving them to get their dues as best they can from the balance in the hands of the landlord or the tenant, as the case may be. We think that the lessees by their conduct, and by undertaking to pay the fees to the village servants, rendered themselves liable for the payment of those fees. The fact that the fees were, for the first time, from and after fasli 1300 entered in the lessees' "demand, collection and balance" accounts shows that it was their intention to collect them and supports the inference and the evidence of the first defence witness, that they made themselves responsible for their payment to the village servants. It is argued that the lessees prior to fasli 1300 never collected the fees from the tenants, and have no legal power now to collect them and cannot, therefore, be liable for them. It has not yet been decided whether the lessees have or have not that right, but it does not affect the question of their liability to the totties. Prior to fasli 1300 the totties never collected their fees from either the tenants or the lessees, as already explained, but it cannot be argued that, for that reason, neither are now liable to the totties. The change of system was made by the lessees and the tenants without the consent of the village servants, and it seems reasonable that, in the circumstances, both should be liable for the fees. The lessees, at all events, are liable since they are entirely responsible for the new state of things under which the totties are deprived of their customary means of obtaining the fees.

It is contended for the plaintiffs that if they are liable at all, it is not for the fees but for damages, as wrong-doers; and that such damages can only be recovered by suit in a Civil Court. We do not think the contention is sound. The lessees made themselves liable to pay the fees, and whether that liability results from custom, or contract, or otherwise does not seem to affect the question of procedure. Section 52, Act II of 1864 (Madras) enacts that "all fees or other dues payable by any person to or on behalf of the village servants employed in revenue or police duties may be recovered in the same manner as arrears of land revenue." The Collector, as representing Government, is interested in seeing that village servants of the class specified are paid their dues so as to enable them to discharge their duties efficiently, and if he is satisfied that their dues are improperly withheld by any person he has power under this section summarily to compel payment. It

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is suggested that when the person alleged to be liable to pay the fees denies his liability and claims that it rests on some other person, the Collector cannot take action until the dispute has been settled by a suit under Regulation VI of 1831 (Madras). No doubt it would be open to the Collector to take this course, and it would ordinarily be the better course, but we do not think that he is bound to take it in all cases. He may satisfy himself, in any way, that the fees are payable, just as he may satisfy himself in any way that land revenue is payable, by a person, and when so satisfied, he may proceed under the section. It is further contended that the totties could not have sued the lessees under Act III of 1895 (Madras) for recovery of the arrears as they had accrued more than three years before the Deputy Tahsildar's demand was issued, and that, therefore, the debt was barred and consequently not "payable" within the meaning of section 52 when the demand was issued. In answer to this it seems to be enough to say that by section 22 of Act III of 1895 it is enacted that nothing in that Act shall affect the provisions of section 52 of Act II of 1864.

We think, then, that the lessees were liable for the fees and that there was nothing to prevent the Collector from proceeding under section 52 to realize them. On this ground we think that the decree of the Subordinate Judge dismissing the suit was right both on the merits and because the suit was barred under section 59 of the Act, not having been brought within six months of the time when the alleged cause of action arose. No issue was raised in the lower Court, nor was any argument addressed to us to show that Regulation VI of 1831 and Act III of 1895 (Madras) are not applicable to the Sivaganga zamindari.

We dismiss the appeal with costs.

APPELLATE CIVIL.

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

1900. February 20.

PAKRAN (PLAINTIFF), APPELLANT,

v.

KUNHAMMED AND OTHERS (DEFENDANTS), RESPONDENTS.*

Registration Act—Act III of 1877, s. 35—Representative of deceased settler—Admission of execution of document by one out of three representatives—Defect of procedure in course of registration—Validity of registration.

The mother of three sons executed a deed of gift in favour of one of them and then died. The donee alone registered the document, the other sons not appearing before the registering officer. The document having been subsequently put in evidence, it was contended that it was inadmissible on the ground that under section 35 of the Registration Act, the donor being dead, the execution of the document must be admitted by the representative of the deceased, and that an admission by one out of three representatives is not an admission within the meaning of the Act:

Held, that assuming that the three sons of the deceased donor ought to have joined in admitting the execution of the document and that the registering officer was in error in considering one of them the due representative of the deceased, such error was a defect in procedure in the course of registration and the registration was not rendered invalid by reason thereof.

SUIT by plaintiff against his two brothers for possession of one-third share of certain lands which had been the property of his mother. Defence; that the mother had made a gift of the said property to first defendant; and an issue was framed on that point. The District Munsif found against the alleged gift, and decreed one-third share to plaintiff. First defendant appealed to the District Judge who, (after ordering additional evidence to be taken), upheld the validity of the gift to first defendant. He said:—"Exhibit I is produced as a deed of gift by the mother to first defendant . . . . . and I find that the deed of gift is true . . . . . It is contended that the registration of the deed of gift was obtained improperly. This deed was registered by first defendant after the death of his mother. First defendant as her son was one of her representatives, and I can see no reason

* Second Appeal No. 169 of 1899, against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 312 of 1898, reversing the decree of A. Annasami Ayyar, District Munsif of Badagara, in Original Suit No. 695 of 1897.

to hold that the registration was invalid. I find that the gift by his mother to first defendant is true and valid." He also found that the gift had been accompanied by such transfer of possession as was possible and referred to *In re Shaik Abdul Aziz*(1). PAKRAN v. KUNHAMMED.

Plaintiff preferred this second appeal.

Mr. *C. Krishnan*, for appellant, contended that the document, exhibit I, was not duly registered and should have been held to be inadmissible in evidence. By section 35 of the Registration Act, in case the person who has executed a document is dead, the registering officer is to register the document if the representative of the deceased appears before him and admits its execution. Here, the deceased was not represented as required by the section, only one out of three representatives having appeared before the officer. He referred to *Baij Nath Tewari* v. *Sheo Sahoy Bhagut*(2). He contended that all the three sons of the deceased should have admitted the execution before the registering officer, and that section 60 could only apply and render documents admissible in evidence when the terms of section 35 had been complied with. Here the first defendant, who alone admitted the execution, was himself the donee, and as such, solely interested in the registration. He also contended that even if the registration should be held to be valid, the gift must fail, inasmuch as there had been no transfer of possession in pursuance of the gift, as required under the Muhammadan Law.

J. L. Rosario, (with him *Ryru Nambiar*), for respondent No. 1. —The Court cannot go behind a registered document when once it has been registered, for the purpose of enquiring into the validity of the registration. See *Hardei* v. *Ram Lal*(3) and *Mohammed Ewaz* v. *Birj Lall*(4). See also sections 65 and 49 and Rules 7 and 8. The registering officer makes enquiry and may compel registration, and when he has once registered, the document is admissible in evidence.

JUDGMENT.—Section 123 of the Transfer of Property Act does not apply to the gift in this case, as it is one by a Muhammadan governed by Muhammadan Law (section 129 of the same Act). It is contended that the gift although formally registered was not duly registered under the Registration Act and is therefore not

(1) I.L.R., 11 Bom., 691.
(2) I.L.R., 18 Calc., 556.
(3) I.L.R., 11 All., 319.
(4) L.R., 4 I.A., 166.

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admissible in evidence. The ground upon which this contention is based is that, under section 35 of the Registration Act, the donor in the deed of gift being dead, its execution should have been admitted by the "representative" of the deceased and that first defendant being only one of the three representatives, there being two other sons of the deceased, was not by himself the "representatives" of the deceased. Assuming that the contention is right and that the three sons should have joined in admitting the execution of the document and that the Sub-Registrar was in error in considering the first defendant the due representative of the deceased, such error is in our opinion only a defect of procedure in the course of registration, and therefore the registration is not rendered invalid on that account. The observations of the Judicial Committee in *Sah Mukhun Lall Panday* v. *Sah Koondun Lall*(1) and repeated in *Mohammed Ewaz* v. *Birj Lall*(2) warrant the view we have taken which has also been taken by the Allahabad High Court in *Hardei* v. *Ram Lall*(3). There are cases in which non-compliance with the provisions of the Registration Law has been held to amount to more than a defect in the procedure and to invalidate the registration, such as the cases of *Baij Nath Tewari* v. *Sheo Sahoy Bhagat*(4) and *Narasamma* v. *Subbarayudu*(5). Neither of these decisions has reference to section 35 of the Registration Act, non-compliance with the terms of which is what we are now dealing with. The District Judge was therefore right in holding that the deed of gift was duly registered. There is no evidence to show that the gift was invalid under Muhammadan Law.

The second appeal is dismissed with costs.

(1) L.R., 2 I.A., 210.
(2) L.R., 4 I.A., 166.
(3) I.L.R., 11 All., 319.
(4) I.L.R., 18 Calc., 556.
(5) I.L.R., 18 Mad., 364.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.

THE COMMERCIAL BANK OF INDIA, LIMITED (DEFENDANT No. 9), APPELLANT,

v.

ALLAVOODEEN SAHEB AND OTHERS (PLAINTIFFS Nos. 1 TO 4 AND DEFENDANTS Nos. 1 TO 8), RESPONDENTS.*

1909. January 15, 16, 17, 18, 19. February 20.

Limitation Act—Act XV of 1877, s. 14, arts. 120, 127—Dismissal of former suit on substantive ground of failure to establish cause of action—Claim by contributors to a common fund.

An agreement was entered into between an uncle and his nephews, in 1879, that their earnings should be put into a common fund, which fund should be utilised for family requirements. No provision was, however, made for the division of any surplus that might arise. The agreement was acted upon until 1894, by which time a sum of Rs. 37,723-8-0 had accumulated. Upon a claim being made by the nephews in 1894 for a distribution of this fund, the uncle denied their right to participate in it. The uncle, who was working in partnership with others, in the same year, 1894, instituted a suit against his partners for an account and for his share of profits. He claimed the said accumulated fund of Rs. 37,723-8-0 as his share. While his suit was pending, namely, in December 1895, he assigned its subject-matter to the present ninth defendant, (a banking corporation). The partners, in defence, alleged that the present plaintiffs were entitled to share equally in the Rs. 37,723-8-0 and that they held the fund as stake-holders. In December 1894, present plaintiffs filed a suit against their uncle, the said first defendant, and his partners, in which they claimed shares in the said sum of Rs. 37,723-8-0. The two suits were tried together. First defendant's suit against his partners was dismissed on the ground that he had claimed for himself alone and had not brought the proper parties before the Court. In plaintiffs' suit, the latter were declared to be entitled to shares in the said sum, as prayed. First defendant appealed in both suits, judgment being given by the Appellate Court on 19th October 1897. In the suit in which first defendant was plaintiff, the plaint was allowed to be amended and a decree was passed for the amount found due to him alone in the settlement of accounts. In the plaintiffs' suit, the Appellate Court found that plaintiffs had no cause of action as against first defendant's firm; and that as between plaintiffs and first defendant there were accounts to be settled, in addition to those which appeared in the books of the firm. The Appellate Court further declined to treat the suit as one for partition only, and dismissed it, intimating that plaintiffs could obtain relief by way of partition in a suit so framed as to embrace all the parties interested

* Original Side Appeal No. 26 of 1899 against the decree of Mr. Justice Boddam, in Civil Suit No. 25 of 1899.

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and all the property in which they were interested. On 30th January 1899, plaintiffs filed the present suit in which they claimed that their shares in the said fund of Rs. 37,723-8-0 should be determined and paid:

Held, (affirming BODDAM, J.) that plaintiffs were entitled to recover.

Held also, that the time occupied in prosecuting the former suit could not be excluded when computing the period of limitation. Though the plaintiffs had acted with due diligence in instituting their former suit, it was dismissed—not on any technical ground of misjoinder of parties or of causes of action—but on the substantive ground that having regard to the frame of the suit, no cause of action had been established against any of the defendants; and the suit was not one which the Court from defect of jurisdiction or other cause of a like nature, was unable to entertain.

Held further, that the claim was not barred by limitation. The title of the nephews was not based on contract, express or implied, but arose out of the fact that they were contributors to a common fund, which the Court was now asked to distribute. The claim was one which the Court must deal with on equitable principles and apart from any question of partnership or of contract, and was consequently one to which article 120 of the Limitation Act applied. *Also*, that the question was not one relating to joint family property, within the meaning of article 127.

Rani Meea Kuear v. *Rani Hulas Kuear*, (13 B.L.R., 312), referred to.

SUIT to determine plaintiffs' shares in a sum of Rs. 37,723-8-0. The following facts are taken from the judgment of the Chief Justice:—

"By a deed, dated 3rd December 1895, Oosman Saheb, the first defendant, assigned to the Commercial Bank of India, Limited, the ninth defendant, the subject-matter of suit No. 242 of 1894, which was then pending in the High Court, and for the purposes of the deed, appointed the Bank his attorney. In the suit in question, Oosman Saheb asked that his share in a business, which is described in the recitals to the deed as a partnership business carried on by him jointly with the defendants in that suit (four persons who carried on business under the name of T. Rahiman Saheb & Co.) between August 1885 and May 1894, should be ascertained and declared and that the share of the profits due to Oosman Saheb should be paid to him. The amount claimed by Oosman Saheb in that suit was Rs. 37,723-8-0. The defendants to that suit, in their written statement, alleged that the nephews of Oosman Saheb were entitled to share equally with Oosman Saheb in this sum of Rs. 37,723-8-0 and that they (the defendants) held this sum as stake-holders. This written statement was put in in December 1894, a year before the date of the deed of assignment. Shortly after the institution of the suit, the subject-matter

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of which Oosman Saheb purported to assign to the Commercial Bank under the deed above referred to, viz., on 22nd December 1894, a suit (No. 266 of 1894) had been instituted by Oosman's nephews against the defendants in suit No. 242 and against Oosman, the nephews alleging that they were living as members of one family, that they were entitled to participate equally with Oosman Saheb in the sum claimed by him from the defendants in suit No. 242 of 1894 and asking for a declaration that they were entitled to five-sixths of this sum. Oosman's suit (No. 242 of 1894) and the nephews' suit (No. 266 of 1894) were tried together. Oosman's suit was dismissed on the ground that he had not brought the proper parties before the Court. In the nephews' suit, a declaration was made that they were entitled to five-sixths of Rs. 37,723 and that Oosman Saheb was entitled to one-sixth of that sum; judgment was given for the nephews for five-sixths of the amount in question. Oosman appealed in both suits. On 19th October 1897, the Appellate Court delivered judgment in the two appeals. In Oosman's suit, the Appellate Court held that, in strictness, the suit ought to be dismissed, on the ground that he had framed his suit on the footing that the accounts between him and the defendants remained unsettled, whereas, in the view taken by the Appellate Court, a settlement of accounts had been made in May 1894. The Appellate Court were of opinion that if Oosman had framed his suit so as to demand from the defendants the payment of the sum found to be due to him in the settlement of accounts, he would have been entitled to a decree for that amount. They allowed the plaint to be amended and gave a decree for the sum named in the account. In October 1897, the date of the judgment of the Appellate Court, the sum in dispute was in the hands of a receiver. On 30th August 1898, it was paid over to the Bank as the attorney of Oosman Saheb under the order of the Court in pursuance of the Appellate Court's judgment. Under a later order of Court, it has been paid into Court by the Bank and is now in Court. In the nephews' suit, the Appellate Court were of opinion that they had no cause of action against 'the firm' (*i.e.*, T. Rahiman Saheb & Co.). As between Oosman and the nephews, the view of the Appellate Court was that there were accounts to be settled and the debits and credits which appeared in the books of 'the firm' would have to be brought into those accounts, but that other accounts would have to be gone into besides

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those appearing in the books of 'the firm.' The Appellate Court were of opinion that the plaintiffs could not ask the Court to treat their suit as one for partition only and claim a decree for their share as against Oosman Saheb and, whilst indicating their opinion that the plaintiffs could obtain relief by way of partition in a suit so framed as to embrace all the parties interested and all the property in which they were interested, allowed the appeal and dismissed the suit."

Three of the plaintiffs in the said Original Suit No. 266 of 1894 now brought this suit, another of the plaintiffs in that suit being now impleaded as second defendant, and another having since died. Plaintiffs claimed to have their shares in the said sum of Rs. 37,723–8–0 ascertained and paid to them. The suit was filed on 30th January 1899. The ninth defendant denied that plaintiffs had any cause of action. The judgment of the Court was to the effect that the first three plaintiffs were entitled to three-fifths and fourth plaintiff and defendants Nos 3 to 8 were jointly entitled to one-fifth of the said sum of Rs. 37,723–8–0.

Defendant No. 9 preferred this appeal.

Mr. *R. F. Grant*, for appellant, contended that the suit was barred by limitation. If a partition suit, it was not governed by article 127, as that article only applied to Muhammadan families who have accepted the rules of Hindu Law. See *Patcha* v. *Mohidin*(1). The parties here were Labbais. If not a partition suit, it must be either a suit on a contract, in which case it would be barred under articles 113 and 115, or a partnership suit, when it would be bad, because all assets had not been brought into account. [He argued generally on the merits.]

Hon. Mr. *E. Norton* and Mr. *J. H. M. Ryan* for respondents Nos. 2 and 3.—There was no firm carrying on a common business, nor was there a combination of property, and so there was no partnership. See sections 239 and 242 of the Contract Act. The title to division is only an incident to the contract attached by law, and the right to sue only accrued when the money reached the hands of another member of the family, and was ascertained. See *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*(2). The suit is governed by article 127, which applies to Muhammadans as well as Hindus. The suit is for a specific share, to be ascertained in

(1) I.L.R., 15 Mad., 67. (2) 13 B.L.R., 312.

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consequence of an alienation by one of the coparceners. See *Venkatachella Pillay* v. *Chinnaiya Mudaliar*(1). That was a case of an undivided Hindu family, but there is no distinction. See also *Chinna Sanyasi* v. *Suriya*(2) and *Subramanya Chettyar* v. *Padmanabha Chettyar*(3). *Venkayya* v. *Lakshmayya*(4) does not apply as there had been no alienation to a stranger. Under section 14 of the Limitation Act plaintiff is entitled to have the time occupied in the other proceedings allowed. See *Venkiti Nayak* v. *Murugappa Chetti*(5), and *Assan* v. *Pathumma*(6), in both of which time was allowed in respect of previous suits dismissed on account of misjoinder.

Mr. *R. F. Grant* in reply.—For section 14 of the Limitation Act to apply, the dismissal must proceed on some other grounds than on a determination on the merits. In *Assan* v. *Pathumma*(6) the judgment in *Venkiti Nayak* v. *Murugappa Chetti*(5) is interpreted as covering every case of misjoinder, whereas the latter judgment was only on the particular facts of the case. The time occupied in prosecuting a suit dismissed because the plaintiff had failed to bring in all the property should not be deducted.

Sundara Ayyar and *K. Srinivasa Ayyangar* for respondents Nos. 1 and 4.

SIR ARNOLD WHITE, C.J. [after stating the facts as above].—In their written statement, the Bank denied in general terms that the plaintiffs in the present suit had any cause of action against them, but they did not plead the law of limitation, and they did not rely on the law of limitation in the Court below. The Bank now say that the question of limitation did not arise in the Court below—at any rate not until after judgment—because the suit was, in substance, a suit for partition, for which the time would begin to run from May 1894, and the period of limitation would be twelve years (article 127 of the schedule to the Limitation Act). In the Court below, the defendants contended that the nephews' suit was a suit for partition and that, as a suit for partition, it was bad, because *ex concessis* the whole of the family property had not been brought into account. The learned Judge held that it was not a suit for partition, but an action, founded on contract,

(1) 5 M.H.C.R., 166 at p. 170. (2) I.L.R., 5 Mad., 196.
(3) I.L.R., 19 Mad., 267. (4) I.L.R., 16 Mad., 98.
(5) I.L.R., 20 Mad., 48. (6) I.L.R., 22 Mad., 494.

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for the division of a particular sum of money. In this state of things, before this Court, the appellant (the Bank) raised the question of limitation and we are bound in law to consider this question and to give effect to the appellant's contention, if we consider it to be well founded. The present suit was instituted on 30th January 1899. It was argued on behalf of the appellant that even assuming the suit to have been one for partition, article 127 only applies to Muhammadan families who have accepted the rules of Hindu Law with reference to the succession and devolution of their property, and reliance was placed on the judgment of this Court in *Patcha* v. *Mohidin*(1)—a decision to the effect that the words "joint family property" in the article in question are intended to apply to joint family property in the Hindu sense of the term. It is admitted that the parties to this litigation are Labbais, but the plaintiffs do not allege any family custom, but rely on an agreement which, they say, was entered into in the year 1879 between themselves, their father Chandu Mean Saheb, and their uncle Oosman Saheb, under which all the earnings of Oosman Saheb, the uncle of the nephews then living, and of any other son that might thereafter be born to Chandu Mean Saheb, should be common property (paragraph 9 of plaint) and that, in case any of the persons entitled to share under this agreement should die leaving male issue, his share should descend to his issue in the same manner as in a joint Hindu family (paragraph 21 of the plaint). It seems doubtful, whether this agreement, even if we were prepared to hold that it has been proved in fact and was enforceable in law, would make the property in question joint family property in the Hindu sense of the term. The learned Judge in the Court below was of opinion that the plaintiffs had not, however, made out a contract in the terms alleged in their plaint but he held that they had established a contract to the effect that the earnings of the members of the family, who had worked in the firm of T. Rahiman Saheb & Co., and who were of age, as well as the earnings of the first plaintiff, who had worked in another firm at Ambur, should be shared equally and divided equally among those who entered into the arrangement, and in his finding that the fourth plaintiff and the third and eighth defendants were jointly entitled to a

(1) I.L.R., 15 Mad. 57.

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one-fifth share he applied the Muhammadan and not the Hindu Rules of Law, with reference to the devolution of the property of a deceased member of the family. In this state of things, it cannot be said that the family property in question is joint family property in the Hindu sense of the term, and, in my judgment, article 127 does not apply.

It was also argued on behalf of the appellant that, if the suit was not a partition suit, it must be regarded either as a partnership suit, in which case it would be bad, because, admittedly, all the plaintiffs' assets had not been brought into account, or a suit based on contract (see articles 113 and 115), in which case the plaintiffs' suit was out of time, inasmuch as their cause of action arose in May 1894. Even if the cause of action arose in December in 1895, the date of the assignment by Oosman to the Bank, the present suit, which was instituted in January 1899, would be out of time, if the suit is to be regarded as a suit for an account and share of the profits of a dissolved partnership (article 106) or a suit for specific performance of a contract (article 113) or a suit for compensation for breach of contract (article 115).

As regards the question of partnership, I am not prepared to say that, construing the language of Boddam, J., strictly and literally (. . . . . "there was a contract made at the commencement of the business," &c.), the contract found by him is not a contract of partnership between Oosman and his nephews *inter se*. In my judgment, however, Boddam, J., did not intend to find, as a fact, that Oosman and his nephews were partners. The language of Boddam, J., (. . . . . "that the profits made by those who became members of T. Rahiman Saheb & Co.") would also seem to indicate that in his view there was a partnership between Oosman and his nephews on the one hand and the firm of T. Rahiman Saheb & Co. on the other. But the learned Judge has himself held in another suit that there was no partnership as between the family and the firm and this view has been affirmed in appeal.

In my judgment, there was no agreement between Oosman and his nephews to combine their labour "in some business" and consequently the relation of partnership as defined by section 239 of the Contract Act did not subsist between them.

If the suit is to be regarded as a partnership suit or as a suit based on contract, the plaintiffs' remedy would be barred by the law of limitation. As against this, it was contended on behalf of

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the plaintiffs that their rights were saved by section 14 of the Limitation Act and reliance was placed on the decisions of this Court in *Venkiti Nayak* v. *Murugappa Chetti*(1) and *Asan* v. *Pathumma*(2). In the latter case, it was held that it followed from the decision of the Full Bench in *Venkiti Nayak* v. *Murugappa Chetti*(1) that section 14 applies where a proceeding has become abortive by reason of misjoinder of parties. In my judgment, section 14 does not apply to the facts of the present case. Though, no doubt, the plaintiffs acted with due diligence in instituting suit No. 266 of 1894 on 22nd December 1894, which was dismissed by the Appellate Court on 19th October 1897, the suit was dismissed, not on any technical ground of misjoinder of parties or of causes of action, but on the ground that, having regard to the frame of the suit, no cause of action had been established against any of the defendants. It cannot be said that the abortive suit was one which the Court, from defect of jurisdiction or other cause of a like nature, was unable to entertain.

The learned Judge has found upon the evidence that there was a contract under which the parties to the contract were to share equally and divide equally all their earnings. In my view, the agreement entered into in 1879 amounted to nothing more than an agreement between Oosman and his nephews to put their earnings into a common fund and to utilize that fund for family requirements. Whether this was a legal contract or whether, as regards some of the parties who acted on it, it was *nudum pactum* is immaterial. The agreement was in fact acted on by Oosman and his nephews from 1879 to 1894. It appears to me that, at the time the agreement was entered into, the parties never contemplated that the common fund would be more than sufficient for family requirements, that they did not contemplate any surplus being available and that they made no agreement as to how any surplus was to be dealt with. In 1885, there was a settlement of accounts. Up to that time, although the contributors to the common fund must have known that there was a strong probability that when remuneration was apportioned to them by the firms for whom they worked their earnings would amount to more than was necessary for ordinary family requirements, they did not know what the amount of their remuneration would be, or whether any

(1) I.L.R., 20 Mad., 46.

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remuneration would in fact be awarded to them. Their claim for remuneration against their respective firms was recognized by their being allowed to draw in anticipation of their earnings, but it is doubtful whether it amounted to anything more than a strong moral claim. It was left entirely to the *Ejamans* of the firm to decide when the remuneration of the various workers in the firm should be allotted and what the proportion of that remuneration to profits made should be. Up till 1884, there had been no allocation of earnings. After the settlement of accounts arrived at in 1885, it was, of course, within the knowledge of the members of the family that a sum of Rs. 9,000 and odd stood to the credit of Oosman in the books of T. Rahiman Saheb & Co. Even then, however, no division of this sum was contemplated. The sum was allowed to remain as capital in the firm and no question appears to have arisen as to how it should be dealt with as between the members of the family until 1894. The state of things in 1894 was this. The contract to form a common fund out of the family earnings had been performed. No other contract was then subsisting. A fund was in existence created by the contributions of the members of the family and the nephews desired that this fund should be distributed among those entitled to participate in it. The firm of T. Rahiman Saheb & Co. were willing to pay over this amount, so long as the interests of the nephews were safe-guarded, but they declined to pay it to Oosman. Oosman refused to admit the rights of the nephews to participate in it. The nephews then brought proceedings with the view of establishing their rights. These proceedings proved abortive. The rights of Oosman and his nephews, *inter se*, were never adjudicated upon by the Appellate Court, though that Court clearly recognized rights on the part of the nephews as against Oosman, which could be enforced if the appropriate remedy were adopted. After Oosman purported to assign to the Commercial Bank the whole of the fund in question, the nephews instituted the present suit, in which they ask that their rights may be declared and the fund dealt with by the Court. It seems to me that the title of the nephews is not based on contract, express or implied, but arises out of the fact that they were contributors to the common fund, which the Court is now asked to distribute.

The decision of the Privy Council, with reference to the question of limitation, in the case of *Rani Mewa Kuwar* v.

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Rani Hulas Kuwar(1) is an illustration of the principle, which, in my judgment, is applicable to the facts of the present case.

The claim is one which the Court must deal with on equitable principles and apart from any question of partnership or of contract and is consequently a claim to which article 120 applies and the period of limitation is six years. In this view, it is immaterial to consider whether the plaintiffs' cause of action arose in 1894, when Oosman refused to recognize their rights, or on 3rd December 1895, the date of the assignment by Oosman to the Bank, or, as alleged in the plaint, on 30th August 1898, the date when the Bank as Oosman's assignee and attorney received the money out of Court. These dates are all within the six years' limitation provided by article 120 of the Limitation Act. In my judgment, the plea of limitation fails.

[After dealing at length with the merits of the case, His Lordship concluded:] In my judgment, the family history and the system of promiscuous drawing, to which I have referred, show that it was the intention of the parties to treat the fund created by their common earnings as a common fund. There is a presumption in favour of equality, when it is not shown that the parties interested intended any other principle of distribution to be applied. This principle of equality is illustrated by section 45 of the Transfer of Property Act and section 253 of the Contract Act.

I think Boddam, J., applied the right principle in dealing with the distribution of this fund, that his judgment ought to be affirmed, and the appeal dismissed with costs. Fees will be allowed for two Counsel.

DAVIES, J.—I concur throughout.

(1) 13 B.L.R., 312.

APPELLATE CIVIL.

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

SORNAVALLI AMMAL AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

MUTHAYYA SASTRIGAL (DEFENDANT), RESPONDENT.*

1900. February 21, 22.

Limitation Act—Act XV of 1877, arts. 113, 144—Suit on an award—Meaning of "contract" in art. 113—Specific Relief Act—Act I of 1877, s. 30.

By an award bearing date 7th July 1893 plaintiffs were held to be entitled to certain immoveable property. On 15th November 1897, they filed a suit to enforce the award. On its being contended that the suit was barred by limitation, under article 113 of the Limitation Act, it being in fact for the specific performance of a contract:

Held, that the suit was not barred, the article applicable being article 144. A suit to enforce an award cannot be treated as a suit to enforce a contract, within the meaning of article 113, the word "contract" in that article being used in its ordinary sense.

Sukho Bibi v. *Ram Sukh Das*, (I.L.R., 5 All., 263), and *Raghubar Dial* v. *Madan Mohan Lal*, (I.L.R., 16 All., 3), referred to.

SUIT to recover immoveable property. Plaintiffs Nos. 1 to 4 and defendant's late wife were sisters, in whose favour their grandmother had disposed of all her properties in specific portions by a registered settlement in 1884. Disputes having arisen, after the death of defendant's wife, regarding the properties which she had enjoyed, they were referred to arbitration, and an award was passed on 7th July 1893. Defendant had sued to set aside this award, without success, it being held to be valid and binding. This decision was affirmed on appeal by the District Court. Under the award, the right to the properties enjoyed by defendant's wife passed to plaintiffs Nos. 1 to 4, defendant being excluded from them. Plaintiffs alleged that they had obtained possession of the other properties except those now sued for. Plaintiff No. 5 was the son of plaintiff No. 4, and plaintiff No. 6 claimed to have purchased the share of plaintiff No. 4. Defendant set up the plea (among others) of limitation, the suit having been brought more than three years from the date of the award, and

* Second Appeal No. 195 of 1899, against the decree of S. Russell, District Judge of Madura, in Appeal Suit No. 506 of 1898, reversing the decree of V. Narayanasami Ayyar, District Munsif of Madura, in Original Suit No. 650 of 1897.

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an issue was framed on that question. The District Munsif held that inasmuch as the award was a registered one, and as the plaintiff's claim was based on the award, the period of limitation was six years under article 116 of the Limitation Act. He gave judgment for the plaintiffs. Defendant appealed to the District Judge who said:—"The case has been argued on the points of limitation only. The question in the case is whether article 113 or 144 of the Limitation Act applies. There was a dispute between the plaintiffs and the defendant about certain items of property. An award was passed on 7th July 1893. It was registered. The items of land sued for were awarded to the plaintiffs. The arguments of the defendant's vakil are as follow: (1) an award is a contract; (2) section 30 of the Specific Relief Act I of 1877 puts relief connected with awards on the same footing as that in the case of contracts; (3) the period of limitation is three years as per article 113. Article 113 is for 'specific performance of a contract.' Plaintiffs allege that their suit is by way of ejectment and rely upon article 144. If A executes a deed of sale to B, the latter has twelve years within which to recover the property conveyed. Similarly it is argued that the plaintiffs are entitled to twelve years from the date of the award upon which date the right in the property passed to the plaintiffs. I am not satisfied, however, that the argument advanced for the plaintiffs is sound. The suit is, to my mind, really one to enforce the terms of an award and the period of limitation is in my opinion only three years under article 113. It makes no difference that the award has been registered."

He allowed the appeal and dismissed the suit.

Plaintiffs preferred this second appeal.

Sundara Ayyar and *K. Srinivasa Ayyangar* for appellants.—The suit is for the recovery of land on title, and not for specific performance of a contract. The award is the title, just as a sale deed or a judgment of the Court would be. We have twelve years. An award is not a contract. It is a judgment of a tribunal agreed upon by the parties, though it cannot be executed without being first made a decree of Court,—as in the case of foreign judgments. In some suits on awards special periods of limitation are provided in the Act; see articles 45 and 46 of schedule II to the Limitation Act. Article 113 relates to the specific performance of a contract. Though under the Specific Relief Act the procedure to be followed in granting relief on an award is similar to that on

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contracts, the word, contract, as used in article 113 of schedule II to the Limitation Act, cannot be extended to mean an award. Both terms are used in the Act. Further, this suit is not for specific performance at all, but for recovery of possession. The award is only used as evidence of title. Even if article 144 does not apply, then the only article applicable is 120, and even then the suit will have been brought in time.

V. Krishnasami Ayyar for respondent.—An award is, in effect, a contract, since the parties agree that they will be bound by such terms as may be settled by the arbitrator. The finding of the arbitrator, when arrived at, becomes a term of the original contract agreeing to the arbitration; see *Wood* v. *Griffith*(1). Two Allahabad cases (*Sukho Bibi* v. *Ram Sukh Das*(2), and *Raghubar Dial* v. *Madan Mohan Lal*(3)) are exactly in point. The Legislature, too, has treated awards as contracts; see Specific Relief Act, section 30; and per Lord Justice Turner, in *Nickels* v. *Hancock*(4).

JUDGMENT.—The award in this case adjudged to the plaintiffs' certain immoveable property, to recover which the present suit is brought. The date of the award is 7th July 1893, and this suit was instituted on the 15th of November 1897. The District Judge held the suit was barred by limitation, as the article applicable was 113 of the second schedule of the Limitation Act. That article provides for suits for specific performance of a contract and allows only three years from the date fixed for the performance, and in case no date is fixed, when the plaintiff has notice that performance is refused. We may note in passing that, if the article is applicable, the Judge's decision is defective, as he does not state from which period limitation began to run in this case. We are, however, unable to agree with the Judge that the said article 113 is applicable to the present case. This is a suit for the recovery of land, the title to which was declared in plaintiffs' favour by the award. The award does not provide for the execution of any instruments between the parties, or the performance of any conditions precedent to the plaintiffs' enjoyment of the land—in other words, the plaintiffs acquired under the award a complete title to the land on the date of the award and were entitled to take possession thereof from that date.

(1) 1 Sw., 43 at p. 54.
(2) I.L.R., 5 All., 263.
(3) I.L.R., 16 All., 3.
(4) 7 De Gex M. & G., 300 at p. 317.

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In these circumstances, the suit clearly appears to us to be one falling under article 144, for the possession of immoveable property, and is within the twelve years' time allowed by that article. Even if the suit be treated as one to enforce the terms of an award, the only article applicable is No. 120 for suits for which no period of limitation is otherwise provided and the suit is within the six years' time allowed by that article. Our attention has been called to *Sukho Bibi* v. *Ram Sukh Das*(1), where a suit for money under an award was held to be virtually a suit to have the award specifically enforced and was governed by article 113, and the same article was held applicable in a similar suit (*Raghubar Dial* v. *Madan Mohan Lal*(2)), although the reasoning in the latter case appears to be inconsistent with that in the former. In the first place, it is difficult to see how a suit for a sum of money can in any light be regarded as a suit for specific performance. In the next place, we think a suit to enforce an award cannot be treated as a suit to enforce a contract within the meaning of article 113, as the term contract there must be understood in its ordinary sense. It is true that section 30 of the Specific Relief Act directs that the provisions of chapter II of that Act shall apply to awards. It cannot on that ground be contended that awards are contracts, because it would have to be similarly contended that directions in a will or codicil to execute a particular settlement, which are included in the same section, are also contracts, which would be absurd. No doubt, an award springs out of an agreement to submit to arbitration, but the award itself is a decision of the arbitrator binding upon the parties as a decision. The observations of the Lord Chancellor in *Wood* v. *Griffith*(3), and of Lord Justice Turner in *Nickels* v. *Hancock*(4), do not, in our opinion, go so far as to declare that in England an award is a contract. They merely show that the jurisdiction of the Courts of Equity in enforcing the specific performance of the provisions of an award rests on the ground that the award is the outcome of the contract to refer to arbitration. It appears to be on this principle that section 30 of the Specific Relief Act so far as it relates to awards has been enacted. However this may be, the authorities cited afford no warrant for our construing the term "contract" in article 113 as comprehending an award.

(1) I.L.R., 5 All., 268.
(2) I.L.R., 16 All., 3.
(3) 1 Sw., 43 at p. 54.
(4) 7 De Gex M. & G., 300 at p. 317.

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We must, therefore, reverse the decree of the District Judge, as the suit is not barred by limitation, and remand the appeal for hearing and disposal with reference to the other questions raised in the case. Costs will abide and follow the result.

APPELLATE CIVIL.

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

KRISHNA AYYAR AND OTHERS (DEFENDANTS NOS. 2 TO 9), APPELLANTS,

v.

KRISHNASAMI AYYAR (PLAINTIFF), RESPONDENT.*

1900. February 23. March 1.

Hindu Law—Promissory note by member of an undivided Hindu family—Liability of other member—Negotiable Instruments Act—Act XXVI of 1881, *ss.* 4, 26, 27.

The maker of a promissory note (executed in plaintiff's favour), being a member of an undivided Hindu family, had borrowed from plaintiff the money represented by the note and purchased therewith land for the benefit of the family, which consisted of himself (the maker of the note), an uncle and the sons of the uncle. The uncle had always recognised the debt as a family debt, and the land purchased with the money borrowed had, in a subsequent division of property, been allotted to the uncle and his sons, who had also agreed with the maker of the note that they would discharge the debt. On a suit being brought against the maker of the note, as well as the uncle and his sons:

Held, (DAVIES, J., dissenting), that all the members of the undivided family were liable.

Per SUBRAHMANIA AYYAR, J.—Even assuming that the maker of the note was not the manager of the family, he was the agent of his coparceners when buying the land and raising the loan, and his acts as such agent bound the uncle who expressly assented to them; also that inasmuch as the uncle was liable, his sons must be also held liable for the debt to the extent to which they were interested in the family property, and that even if they were minors when the money was borrowed.

Whether, having regard to sections 233 and 234 of the Indian Contract Act, a principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name.—*Quære.*

Per DAVIES, J., (1) Had the suit been brought on a bond, or on the debt of which the promissory note afforded evidence, other members of the family might

* Appeal No. 6 of 1899, under section 15 of the Letters Patent, against the decision of the High Court in Second Appeal No. 455 of 1898, presented against the decree of V. Srinivasa Charlu, Subordinate Judge of Kumbakonam, in Appeal Suit No. 492 of 1897, affirming the decree of M. Subbayyar, District Munsif of Pattukottai, in Original Suit No. 581 of 1896.

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have been held liable as well as the maker of the note, on the ground that the latter represented them. But in the case of a suit on a promissory note (as this suit was) no such representation could be alleged unless the persons said to be represented appeared by name on the face of the document; (2) Where the name of only one person appears on a promissory note and he does not purport to make it on behalf of any one but himself, none but the maker can be held liable to discharge it.

SUIT to recover a sum of money obtained from plaintiff by first defendant for the expenses of his family and for which first defendant had executed a promissory note in plaintiff's favour. Second defendant was the uncle of first defendant, and defendants Nos. 3 to 9 were the uncle's sons. Defendant No. 1 had obtained the loan for the purchase of land for the benefit of the family. Defendant No. 2 had always acknowledged the debt to be a family debt; and the lands purchased with the borrowed money had since been allotted, in a division, to defendants Nos. 2 to 9, who had agreed with the first defendant that they would discharge the debt. The plaint stated as follows:—"The first defendant's father and the second defendant are undivided brothers. Defendants Nos. 3 to 9 are undivided sons of the second defendant. The first defendant's father died about 8 years ago. His son, first defendant, and the second defendant are undivided. For the Rs. 1,000 received from me for the expenses of defendant's family, a promissory note was executed to me by the first defendant on 10th June 1894, in which it is stipulated that the above sum should be paid to me on demand with interest at ½ per cent. per mensem. No amount has been received in respect of that. Now I hear that defendants have effected partition of their properties and that in that partition deed it is laid down that the second defendant should discharge the plaint debt. As the plaint debt has been incurred by the defendants for the expenses of their own family and as all the defendants are bound to discharge that amount, I instituted this suit against all the defendants who are concerned in it. I demanded payment of the said sum from the defendants but with no effect. The cause of action arose from 10th June 1894." Plaintiff prayed for a decree ordering payment to him by the defendants of the amount mentioned with future interest and costs in the suit. The second issue was:—"Whether the note and the plaint debt is binding on defendants Nos. 2 to 9." The promissory note which was filed as Exhibit A was in the following terms:—"Promissory note, dated 10th June 1894, executed to Krishnasami Ayyar Avargal, son of Chinnia Seshappayyar, residing in Sithamalli, Mannargudi taluk, by Rangasami Ayyan, son of Vengachi Ayyar, residing in Pottivayal, Pattukottai taluk.—I shall, on demand, pay you the sum of Rs. 1,000 being the sum payable to you on a promissory note executed to you by me on 23rd June 1891 last,—with interest at 8 annas per cent. per mensem, and take back this promissorynote.—(Signed) Rangasami Ayyan." The District Munsif passed a decree against the first defendant alone. Plaintiff appealed on the ground, among others, that inasmuch as the amount due under the note had been borrowed for family purposes and the executant had been admittedly the family manager, defendants Nos. 2 to 9 were also liable. The Subordinate Judge allowed the appeal, decreeing that all the defendants were liable.

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Defendants Nos. 2 to 9 preferred this second appeal, on the ground, among others, that they could not be liable on a promissory note executed by first defendant.

The case first came on for hearing before SUBRAHMANIA AYYAR and DAVIES, JJ.

V. Krishnasami Ayyar for appellants.

Ramakrishna Ayyar for respondent.

SUBRAHMANIA AYYAR, J.—The plaintiff (respondent) sued for the money due under a promissory note executed by the first defendant when he was undivided from his uncle, the second defendant, and the latter's sons, defendants Nos. 3 to 9. The loan was obtained by the first defendant in connection with the purchase of certain lands made by him for the family. The debt has all along been acknowledged by the second defendant to be a family debt. Further, the lands, in connection with the purchase whereof the debt was contracted, having, in the division which took place subsequently, been allotted to the share of the defendants Nos. 2 to 9, it was then agreed between them and the first defendant that the former should discharge the debt. The lower Appellate Court held that the defendants Nos. 2 to 9 (appellants) also were liable to the plaintiff for the amount in question. The first contention on their behalf was that though the debt was contracted for a family purpose, yet, as the document is a promissory note none but the actual maker of the note is liable to the plaintiff. No doubt according to the English law none but those whose signatures appear on a bill of exchange or a negotiable promissory note can be sued thereupon. No authority was cited to show that that rule has been adopted in

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this country. No provision similar to section 23 of the English Bills of Exchange Act, 1882, has been enacted here. And having regard to sections 233 and 234 of the Indian Contract Act, it is a question whether the principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name. However this may be, the rule stated above is not applicable to the present case as the promissory note in question is not a negotiable instrument, within the meaning of the Negotiable Instruments Act, 1881. It was next urged, if I followed the argument correctly, that the first defendant, even if he was the manager of the family, could not, by such an instrument as the one in question, bind his coparceners. Now there can be no doubt that a manager can even by a contract to pay money, not evidenced by an instrument which does not amount to a negotiable instrument and which does not create a charge on the family property, bind his adult coparceners. In the Court of first instance no direct statement appears to have been made by either party with reference to the question whether the first defendant was manager or not. But in the lower Appellate Court it was urged for the plaintiff that the first defendant was the manager when the debt was contracted. The Subordinate Judge's notes of the argument before him suggest that that allegation was not denied on behalf of the contesting defendants. However, the Subordinate Judge says nothing about it in his judgment. Assuming that the first defendant was not the manager of the family, still the facts established leave, in my view, no alternative but to conclude that, in buying the land referred to and raising the loan in question, the first defendant was in fact the agent of his coparceners and his acts as such bound the second defendant who expressly assented to the transactions. If any authority were needed for the view that a coparcener, who is not the manager, may, under certain circumstances, bind the other coparceners, reference may be made to *Sheo Pershad Singh* v. *Saheb Lal*(1), where Pigot and Rampini, JJ., referring to the junior members whose acts were in question there, observe "Lalji and "Sitaram, though not the managers of the family, were yet its "accredited agents in the management of the money-lending busi- "ness, and as such had the authority of the other members to pledge "the family property for a joint debt contracted apparently in the

(1) I.L.R., 20 Calc., 453 at p. 461.

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"ordinary course of that business." It follows therefore that the second defendant was from the first one of the persons liable for the debt. As to his sons, even if all of them were under age when the money was borrowed, they also must be held to be responsible for the debt to the extent to which they are interested in the family property. For though, according to *Waghela Rajsanji* v. *Shekh Masludin*(1), *Indur Chunder Singh* v. *Radhakishore Ghose*(2), *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*(3), and *Radhanath Mookerji* v. *Muthoormohun Roy*(4), cited in Trevelyan's 'Law relating to Minors,' 2nd edition, page 186, defendants Nos. 3 to 9, assuming they were minors, would not be liable for the amount of the note as coparceners of the first defendant, yet it must be held that the fact that the second defendant also had become a debtor in respect of the amount, imposed, under the Hindu Law, on defendants Nos. 3 to 9, as his sons, the duty of paying the debt so far as their interest in the joint property is concerned. I would therefore dismiss the second appeal with costs.

DAVIES, J.—I think the appellants' objection that only the first defendant can be held liable on the promissory note, upon which the suit is brought, as he alone is the maker thereof, is unanswerable. There can be no doubt that the document sued on is a promissory note within the definition of section 4 of the Negotiable Instruments Act, and cannot therefore be treated as a mere bond (although under the Stamp Act it had to be stamped as a bond).

Had it been a bond that was sued on or had the suit been brought on the debt, of which the promissory note afforded evidence, other members of the first defendant's family might have been held liable as well as himself on the ground that the first defendant represented them; but in the case of a promissory note, no such representation can be pleaded, unless the persons said to be represented appear on the face of the document by name (*vide* section 27 of the Negotiable Instruments Act). The name of no one but the first defendant appears in the plaint promissory note, and he does not purport to make it on behalf of any one else but himself. Therefore no one but the first defendant can be held liable to discharge it. I would therefore allow the second appeal, and reverse

(1) L.R., 14 I.A., 89; I.L.R., 11 Bom., 551.
(2) L.R., 19 I.A., 90; I.L.R., 19 Calc., 507.
(3) I.L.R., 20 Bom., 61.
(4) [Calcutta] Original Side Appeal No. 48 of 1881 (unreported).

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the decree of the lower Appellate Court and restore that of the Munsif with the appellants' costs in this and in the lower Appellate Court.

[Under section 575 of the Code of Civil Procedure the judgment of Subrahmania Ayyar, J., prevailed and the second appeal was dismissed with costs.]

Against the above order of dismissal the appellants preferred this appeal, under section 15 of the Letters Patent, and the case was re-argued before the Court constituted as above.

V. Krishnasami Ayyar for appellants.—The contention of the plaintiff is that a promissory note binds the family of which the maker may be shown *aliunde* to be the manager. This contention is directly opposed to section 27 of the Negotiable Instruments Act, and would render meaningless the words "acting in his name" in that section. See also clauses 2 and 3 of section 28. The policy of the law merchant, of which the law of negotiable instruments is a branch, is that the holders in due course and endorsees should not be put to the necessity of looking beyond the instrument or what appears on the face of it. In *Basivi Reddi* v. *Tammanna*(1) this High Court has held that a suit on a note lies only as against the executant or other persons that are bound on the face of the instrument and that proof *aliunde* is inadmissible to show undisclosed principals bound by the promissory note. The provisions of the Contract Act relating to undisclosed principals do not apply to negotiable instruments. That Act is not exhaustive (*The Irrawaddy Flotilla Company* v. *Bugwandas*(2)). [SUBRAHMANIA AYYAR, J.—The liability of the family would arise, if at all, under the Hindu Law.] Where negotiable instruments are concerned, the law which governs the parties is the Negotiable Instruments Act, and not the Hindu Law. The liability of a partnership, under the general law, for the acts of one of the partners, has been superseded by the Negotiable Instruments Act (*Basivi Reddi* v. *Tammanna*(1)). Moreover, the note sued on is not a negotiable instrument. Section 27 refers in express terms to promissory notes. The question of negotiability is immaterial. That is an incident attaching to a promissory note under the law merchant. The question is whether the note is a commercial

(1) Appeal No. 182 of 1891 (unreported). (2) I.L.R., 16 Calc., 690.

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paper and not whether it is a negotiable instrument, (*Jetha Parkha* v. *Ramchandra Vithoba*(1)). It is further to be observed that this suit has not been brought on the debt but only on the note. The plaint does not refer to the existence of the debt, nor does it allege that the maker of the note was the manager of the family. The nature of the action should not be allowed to be changed (*Bowring* v. *Shephard*(2)).

Sivasami Ayyar for respondents.—The suit is not only on the note but also on the debt. [DAVIES, J.—In the plaint the cause of action is stated to have arisen on the date of the note, and not on that of the debt.] The plaint sets forth also the consideration. It prays for a decree against all the defendants. Issue 2 speaks distinctly of the plaint-debt and the suit-note. The facts found by the Subordinate Judge point distinctly to the suit having been treated by the Courts and the parties as a suit on the consideration. The case of *Basivi Reddi* v. *Tammanna*(3) cited for the appellant is similar. It must be conceded that a Hindu son is liable to pay the debt of his father under a promissory note (*Laljee Sahay* v. *Fakeer Chand*(4)). The son's liability is the same as that of the family. Both are incidents of the Hindu Law, which is not abrogated by the provisions of section 27 of the Negotiable Instruments Act. The provisions of the Act are in no way so stringent as the wording of similar provisions in the English Bills of Exchange Act; and yet see note at page 65 to illustration (2) to section 23; see also illustrations 8 and 9 to section 23. A principal allowing an agent to contract in his name is bound by the instruments executed by him (*Edmunds* v. *Bushell*(5)); see also *Yorkshire Banking Company* v. *Beatson*(6) where the principal and agent had one and the same name. The name of a Hindu family may be said to be the name of its manager, or the family may be said to have authorised the manager to act in his own name. *Sheo Pershad Singh* v. *Sahib Lal*(7) speaks of the manager as the accredited agent of the family. He borrows, sells, purchases and executes documents for the family. Under the Hindu Law the family is liable (*Krishnashet* v. *Hari Valji*(8)). The ancient texts declare that debts contracted by any person for the

(1) I.L.R., 16 Bom., 689 at p. 698.
(2) 6 Q.B., 309 at p. 331.
(3) Appeal No. 182 of 1891 (unreported).
(4) I.L.R., 6 Calc., 135.
(5) 1 Q.B., 97.
(6) L.R., 5 C.P.D., 109.
(7) I.L.R., 20 Calc., 453.
(8) I.L.R., 20 Bom., 488.

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behoof of the family should be paid by the family—Vishnu, chapter VI, section 39; Manu, chapter VIII, section 167; Narada, chapter I, sections 12 and 13. In *In re Soltykoff*(1) a guardian was allowed to sue his ward for necessaries supplied, though he could not have sued on the note executed by the minor for that consideration.

V. Krishnasami Ayyar in reply.—The plaint does not refer to the old debt. Even if it did, the suit on the old debt would be barred. When there is a note no suit lies on the consideration. (*Valiappa* v. *Mahommed Khasim*(2)) followed in *Palaniappa Chetti* v. *Periakaruppan Chetti*(3)).

SHEPHARD, J.—The point taken on behalf of the appellants is one which, notwithstanding the frequency of cases such as the present, has never before been raised before me. No reported case is cited in support of it, and the case of *Ramasami Mudaliar* v. *Sellattammal*(4) and *Krishnashet* v. *Hari Valji*(5) are against it. The contention is that the English rule of law now expressed in the 23rd section of the Bills of Exchange Act is the rule of law enacted for this country and that this rule precludes the payee of a promissory note when suing the maker from enforcing his right against third persons who, according to Hindu Law, may, in respect of the family property in their hands, be responsible for debts incurred by him. It may be that the first of those two propositions is correct, although there is a remarkable difference between the statement of the English Law in Byles on 'Bills,' reproduced in the 23rd section of the Statute (Bills of Exchange Act) and the 27th section of the Negotiable Instruments Act. Let it be granted, however, that this section is intended to enact the English rule of law and that it applies to promissory notes, whether or not they are negotiable. Still, I am of opinion that the section does not prevent the maintenance of the present action, because the rule in question pre-supposes a case of mere agency, whereas here the respondents are not sought to be made liable on the ground that the maker of the note was their agent. The liability of persons in the position of the appellants, which arises on its being shown that a debt has been properly incurred in the management of the family affairs, is founded on Hindu Law and not on the law of agency. It is precisely similar to the liability

(1) [1891] 1 Q.B., 413.
(2) I.L.R., 5 Mad., 166
(3) I.L.R., 17 Mad., 268.
(4) I.L.R., 4 Mad., 375 at page 379.
(5) I.L.R., 20 Bom., 488.

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of a son for the father's debt under the same system of law. In neither case is the liability incurred such liability as would be incurred if the relation of the parties were that of agent and principal. When the father or manager of a Hindu family has incurred a debt and given a promissory note therefor, the creditor may sue him upon the note and make him personally liable; he cannot make the sons or other members of the family liable personally, nor in strictness can he sue them upon the note. Not being parties to the instrument, they could not, supposing it to be the case of a bill-of-exchange drawn by the father, plead want of notice to themselves of dishonour of the bill (see *Krishnashet* v. *Hari Valji*(1). The position of the appellants with regard to the plaintiff may usefully be compared with that of the husband under English law in reference to his wife's debts. At common law, a married woman and her husband were both liable on her contracts entered into before marriage and the liability of the husband was in no way dependent on or limited by the existence of property derived by him from his wife. If, before marriage, she made a promissory note, an action could be brought against her husband and her (see form in Bullen and Leake's 'Pleadings,' 3rd edition; Byles on 'Bills,' page 74, citing *Mitchinson* v. *Hewson*(2). The Married Woman's Property Act, 1882, altered the law by limiting the liability of the husband to the value of his wife's property acquired by him. There is in this case no joint liability, nor is the liability of the husband that of a surety, but it resembles it, inasmuch as any defence which would be open to the debtor would equally be open to him (*Beck* v. *Pierce*(3)). It appears to me that these observations apply equally to the present case or to that of a Hindu father whose son is joined in an action for debt brought against them. If it is consistent with the English rule of law relating to bills-of-exchange that the husband may be joined in an action against his wife, it is no less consistent with the law of this country that a member of a Hindu family should be joined in an action against the manager on a promissory note made by him. In the one case, as in the other, there is a liability which is, so to speak, external to the obligation arising on the making of the promissory note, and in both cases that liability is limited, while the liability of the maker is absolute. It is

(1) I.L.R., 20 Bom., 488. (2) 7 T.R., 348. (3) L.R., 23 Q.B.D., 316,

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argued that the present suit was strictly confined to a demand for payment of the note and that the plaint did not include a demand in respect of the original debt. It appears to me on reading the plaint that it contains all the allegations that are needed in order to charge the appellants with liability. The charge is that the debt was incurred for the expenses of the family and that they are bound to discharge it. There can be no doubt that the Courts below as well as the appellants understood fully the case which the plaintiff was seeking to establish. On the facts found, no question of limitation arises. I think the appeal should be dismissed with costs; but I would amend the decree so as to make it more clear that the amount of the debt is to be recovered from the family property in the hands of the appellants.

SUBRAHMANIA AYYAR, J.—I have no doubt that in so far as the appellants—defendants Nos. 2 to 9—are concerned, the suit was based on the ground that they were liable for the debt due under the first defendant's promissory note as the debt was incurred for a purpose binding on the family of which all the defendants were undivided members. The averments in the plaint as to why the appellants were made parties to the suit, coupled with the second issue raised and tried, in my opinion, show that a different view cannot be taken in regard to the frame of the suit in so far as the appellants are concerned; and it being established, as stated in my previous judgment, that the debt in question was incurred under circumstances which made it binding on the appellants also, I do not see how the suit can be held to be unsustainable as against them. It is scarcely necessary to say that there is no rule of law which prohibits a party in the position of the plaintiff here from suing along with the maker of the promissory note other persons liable for the debt. Take, for example, a Hindu father who borrows money on a promissory note for a purpose which is not immoral. Can it be contended that the payee is not entitled to sue the father and the sons together? Certainly not. And so far as the point under consideration goes, there is unquestionably no difference on principle between the case above put and the case where a family debt is incurred by an undivided member who is not the father of the remaining coparceners. No doubt section 27 of the Negotiable Instruments Act, on which much stress was laid on behalf of the appellants, is relevant where a person is sought to be made liable as a party to an

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instrument falling within the said Act. But the section referred to has no application whatever to a case where, as in the present instance, a person who is not a party to a promissory note or other similar instrument is sought to be made liable in respect of the money due thereunder, in consequence of an obligation cast upon him by his personal law in respect of such debt. It is, in my opinion, idle to argue that the section relied on abrogates obligations such as that just mentioned or in any way interferes with the rule of procedure which enables a plaintiff in a case like this to implead persons who are more or less under the law liable for the debt though they are not parties to the instrument along with the party thereto. I agree in the order proposed by my learned colleague, Shephard, J.

DAVIES, J.—I must adhere to my former opinion in this case which is supported by the ruling of a Division Bench of this Court in *Basivi Reddi* v. *Tammanna*(1) where it was held that the name of one member of a partnership on the promissory note could not be taken to represent the patnership whose name was not on it. That was a case of Hindu partners. It is urged that here the case is different, being one of a Hindu family. I cannot see how that affects the matter. There is nothing exempting any class of persons from the operation of the Negotiable Instruments Act, which is therefore applicable to all. So the only question is whether any person who has not signed a promissory note is liable thereunder. There is no doubt that the law of England is that no person is liable upon a promissory note unless his name appears thereon and the law is embodied in sections 23 and 89 of the Bills of Exchange Act, 1882. That the law does not appear in such express terms in the Indian Negotiable Instruments Act is, in my opinion, no argument that it does not apply here, when sections 4 and 26 and 27 will allow of such construction by implication and there is nothing to the contrary. Whether the suit can be sustained against the other members of the first defendant's family upon the consideration for the promissory note is quite another question. In my opinion the plaint was based entirely on the promissory note and it cannot now be treated as based on the original consideration as fresh questions of limitation and otherwise which have not been tried as they were not in issue would arise and the trial of the case would have to begin *de novo*.

(1) Appeal No. 182 of 1891 (unreported).

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

1899. December 8. 1900. March 1.

KRISTAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

NARASIMHAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Suit for partial partition—Family property available for partition at the time—Property mortgaged with possession to third party not included—Maintainability of suit.

One of two undivided brothers composing a Hindu family sold the whole of a house, which was in fact joint family property, alleging family necessity in justification of the sale. The other brother subsequently sold his undivided half share to two persons who now sued as plaintiffs for partition and possession of one-half of the house. The family owned another house which had, however, for some time been mortgaged with possession to a third party and was not available for partition at the time. On the plea being raised that the suit was one for partial partition and could not be sustained:

Held, that the suit was maintainable. Inasmuch as the other house was mortgaged with possession to a third party and therefore no longer available for immediate partition, the suit was one for partition of the whole of the family property liable to partition at the time.

Narayan Babaji v. *Pandurang Ramchandra*, (12 Bom. H.C.R., 148), followed.

SUIT for partition and separate possession of the half share in a house. A Hindu family consisted of two undivided brothers, now impleaded as first and second defendants. Second defendant sold the whole of a house, the property of the joint family, to a purchaser now impleaded as third defendant, on the ground of family necessity. First defendant subsequently sold his undivided half share in the same house to two persons who now sued as plaintiffs and claimed partition and separate possession of first defendant's share of the said house. They alleged that third defendant's purchase was illegal; that his vendor, second defendant, had only a half share in the house, and that third defendant could not acquire more than that half by the sale deed in his favour. First defendant allowed the suit to proceed *ex parte;* and second and third

* Second Appeal No. 1494 of 1898, against the decree of E. C. Rawson, District Judge of Vizagapatam, in Appeal Suit No. 173 of 1897, affirming the decree of B. Joga Rao, District Munsif of Vizianagram, in Original Suit No. 260 of 1896.

defendants pleaded, *inter alia*, that the suit was not maintainable inasmuch as defendants Nos. 1 and 2 had other family property, and that plaintiff could not maintain the suit for partition of a specific portion of the family property. Issues were framed on these points. The District Munsif found that the family did own another house, but that it had been mortgaged for many years with possession, to a third party. He held that the whole property must be brought into hotch-pot; and that the suit for the house alone was not sustainable. He referred to *Venkatarama* v. *Meera Labai*(1) and dismissed the suit. Plaintiffs appealed to the District Judge who confirmed the decree of the lower Court.

Plaintiffs preferred this second appeal.

Ramachandra Rao Saheb for appellants.—Plaintiff seeks to recover the half share in the house which he has bought. Second defendant has sold the whole house to third defendant. The sale is justified on the ground that second defendant had acquired the right by adverse possession and it is contended that the suit is bad as being for partial partition. It is submitted that the question whether it is partial partition or not does not arise; if it did, *Venkatarama* v. *Meera Labai*(1) would be conclusive. The house which has been mortgaged with possession for years has gone out of the category of family property, apart from adverse possession. The sale by second to third defendant can only have passed the vendor's share. In *Venkatarama* v. *Meera Labai*(1) the suit was by and against members of a family; here the interests of the members of the family have passed to strangers—plaintiff and third defendant both being strangers. If second defendant had not sold his interest it would have still been family property, and the suit could not have been brought. I do not dispute that third defendant has acquired a half share, namely, the share of his vendor. I only dispute his claim to the whole. In *Subbarazu* v. *Venkataratnam*(2) the same objection on the ground of partial partition was raised, but it was held that no such question arose as the whole interest of the coparceners had passed to strangers. The only difference between the cases is that in *Subbarazu* v. *Venkataratnam*(2) the properties had passed into the same hands, whereas here different persons have become purchasers. In *Subramanya Chettyar* v. *Padmanabha Chettyar*(3), there is similar reasoning

(1) I.L.R., 13 Mad., 275. (2) I.L.R., 15 Mad., 234. (3) I.L.R., 19 Mad., 267.

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though it was a converse case. Where both parties are strangers and the items of property such that no question of family property can arise, there can be no question of partial partition. The only property not included in the suit is the house which has been mortgaged with possession for many years. This is no bar to the suit as now framed. See *Narayan Babaji* v. *Pandurang Ramchandra*(1). The fact that the members of the family are parties is immaterial, they being impleaded *pro formâ*.

Seshagiri Ayyar for respondents Nos. 2 and 3.—In *Narayan Babaji* v. *Pandurang Ramchandra*(1) there was a general partition, and a certain item was not included because it was mortgaged. A subsequent suit was brought for the item in which it was decided that the prior suit should have been for the whole of the property, under section 7 of the then Code of Civil Procedure (Act VIII of 1859)—which corresponded with section 43 of the present Code. It is not correct to say that no question of family property is involved here. The sale must be supported by showing family necessity, and involves an enquiry into family property generally. *Subbarazu* v. *Venkataratnam*(2) does not support the appellant. *Subramanya Chettyar* v. *Padmanabha Chettyar*(3) shows the difference between suits between a member of a family and a stranger suing for partial partition. Even if a member of a Hindu family may sue for the partition of a portion of the family property it does not follow that a stranger can do so. It is submitted that the present suit, being between a stranger and a member of a family for partial partition, does not lie. (He also referred to *Palani Konan* v. *Masakonan*(4).)

Ramachandra Rao Saheb in reply.—In *Palani Konan* v. *Masakonan*(4) it was contended that the vendor was entitled on the ground of self-acquisition, and the question now argued was not considered. If one member of a family may maintain a suit for partial partition, so should a purchaser from him.

JUDGMENT.—The facts of the case so far as they need be stated for the purposes of this second appeal are as follows:—The first and second defendants are the only coparceners in an undivided Hindu family governed by the Mitakshara law. Some time ago

(1) 12 Bom. H.C.R., 148 at p. 155.
(2) I.L.R., 19 Mad., 267.
(2) I.L.R., 15 Mad., 234.
(4) I.L.R., 20 Mad., 243.

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the second defendant sold to the third defendant the whole of a house, the property of the joint family, alleging the existence of family necessity to justify the sale. Subsequently first defendant sold to the plaintiffs his undivided half share in the same house.

Plaintiffs brought the present suit to compel the defendants to divide off and deliver to him one-half of the house.

The second and third defendants pleaded, *inter alia*, that the family owned another house and that therefore a suit for partition of the plaint house alone could not be sustained.

The third and fourth issues were framed on these allegations and are as follows:—Whether the second defendant has another family house in his possession? If so, whether the suit for partition of the house in question alone is sustainable?

The District Munsif found that the family did own another house, but that it had for many years been mortgaged with possession to a third party. As to the fourth issue the plaintiffs contended that as the house was out of possession of the family and was not then available for partition, its existence formed no bar to the suit. The District Munsif disallowed this plea saying that "the equity of redemption or other rights of the mortgagor would form the subject of consideration in allotting shares." He, however, quoted no authority for his decision, but went on to remark that as the first and second defendants are undivided "there is no saying that they have not got family moveables worth even a cash. The whole property must be brought into hotch-pot."

He therefore dismissed the plaintiffs' suit and the District Judge, observing that it was not denied before him that there was "other family property" besides the plaint house, confirmed the decree. Against that decree the plaintiffs appeal.

It seems to us that the Courts below have not kept clearly in view the principles that govern a suit of this kind and have failed to ascertain the facts on which the rights of the parties depend.

If there was, as the District Munsif assumes there was, other joint family property besides the plaint house and the house mortgaged with possession to a third party, then there is clear authority that the plaintiffs could not maintain the suit for a partition of a part only of the family property (*Venkatarama* v. *Meera Labai*(1) followed in *Palani Konan* v. *Masakonan*(2) in

(1) I.L.R., 13 Mad., 275.
(2) I.L.R., 20 Mad., 243.

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both of which cases there was other joint family property available for immediate division though in the latter case the reporter has not made this clear). We cannot admit the contention of the appellants' vakil that the real contention was only between the plaintiffs and the third defendant, who were both strangers to the family and that, therefore, the rules relating to partition of family property have no application as explained in *Subbarasu* v. *Venkataratnam*(1). On the pleadings there was a contest between the plaintiffs and first defendant on the one hand and the second and third defendants on the other hand as to whether the second defendant's sale of the whole of the plaint house was justified by family necessity. First and second defendants were therefore necessary parties. The equities between first and second defendants would have to be enquired into, and plaintiffs could only recover a half share in the house subject to the equities to which their vendor, the first defendant, was liable. In the case in *Subbarasu* v. *Venkataratnam*(1) the plaintiff was the purchaser of the whole of the rights of the joint family and the defendants were also strangers to the family. That case therefore has no application to the facts of the present case.

If, on the other hand, there was no joint family property save the plaint house and the house mortgaged with possession to a third party and therefore no longer available for immediate partition, then there is authority for holding that the suit for partition of the plaint house would be maintainable, for the suit is then one for partition of the whole of the family property liable to partition at the time (*Narayan Babaji* v. *Pandurang Ramchandra*(2) referred to with approval in the recent case of *Shivmurtappa* v. *Virappa*(3) where all the authorities are reviewed). The second and third defendants did not allege the existence of any joint family property liable to partition except the house which the District Munsif found was mortgaged with possession to a third party, but the District Munsif assumed (without any justification so far as we can see) that there must be other family property liable to partition. The District Judge appears to have made the same assumption, and the assumption has not been specifically objected to in the grounds of second appeal, though in arguing the appeal it is contended

(1) I.L.R., 15 Mad., 234. (2) 12 Bom. H.C.R., 148 at p. 155.
(3) 1 Bom. Law Reporter, p. 620.

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that there is no ground for the assumption. In this state of things we think the best course is to call on the District Judge for a finding, on further evidence if either party desires it, as to whether there is any joint family property apart from the plaint house and the house outstanding on mortgage. The finding should be returned within two months from the date of the receipt of this order and seven days will be allowed for filing objections after the finding has been posted up in this Court.

[In compliance with the above order the District Judge submitted his finding that there was no family property except the house sued for and the house which had been mortgaged to a third party.]

The second appeal coming on for final hearing after the return of the above finding, the Court delivered the following

JUDGMENT.—No objection is taken to the finding. We accept it and, reversing the decrees of the Courts below, we remand the suit to the Court of First Instance for disposal according to law.

Costs throughout will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1900. March 13.

TAYARAMMA (PLAINTIFF), APPELLANT,

v.

SITARAMASAMI NAIDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Hindu Law—Bequest for immoral consideration—Condition of future cohabitation—Invalidity of bequest—Succession Act—Act X of 1865, s. 114.

A bequest by a Hindu testator, made conditional on the continuance of immoral relations between himself and the legatee, is void.

SUIT to recover possession of a house and other property. Plaintiff had left her husband some years prior to 1894, and lived with one Appala Narasayya as his wife. By his will, Appala

* Second Appeal No. 264 of 1899 against the decree of E. C. Rawson, District Judge of Vizagapatam, in Appeal Suit No. 131 of 1898, affirming the decree of V. Subrahmaniam, District Munsif of Vizagapatam, in Original Suit No. 239 of 1897.

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Narasayya made a bequest to plaintiff of the house now sued for. The bequest was worded in the following terms:—"As your husband does not maintain you, as you came over to me and are attending on me and managing my food, &c., as suits to my convenience, and as I have none else, as wife, children, &c., I gave away the following properties with my consent:—The tiled house and all the moveable properties besides, which are under my possession. If you should look after me till the end of my life, the said tiled house and the moveable properties that may be possessed till then are assigned to you, by means of this will, as your right, after my death, with my free will and consent. Neither myself nor my heirs shall raise any disputes whatsoever in respect of the same." He died in 1896. First defendant, the brother of the testator having obtained possession of the property, plaintiff now brought this suit against him and others. First defendant pleaded that the bequest in the will was for an immoral consideration; and an issue having been framed on that point the District Munsif said:—"I think one need not feel the least hesitation in saying that the bequest was made in consideration of future cohabitation as well as past. A promise made in consideration of future illicit cohabitation is given upon an immoral consideration and is void whether made by parole or under seal, (*Ayerst* v. *Jenkins*(1)). In a somewhat similar case, *Lachmi Narain* v. *Wilayti Begam*(2), a gift made by one to his mistress who lived with him as his wife, on condition of her continuing to be his wife and remaining obedient to him, her husband, was upheld by the High Court of Allahabad when it was called into question by a creditor of the donor three years after the gift, and that judgment was confirmed by the Privy Council (*Ram Sarup* v. *Mussumat Bela*(3); but I think the case is clearly distinguishable from the present one. . . . . It has been argued in this connection by plaintiff's vakil that section 23 of the Contract Act would apply only to contracts and not to gifts or bequests by will, but I think it is a mistake; the principle would apply to bequests by will equally. (*Vide* section 114 of Indian Succession Act.)" He held that the bequest was invalid, and that decision was upheld by the District Judge on appeal.

The plaintiff preferred this second appeal.

(1) L.R., 16 Eq., 275.
(2) I.L.R., 2 All., 433.
(3) L.R., 11 I.A., 44; I.L.R., 6 All., 313.

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Ramachandra Ayyar, for appellant, contended that even if the condition in the will were construed as being for future cohabitation, and so constituted an immoral consideration at the time of execution, the will only spoke from the date of the testator's death, when the consideration had become past and performed; and it had always been held that past cohabitation is a good consideration. He referred to *Lachmi Narain* v. *Wilayti Begam*(1), *Ram Sarup* v. *Mussumat Bela*(2), *Hall* v. *Palmer*(3), *Shewell* v. *Dwarris*(4), *Ithell* v. *Beane*(5), and *In re Vallance*(6).

V. Krishnasami Ayyar, for respondent, argued that the document clearly disclosed an immoral consideration, if it were construed with reference to the surrounding circumstances. The future cohabitation was a condition precedent to the gift, which failed according to the ordinary rules, and on grounds of public policy. That was the English law and it had been adopted by the Indian Legislature in the Contract Act, section 23, the Transfer of Property Act, section 25, and the Succession Act, section 114. He referred to Williams on 'Executors,' volume II, 9th edition, page 1128; Shephard's 'Touchstone,' pages 122 and 123 and the Civil Law, and to the distinction there drawn between *malum prohibitum* and *malum in se*: the former rendering both condition and bequest void, the latter vitiating only the condition and not the bequest. No such distinction was to be found in the Indian law, so that the bequest was void.

Ramachandra Ayyar, in reply, contended that the principle expressed in section 114 of the Succession Act could not be applied to the case as that Act did not apply to Hindus in the mufassal.

JUDGMENT.—Having regard to the facts found and to the terms of the will we think that the lower Courts were entitled to find that the bequest was made conditional on the continuance of the immoral relations between the plaintiff and the testator.

According to the principle of English law which finds expression in section 114 of the Indian Succession Act (X of 1865) such a condition renders the bequest void. We are unable to agree to the suggestion that, as the Indian Succession Act is not applicable to Hindus in the mufassal, we should therefore regard

(1) I.L.R., 2 All., 433.
(2) L.R., 11 I.A., 44; I.L.R., 6 All., 313.
(3) 13 L.J., Ch., 352.
(4) 1 John., 172.
(5) 1 Ves, Sen., 215.
(6) L.R., 26 Ch.D., 353.

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the principle to which we have referred as inapplicable to the present case. The same principle has been followed in section 25 of the Transfer of Property Act in regard to transfers *inter vivos* and in the Indian Contract Act in regard to contracts, both of which Acts apply to Hindus in the mufassal. We must therefore take it that the principle is applicable to the present case as a rule of equity and good conscience. The principle that we should follow being in our opinion thus clear, it is not necessary to notice the cases referred to in the argument of appellant's vakil.

We dismiss the second appeal with costs.

APPELLATE CIVIL.

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

1900. March 8, 14.

MUNISAMI NAIDU (DEFENDANT), APPELLANT,

v.

PERUMAL REDDI (PLAINTIFF), RESPONDENT.*

Rent Recovery Act (Madras) Act VIII of 1865, ss. 7, 9, 10 - Patta tendered within fasli—Suit after fasli, when patta amended Maintainability of suit.

A land-holder tendered a patta within the fasli. After the close of the fasli he brought a suit to enforce its acceptance, when the patta was amended. After judgment in that suit, the land-holder attached the land; whereupon the tenant sued to have the attachment set aside, on the ground that as no proper patta had been tendered within the fasli, and the suit which resulted in the rectification of the patta had been filed after the close of the fasli, the land-holder was precluded from enforcing his claim:

Held, that inasmuch as judgment had been obtained, fixing the terms of the patta, the tenant could not plead, in answer to an action for rent, the incorrectness of the patta originally tendered. A land-holder has a choice of two alternatives. If he satisfies himself that the patta tendered by him is the right one, he may bring his suit for rent or take other measures to recover it. He takes his chance of some flaw being discovered in the patta. If he is not so satisfied, he institutes a suit under section 10 of the Rent Recovery Act and obtains a judgment which fixes the terms of the patta for that fasli beyond all dispute.

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* Second Appeal No. 231 of 1899 against the decree of A. Venkataramana Pai, Acting District Judge of North Arcot, in Appeal Suit No. 30 of 1898, affirming the decision of J. W. Hughes, Acting Head Assistant Collector of North Arcot, in Summary Suit No. 481 of 1897.

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SUIT under the Rent Recovery Act (Madras), 1865, to set aside an attachment of land. Plaintiff contended that a proper patta was not tendered to him within the fasli and that therefore no attachment could be made for the arrears of that fasli. Defendant had, in fact, tendered a patta to plaintiff within the fasli, and had brought a suit after the close of the fasli to enforce its acceptance, when the patta was ordered to be amended. After judgment in that suit he had attached plaintiff's interest in the land. The Acting Head Assistant Collector held that there had been no tender of a proper patta within the fasli, because, by *Sobhanadri Appa Rau* v. *Chalamanna*(1), an amended patta relates back to the date of the suit brought to enforce acceptance of patta; which, in this case, had been filed after the close of the fasli in question. He held, therefore, that the attachment was invalid: and set it aside. The Acting District Judge, on appeal, said:—"The question is whether the defendant was entitled to attach the plaintiff's land for arrears of rent of fasli 1305. In Summary Suit No. 745 of 1896 the defendant sued to enforce the acceptance of the patta tendered by him to the plaintiff. The revenue Court amended the patta. The said Suit No. 745 was filed on 18th August 1896, *i.e.*, after the close of the fasli 1305. The defendant attached the plaintiff's interest in the land after judgment in that suit. The objection is that the landlord is not entitled to attach unless he had tendered a proper patta within the fasli. It has been held (*Sobhanadri Appa Rau* v. *Chalamanna*(1)) that the amendment relates back to the date of the suit. So, there was no tender of a proper patta within the fasli. It would even appear that the suit brought after the fasli was of no effect. In *Ramasami Mudaliar* v. *Rathna Mudaliar*(2) it has been held that a tenant's suit for patta brought after the fasli was barred by time. The objection that no summary suit lies against an attachment of land is groundless. Section 40 expressly allows a summary suit in such cases. The appeal is dismissed."

The defendant preferred this second appeal.

Seshagiri Ayyar for appellant.—It is submitted that the Acting District Judge is wrong. *Sobhanadri Appa Rau* v. *Chalamanna*(1) has been overruled by *Sriramulu* v. *Sobhanadri Appa Rau*(3).

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(1) I.L.R., 17 Mad., 225 at p. 228. (2) I.L.R., 21 Mad., 148.
(3) I.L.R., 19 Mad., 21.

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The Court below has confused the case of a landlord tendering a patta with that of the Court settling the patta. [DAVIES, J.—Under section 7 of the Act, no proceedings can be taken unless a proper patta is tendered within the fasli.] But that does not affect the provisions of sections 9 and 10. Otherwise sections 9 and 10 would be ineffective. The Judge is also wrong in holding that no suit can be brought after the fasli. *Ramasami Mudaliar* v. *Rathna Mudaliar*(1) is distinguishable. It mainly rests on the ground that there had been no demand for a patta within the fasli. *Papamma* v. *Subbanna*(2) is in point. There is no objection to a suit after the fasli, provided that whatever should have been done within the fasli has been done. Moreover, this was a mere attachment and no more, and there is no provision of law under which a suit can be brought to contest an attachment. There is no cause of action.

Sundara Ayyar and *Subbayya Mudaliar* for respondent.—Section 7 covers all classes of cases and the first requisite is that a proper patta should have been tendered within the fasli. Section 10 simply enables a party to get the terms of a patta settled. Proceedings are taken under section 7. This case is the converse of the case in *Ramasami Mudaliar* v. *Rathna Mudaliar*(1) and the District Judge is right in holding that the suit should be brought within the fasli. The observations in *Papamma* v. *Subbanna*(2) were not necessary for the decision of that case.

[The case, having been posted for re-argument, came on before a Court constituted as above.]

Seshagiri Ayyar for appellant (after recapitulating the argument already set out).—The question relates to the fasli ending with June 1896. The landlord, not feeling sure that all the terms of the patta were correct, brought a suit on the 18th August 1896. The Collector modified the patta in regard to minor particulars and directed the tenant to accept it in June 1897. Under section 10 of the Rent Recovery Act, this order of the Collector is equivalent to the tender of a proper patta for the previous fasli 1305. Then the landlord attached the land with reference to the patta as settled by the Collector. The

(1) I.L.R., 21 Mad., 148. (2) I.L.R., 22 Mad., 318.

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present suit is by the tenant to set aside the attachment. His complaint is that there was no proper patta tendered within the fasli and consequently the attachment is illegal. [DAVIES, J.—Did you tender a proper patta within the fasli?] By the decision of the Collector, it must be deemed that the tenant was bound to regard the amended patta as having been tendered to him within the fasli. It must be admitted that the patta actually tendered was not proper in every respect. But that is not necessary. The observations of their lordships in *Rangayya Appa Rau* v. *Venkata Reddi*(1) show that even though a suit may be brought on a wrong patta, after the settlement by the Collector of the terms of the patta, rent may be recovered as if the suit had been based on the amended patta. The decision in *Court of Wards* v. *Darmalinga*(2) shows that no fresh tender of patta is necessary after the decision of the Collector. Therefore the original patta in the hands of the tenant must be deemed to have been amended by the proceedings of the Collector. *Zamindar of Devaracota* v. *Vemuri Venkayya*(3) shows that the original patta need not be, in all respects, a proper one. Moreover sections 7 and 10 must be read as providing for different classes of cases. Section 7 enables a landlord to take proceedings upon his own initiative. If he is satisfied as to the correctness of the patta and does not wish to wait for a judicial determination on it, he takes the risk of losing everything in case it be found that he has tendered an improper patta. Section 10 deals with a case where a landlord is not so sure of his position and prefers to place his case before the Collector and to abide by his decision; after which, he is entitled to the benefit of that decision and to take action on it. Otherwise section 10 is out of place in the Act. Sections 10 and 72 make it clear that the patta amended is the patta tendered—see also *Maruthappa* v. *Krishna*(4) and *Appa Rau* v. *Ratnam*(5). In *Ramasami Mudaliar* v. *Rathna Mudaliar*(6), there had been no demand at all for a patta within the fasli. The demand was after the fasli and the suit was after the fasli. If there be a proper demand within the fasli, the suit after the fasli is maintainable (*Papamma* v. *Subbanna*(7)).

(1) I.L.R., 22 Mad., 249n. (2) I.L.R., 8 Mad., 2.
(3) I.L.R., 1 Mad., 389. (4) I.L.R., 12 Mad., 253.
(5) I.L.R., 13 Mad., 249. (6) I.L.R., 21 Mad., 148.
(7) I.L.R., 22 Mad., 318.

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Subbayya Mudaliar (with him *Sundara Ayyar*), for respondent, contended that *Court of Wards* v. *Darmalinga*(1) did not apply. Suits filed under section 7 differ from those filed under sections 8 and 9. Under the latter, tender of patta is unnecessary. Under section 7, only three things are provided for: (1) tender, (2) exchange and (3) waiver. He referred to *Alagirisami Naiker* v. *Innasi Udayan*(2) and argued that suits under section 9 are for settling the terms of the tenancy, whereas suits under section 7 are for enforcing its terms.

SHEPHARD, J.—There is no dispute between the parties as to the terms of the plaintiff's holding or as to the merits of the claim for rent which the defendant is seeking to make good against his tenant. But it is said that, because a proper patta was not tendered within the fasli, and the suit which terminated in the rectification of the patta tendered was brought after the expiration of the fasli, the defendant is precluded by the provisions of the Rent Recovery Act from enforcing his claim. The first point is disposed of by the decision in *Court of Wards* v. *Darmalinga*(1). The landlord has a choice of two alternatives. If he satisfies himself that the patta tendered by him is the right one he may without more ado bring his suit for rent or take other measures to recover it. He takes his chance of some flaw being discovered in the patta. If he is not so satisfied, he institutes a suit under section 10 of the Rent Recovery Act and obtains a judgment which fixes the terms of the patta for that fasli beyond all dispute When this judgment has been obtained, the tenant cannot afterwards plead in answer to an action for rent the incorrectness of the patta originally tendered. That is the point decided in *Court of Wards* v. *Darmalinga*(1), and that ruling, in my opinion, is practically decisive of the present case.

The plaintiff is really seeking to go behind the judgment which, according to his contention, ought not to have been given. I do not think it is shown that the judgment is wrong, because the Act does not require the suit under section 10 to be instituted before the expiration of the fasli, and even if it were wrong, I do not think it could now be questioned. A judgment passed under section 10 of the said Rent Recovery Act would be futile and serve

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

(2) I.L.R., 8 Mad., 127.

no useful purpose if, notwithstanding it, the objections taken in this case could be urged against the landlord's claim. In my opinion the appeal ought to be allowed with costs. The case must go back to the Head Assistant Collector for trial. The costs hitherto incurred in the Courts below will abide and follow the result.

SUBRAHMANIA AYYAR, J.—I concur.

DAVIES, J.—I agree.

MUNISAMI NAIDU v. PERUMAL REDDI.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

MURUGESA MUDALIAR (PLAINTIFF),

v.

JATTARAM DAVY AND ANOTHER (DEFENDANTS).*

1900. January 29, 30.

Limitation Act—Act XV of 1877, s. 14, arts. 29, 49—Time occupied in prosecuting suit in another Court—Dismissal of suit through defect of jurisdiction or other cause of like nature—Court unable to entertain suit because misconceived.

Defendants having attached certain goods on 12th June 1895, in execution of a decree obtained by them against M., a claim was preferred by plaintiff, on 19th June 1895, and disallowed. Plaintiff thereupon brought a declaratory suit on 2nd August 1895 in the City Civil Court, Madras, and obtained an injunction to stop the sale of the goods, which, however, was dissolved on 27th August 1895, the goods being sold on 5th October 1895, while the suit in the City Civil Court was pending. On 4th December 1896 the City Civil Court declared plaintiff to be the sole owner of the property, which decree was upheld by the High Court on 7th February 1898. On 4th December 1897, plaintiff brought a suit in the Court of Small Causes, Madras, to recover from the defendants the goods or their value, which was dismissed on 2nd May 1898. The dismissal was upheld by a Full Bench of the Court of Small Causes on 22nd October 1898 and by the High Court, on 13th April 1899. In these decisions it was held that plaintiff's suit was not maintainable. Plaintiff filed the present suit on 28th April 1899, in the Court of Small Causes, Madras, and claimed that the cause of action had arisen on 7th February 1898, the date on which plaintiff's right to the specific moveable property had been finally declared. He also claimed that the time occupied in the proceedings in the Court of Small Causes should be deducted under section 14 of the Limitation Act:

* Referred Case No. 23 of 1899, stated under section 617, Civil Procedure Code, and section 69, Presidency Small Cause Courts Act, by the Second Judge of the Court of Small Causes, Madras, in Suit No. 8093 of 1899.

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Held, that the suit was barred; and that plaintiff was not entitled to have the time spent in prosecuting the previous small cause suit deducted from the period of limitation. That suit had been dismissed, not because the Court, through defect of jurisdiction or other cause of a like nature, was unable to entertain it, but because it was misconceived.

AT the request of the plaintiff a case was stated, for the opinion of the High Court, as follows:—"The plaintiff's undermentioned specific goods were rented out and were in possession of one Manicka Mudali, judgment-debtor in Suit No. 4062 of 1895 on the file of the Madras Court of Small Causes, in which the defendants herein were judgment-creditors. The said Manicka Mudali hired the goods on a rental agreement, dated the 3rd January 1895. The defendants herein attached the said goods on the 12th June 1895 in execution of the said decree in the said Suit No. 4062 of 1895. The plaintiff thereupon preferred a claim on the 19th June 1895 and the said claim was disallowed on the 10th July 1895, on the ground that the goods did not belong to the plaintiff, and the attachment was confirmed. Thereupon the plaintiff brought a declaratory suit, on the 2nd August 1895, in the City Civil Court, No. 171 of 1895, and obtained an injunction to stop the sale of the goods, which, however, was subsequently dissolved on 27th August 1895. The defendants raised frivolous objections to the plaintiff's application to stop the sale of the goods, and to the plaintiff's getting possession of them, got the goods sold on the 5th October 1895 and realised the sale-proceeds while the suit in the City Civil Court was pending. The said defendants also filed a written statement that the goods belonged to Manicka Mudali, the third defendant therein in the City Civil Court. Subsequently a decree was passed by the Judge, on the 4th December 1896, declaring that the plaintiff is the sole owner of the property, and the same was upheld by the High Court in City Civil Court Appeal No. 4 of 1897 on the 7th February 1898. The plaintiff now seeks for damages to the extent of Rs. 863, out of which Rs. 615 is the value of the goods and Rs. 248 is the rent on the goods from June 1895 to February 1898 at the aforesaid rate of Rs. 8 per month occasioned by the defendants' wrongful taking and converting of the plaintiff's specific moveable goods from the hands of the said Manicka Mudali. The plaintiff herein has been prosecuting civil proceedings in the Small Cause Court, City Civil Court and

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High Court *bonâ fide* and with due diligence from 19th June 1895 or thereabouts up to 13th April 1899 with regard to the property in question. The cause of action arose on 7th February 1898, the date on which the plaintiff's right to the specific moveable property was finally declared, and the defendants' wrongful taking and conversion of the said property was finally decided unlawful. The plaintiff therefore prays for judgment for Rs. 863 as damages sustained by him for the wrongful taking and conversion of the under-mentioned goods by the defendant without allowing the plaintiff to get possession of his goods, for costs, and for such other reliefs as this Honourable Court may seem fit to grant and the nature of the case may require." Subsequent to the decree in City Civil Court Appeal No. 4 of 1897, plaintiff, on 4th December 1897, brought a suit in the Madras Court of Small Causes, to recover from the defendants the goods or their value. The suit was dismissed by the Chief Judge on 2nd May 1898; and the decision was upheld on 22nd October 1898 by a Full Bench of the Madras Court of Small Causes (one Judge dissenting) which held that the plaintiff's suit to recover the goods from the decree-holders after they were sold by auction and purchased by third parties was not maintainable, and that the alternative prayer in the plaint for the value of the goods was not a claim for compensation, but ancillary to the main relief asked for with reference to section 208 of the Code of Civil Procedure. The decision of the Madras Court of Small Causes was upheld by the High Court on 13th April 1899 on a reference under section 69 of the Presidency Small Cause Courts Act(1). The present suit was filed on 28th April 1899.

Defendant, among other pleas, contended that the suit was barred by limitation. Plaintiff claimed that the period of limitation should be calculated from the time when plaintiff's rights were finally declared by the High Court in City Civil Court Appeal No. 4 of 1897 on 7th February 1898; or, at any rate, that the time occupied in the proceedings connected with Small Cause No. 23026 of 1897 should be deducted under section 14 of the Limitation Act. On the latter point the Judge of the Madras Court of Small Causes said:—"Section 14 appears to me to be clearly inapplicable. It applies to a case which the Court, from

(1) *Murugesa Mudali* v. *Jotharam Davay*, I.L.R., 22 Mad., 478.

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a defect of jurisdiction or other cause of a like nature, was unable to entertain. This Court was not precluded by any such cause from entertaining plaintiff's suit (No. 26026 of 1897). On the contrary, the suit was entertained and decided." He dismissed the suit.

Narayana Rao and *Visvanadha Sastri* for plaintiff.

Venkataramayya Chetti for defendants.

JUDGMENT.—In this case our opinion has been asked as to whether the suit in question is barred by limitation. The material facts and dates are as follows:—The defendants attached certain goods on the 12th June 1895 in execution of a decree obtained by them in the Suit No. 4062 of 1895 against one Manioka Mudali. The plaintiff thereupon preferred a claim on the 10th June 1895 and the said claim was disallowed on the 10th July 1895, on the ground that the goods did not belong to the plaintiff, and the attachment was confirmed. Thereupon the plaintiff brought a declaratory suit on the 2nd August 1895 in the City Civil Court, (No. 171 of 1895), and obtained an injunction to stop the sale of the goods, which, however, was subsequently dissolved on the 27th August 1895. The goods were sold on the 5th October 1895 while the suit in the City Civil Court was pending.

Subsequently a decree was passed by the City Civil Judge on the 4th December 1896 declaring that the plaintiff is the sole owner of the property, and the same was upheld by the High Court in City Civil Court Appeal No. 4 of 1897 on the 7th February 1898.

Subsequent to the decree in City Civil Court Appeal No. 4 of 1897, plaintiff on 4th December 1897 brought a suit in the Small Cause Court to recover from defendants the goods or their value. The suit was dismissed by the Chief Judge on 2nd May 1898, and the decision was upheld on 22nd October 1898 by a Full Bench of the Small Cause Court (one Judge dissenting), which held that the plaintiff's suit to recover the goods from the decree-holders after they were sold by auction and purchased by third parties was not maintainable, and that the alternative prayer in the plaint for the value of the goods was not a claim for compensation, but ancillary to the main relief asked for with reference to section 208 of the Civil Procedure Code. The decision of this Court was upheld by the High Court on 13th April 1899 on a reference under section 69 of the Presidency Small Cause Courts Act(1). The present suit was filed on 28th April 1899.

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In our judgment the plaintiff's cause of action accrued on the 12th June 1895. The present suit was instituted on the 26th April 1899. Unless, therefore, by virtue of the earlier proceedings taken by the plaintiff he can claim the benefit of section 14 of the Limitation Act, the question whether the period of limitation is the one year's period prescribed by article 29 or the three years' period prescribed by article 49 is immaterial. It could not be seriously argued that either the claim proceedings, which began on the 19th June 1895, when the plaintiff preferred his claim and terminated on the 10th July 1895, when the claim was disallowed, or the suit in the City Civil Court which was commenced on the 2nd August 1895, and terminated on the 7th February 1898, in which the plaintiff obtained a declaratory decree, affirmed by the High Court, declaring his title to the goods in question, were proceedings within the scope of section 14. The section clearly has no application to these proceedings. As regards the suit in the Small Cause Court for the recovery of the specific goods seized by the defendants which was instituted on the 4th December 1897, and terminated on the 13th March 1899, and which the High Court held was not maintainable, we do not think the plaintiff is entitled to have the time during which he was prosecuting this suit deducted from the period of limitation. This suit was dismissed on the ground that it was a suit for the recovery of specific property, that the claim for the value of the goods was merely ancillary, and that the suit was not maintainable. No doubt a liberal construction has been placed by the Courts on the words "or other causes of like nature" contained in section 14. But, in our judgment, the section cannot be construed so as to apply to this case. The suit was dismissed not because the Court through defect of jurisdiction or other cause of a like nature was unable to entertain it, but because it was misconceived. Unless we were prepared to go so far as to say that whenever a plaintiff mistakes his remedy he is entitled to the benefit of section 14, it would be impossible for us to hold that the plaintiff was entitled to the benefit of it in the present case.

In the view which we take with regard to section 14 it is not necessary to consider whether the period of limitation is one year under article 29 or three years under article 49, since, in either

(1) *Murugesa Mudali v. Jotharam Davay*, I.L.R., 22 Mad., 478.

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view, the cause of action having accrued on the 12th June 1895, the plaintiff's suit is time-barred.

But it has been argued on behalf of the plaintiff that a distinction must be drawn between a claim for compensation for wrongful seizure of moveable property where the compensation sought is merely the value of the goods seized, in which case it is argued that article 49 applies, and a claim for compensation by way of damages which are consequential on the wrongful seizure and are independent of any question of compensation for the value of the goods, in which case it has been argued the period of limitation is one year under article 29. There is no reason in principle for this distinction and, in our judgment, the Legislature never intended that any such distinction should be drawn. Article 29 is quite general in its terms and we think it was intended to apply to all cases where the alleged wrongful seizure was made under legal process. The case of *Manavikraman* v. *Avisilan Koya*(1) may be distinguished on the ground that, in that case, the wrong complained of was the institution of a suit without reasonable grounds followed by an attachment of the goods of the defendant in the suit; whereas in the present case the goods belonged to a person who was not a party to the suit in which the attachment was made. In our judgment the suit is barred by limitation and we answer the first question submitted to us in the affirmative.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1900. February 2.

QUEEN-EMPRESS

v.

CHENCHAYYA AND OTHERS.*

Criminal Procedure Code—Act V of 1898, s. 248—Withdrawal of complaint—"Complainant."

A complaint having been made to the police, the latter caused charges to be preferred under sections 143 and 504 of the Indian Penal Code against certain

(1) I.L.R., 19 Mad., 80.

* Criminal Appeal No. 744 of 1899, under section 417 of the Code of Criminal Procedure, against the judgment of acquittal passed on the accused in Calendar Case No. 26 of 1899 on the file of the Taluk Second-class Magistrate of Sirvel.

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accused. The person who had complained to the police subsequently filed a petition praying the Second-class Magistrate to withdraw the charges under section 248 of the Code of Criminal Procedure. The Magistrate permitted the withdrawal and directed the accused to be set at liberty:

Held, that the order was bad, there being no "complainant" in the case and that consequently the Magistrate in purporting to act under section 248 had exceeded his powers.

APPEAL by the Public Prosecutor against the following order of acquittal of sixteen accused persons, purporting to be passed by a Second-class Magistrate under section 248 of the Code of Criminal Procedure:—"Complainant Mocherla Ramayya having satisfied the Court that there are sufficient grounds for withdrawing his complaint, the Court permits the same and directs that they be set at liberty under section 248 of the Criminal Procedure Code." This order had been passed on the petition of M. Ramayya as follows:—"Petition on behalf of the complainant most respectfully showeth:—(1) That the complainant has instituted a charge under section 143 of the Indian Penal Code against the accused; (2) that the complainant is unwilling to proceed with the case against the accused; and (3) that the complainant therefore prays this Honourable Court might be pleased to permit him to withdraw the charge against the accused under section 248, Criminal Procedure Code." The Magistrate had taken cognizance of the case against the accused under sections 143 and 504 of the Indian Penal Code, upon the report of the police, made in consequence of a complaint to them by the said M. Ramayya.

Mr. *N. Subrahmaniam*, for the Acting Public Prosecutor, for the Crown.

Sivasami Ayyar for accused No. 1.

JUDGMENT.—In this case we are constrained to hold that the order of the Magistrate permitting the case to be withdrawn is bad on the ground that there is no "complainant" in the case and that consequently the Magistrate, in purporting to act under section 248 of the Code of Criminal Procedure, has acted in excess of his powers. It has been argued that, for the purposes of section 248, "complainant" has not the restricted meaning of a person who files a "complaint" as defined by section 4 of the Code of Criminal Procedure, and that it applies to a person who sets the police in motion by making a complaint to them. *Primâ facie* this seems a reasonable construction to place upon the word. But, reading sections 248 and 249 of the Code of Criminal Procedure together,

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it seems impossible to come to any other conclusion than that section 249 was intended to apply to cases instituted otherwise than upon "complaint" and that section 248 was intended to apply to cases instituted upon "complaint." In the present case there was no "complaint," because it is clear from the record that the Magistrate took cognizance of the case upon the police report. We accordingly allow the appeal and we remit the case to the Magistrate in order that he may deal with it according to law.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1900. February 5.

MADARSAH MARACAYAR (DEFENDANT-PETITIONER), APPELLANT,

v.

PALANIAPPA CHETTI AND OTHERS (AGENT TO PLAINTIFF No. 2 AND PURCHASERS—COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code Act XIV of 1882, ss. 287, 311 "Material irregularity," in publishing or conducting a sale - Omission to state amount of Government tax payable—Right of person complaining to prove substantial loss.

In a proclamation of intended sale issued under section 287 of the Code of Civil Procedure, the omission to state the amount of Government tax payable in respect of the land to be sold is a material irregularity within the meaning of section 311 of the Code. On such an irregularity being committed, the judgment-debtor whose lands have been sold is *primâ facie* entitled to be given an opportunity for proving that he has sustained substantial loss by reason of it.

PETITION under section 311 of the Code of Civil Procedure asking that a sale might be set aside and a fresh sale held. The chief ground relied on was that the amount of Government tax payable in respect of the land had been omitted from the schedule to the sale proclamation. The District Judge held that the omission was not a material one as an intending purchaser could ascertain the amount of the tax from the settlement register or other sources. He declined to interfere and dismissed the petition.

* Civil Miscellaneous Appeal No. 77 of 1899 against the order of D. Broadfoot, District Judge of South Arcot, in Civil Miscellaneous Petition No. 173 of 1899 (Original Suit No. 13 of 1897).

Petitioner preferred this appeal.

MADARSAH MARACAYAR v. PALANIAPPA CHETTI.

Mr. *John Adam* for appellant.

Sundara Ayyar and *Krishnamachariar* for respondents.

JUDGMENT.—In this case the District Judge has held that the omission of the amount of Government tax in the schedule to the sale proclamation is not a material omission. We do not agree with this view. Paragraph (*c*) of section 287 of the Civil Procedure Code expressly requires that the proclamation should state as fairly and accurately as possible the revenue assessed upon the estate. In our opinion the omission to state the amount of Government tax is a "material irregularity" within the meaning of section 311 of the Code. *Primâ facie* therefore the judgment-debtor is entitled to be given the opportunity of proving that he has sustained substantial loss by reason of the irregularity. In the present case, however, we think it would be idle to remit this case to the District Court to give the judgment-debtor an opportunity of proving substantial injury. He tendered no evidence of injury before the District Court, and it seems clear from the record that he was not then, and is not now, in a position to prove any injury.

The appeal is dismissed, but as, in our view, there was a material irregularity in the sale proclamation, it is dismissed without costs.

APPELLATE CIVIL.

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

1900. February 6.

KUTTI ALI (PLAINTIFF), APPELLANT,

v.

CHINDAN AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 13—Res judicata—*Suit for land based on plaintiff's title—Previous suit as lessor—Omission to make title a ground of attack in previous suit—No denial of plaintiff's title as landlord—Maintainability of suit.*

In a previous suit, brought in 1890, plaintiff had sued for the recovery of certain land which he alleged to have been let verbally to the defendants in 1886. Defendants denied the verbal letting and pleaded that they held the land from

* Second Appeal No. 113 of 1899 against the decree of A. Thompson, District Judge of North Malabar, in Appeal Suit No. 273 of 1898, affirming the decree of K. Ramanatha Ayyar, District Munsif of Panoor, in Original Suit No. 93 of 1898.

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plaintiff's predecessor under a written agreement of 1876. The Court passed a decree in plaintiff's favour, holding that the lease under the written agreement had expired prior to 1886, and that the subsequent enjoyment of the land was under a verbal agreement. No steps were taken to execute that decree. Plaintiff now sued defendants for the recovery of the same land, together with arrears of rent, basing his claim on the same written agreement of 1876, and also on his title as owner thereof. The District Court held the claim on the written agreement to be *res judicata*, and that plaintiff could not now sue upon his title as that should have been made a ground of attack in the former suit. On appeal to the High Court:

Held, that inasmuch as plaintiff's title as landlord was recognised in the suit of 1890, the defendants could not have acquired a prescriptive title as against him in 1898, when the present suit was filed; and that plaintiff was therefore entitled to recover the land upon his title independently of any letting by him to the defendants. That the claim for arrears of rent under the old written agreement was *res judicata* by reason of the former suit, but that plaintiff's omission to sue on the strength of his general title in the former suit was no bar to the present suit, inasmuch as his title as landlord had never been disputed.

Zamorin of Calicut v. *Narayanan Mussad*, (I.L.R., 22 Mad., 323), referred to.

SUIT to recover, with arrears of rent, land let on lease by plaintiff's predecessor to the predecessor of defendants in May 1876. Plaintiff also claimed to recover on his title as owner. First defendant, among other pleas, contended that the suit was *res judicata* by reason of the decree in Original Suit No. 89 of 1890; and that plaintiff had lost all right to the land. On the question of *res judicata* an issue was framed by the District Munsif, who said:—"The letting sued on is evidenced by exhibit A, a duly registered instrument (dated 14th May 1876), and it is for a period of four years only from its date. Ten years after the expiry of the term of this lease, plaintiff brought Original Suit No. 89 of 1890 in the Tellicherry Munsif's Court for recovery of this land and another, on the basis of a verbal letting of 22nd November 1886, said to have been made by him to the lessee under exhibit A. The latter, denying the verbal letting sued on therein, pleaded holding of the land by him under the terms of exhibit A itself, but the Court nevertheless passed a decree in plaintiff's favour in that action. The material portion of the judgment runs as follows:—'The written lease of 1876' (the one sued on here) 'terminated prior to 1886, and therefore the subsequent enjoyment of the land is indisputably under an oral agreement express or implied.' This shows that the Court has held that the letting sued on long ago terminated or was superseded by another on which the former action was brought and a decree obtained therein,

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by this very plaintiff for recovery of this land. He has allowed that decree to be time-barred and he is not now in a position to recover the land in execution proceedings. Plaintiff has himself determined the lease sued on prior to 1886 and he cannot, therefore, be allowed to say that the land is still held under this lease. The lease of 1886 made by plaintiff after the determination of the plaint letting is also determined by the decree obtained by himself Neither the lease sued on nor the one of 1886 is now available for plaintiff to come to Court thereon for recovery of this land, and exhibit A is itself evidence that the land came to defendants' predecessor's possession for the first time only under that document. Defendants and their predecessor having been holding the land for more than twelve years and plaintiff having by his own acts and laches lost the means whereby he could claim recovery of the land from them, I must find this issue against him." He dismissed the suit. Plaintiff appealed to the District Judge who said:— "Plaintiff brought Original Suit No. 89 of 1890 to recover the land on a verbal letting of 1886 and obtained a decree, the execution of which is now time-barred. In that suit, the defendant contended that he held under a letting of 1876, which is the one that plaintiff now sues upon, but the District Munsif found that defendant did not hold under that letting, but under an express or implied subsequent verbal letting. It having been found in the prior suit that defendant did not hold under the letting of 1876, plaintiff is barred by section 13, Civil Procedure Code, from bringing his present suit on that letting. Explanation II to section 13 shows that plaintiff cannot now sue upon his title as that should have been made a ground of attack in the former suit (*Haji Hasam Ibrahim* v. *Mancharam Kaliandas*(1), *Ummatha* v. *Cheria Kunhamed*(2)), does not apply as in that case the former suit was brought on title as well as on the letting. I agree with the finding that the present suit is *res judicata* and therefore not maintainable." He dismissed the appeal.

Plaintiff preferred this second appeal.

Ryru Nambiar for appellant.

Mr. *C. Krishnan* for respondent No. 2.

JUDGMENT.—It was found in the suit (Original Suit No. 89 of 1890) that the defendants were then tenants in possession under

(1) I.L.R., 3 Bom., 137. (2) I.L.R., 4 Mad., 308.

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the plaintiff—that is, the title of plaintiff as landlord was recognized. The defendants being tenants in 1890 cannot have acquired a prescriptive title in 1898 when this suit was brought. The plaintiff is, therefore, entitled to recover the land upon his title independently of any letting by him. The question of *res judicata* would apply only to the rent claimed under the old lease exhibit A. The Judge was right in disallowing this part of the claim, but he was wrong in not giving the plaintiff a decree for the land on the strength of his general title, the omission to sue on which in the previous suit was no bar to this, his title as landlord never having been disputed (compare *Zamorin of Calicut* v. *Narayanan Mussad*(1)). We must, therefore, reverse the decrees of both the Courts below and allow the appeal to the extent of giving the plaintiff a decree for the possession of the land. We make no order as to mesne profits as they are not claimed. We direct the parties to bear their own costs throughout.

APPELLATE CRIMINAL.

Before Mr. Justice Shephard and Mr. Justice Davies.

1900. February 7.

QUEEN-EMPRESS

v.

GANAPATHI VANNIANAR AND OTHERS.*

Criminal Procedure Code—Act V of 1898, ss. 269 (1), 536 (2)—Order directing trial by jury—"Particular class of offences"—Revocation of order—Jury case tried by assessors—Omission to take objection before finding recorded—Validity of trial.

By section 269 of the Code of Criminal Procedure the local Government may, with the previous sanction of the Governor-General in Council, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order.

In the "Fort St. George Gazette," dated 30th August 1899, it was notified that, whereas by orders previously made the trial of persons charged with certain offences should, in certain districts of the Presidency, including that of Tinnevelly, be by jury; and whereas disturbances known as the anti-Shanar

(1) I.L.R., 22 Mad., 323.

* Criminal Appeal No. 730 of 1899 against the sentence of F. D. P. Oldfield Additional Sessions Judge of Tinnevelly, in Calendar Cases Nos. 1 and 31 of 1899.

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disturbances had taken place in the districts of Tinnevelly and Madura, and certain persons stood committed for trial and others might thereafter be similarly committed in connection therewith, the Governor in Council, with the previous sanction of the Governor-General in Council, directed, under section 269 of the Code of Criminal Procedure, that the said previous orders be revoked as regards the persons referred to, and that such persons should be tried with the aid of assessors and not by jury.

Certain persons having been so tried for offences under sections 148, 454, 395 and 323 of the Indian Penal Code, one assessor gave it as his opinion that none of them were guilty: the other assessor finding some of them not guilty. The Additional Sessions Judge convicted and sentenced all the accused, whereupon the objection was taken, on appeal, in the High Court, that the trial should have been by jury and not with the aid of assessors and that the conviction should therefore be set aside. The objection was not taken at the trial:

Held, that the omission to take objection to the trial before the Court had recorded its findings was fatal to the contention now urged that the trial was invalid.

Held further, that even assuming that objection had been duly taken, the offences connected with the outbreak had been rightly treated as a "class of offences," and that it was competent to the Government, with the consent of the Governor-General in Council, to revoke the previous notification so far as it related to that class.

APPEAL from a conviction by the Additional Sessions Judge of Tinnevelly Division. The accused had been tried for the offences of rioting armed with deadly weapons, house-breaking and theft, dacoity and voluntarily causing hurt under sections 148, 454, 395 and 323 of the Indian Penal Code. In the opinion of the first assessor none were guilty. The second assessor found two only of the accused guilty. The Judge found all guilty and passed the sentences now appealed from. The trial was held by the Additional Sessions Judge with the aid of assessors, instead of by a jury, in pursuance of the following notification published in an extraordinary issue of the "Fort St. George Gazette," dated 30th August 1899:—"Whereas His Excellency the Governor in Council has, by orders made from time to time under the powers conferred upon him in that behalf, directed that the trial before Courts of Session of persons charged with offences under certain sections of the Indian Penal Code should, in certain districts of the Presidency including the district of Tinnevelly, be by jury:

"And whereas riots and disturbances, known as the anti-Shanar riots and disturbances, have recently taken place in the districts of Tinnevelly and Madura and certain persons now stand committed for trial to a Court of Session in Tinnevelly charged with offences under the said sections, or some of the said sections, in connection

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with the said riots and disturbances, and other persons may hereafter be charged with offences under the said sections, or some of the said sections, in connection with the said riots and disturbances, and committed for trial to the said Court of Sessions :

"His Excellency the Governor in Council, under the powers conferred upon him by section 269 of the Code of Criminal Procedure, 1898, and all other powers and authorities enabling him in that behalf, and with the previous sanction of the Governor-General in Council, is pleased to direct and hereby directs that the orders hereinbefore referred to shall be revoked as regards the persons who now stand committed for trial as aforesaid to the Court of Session in Tinnevelly and as regards any other persons who may hereafter be charged with offences under the said sections, or any of the said sections, in connection with the said riots and disturbances, and be committed for trial to the said Court of Session, but not further or otherwise :

"And His Excellency the Governor in Council, under the powers aforesaid and with the like sanction, is pleased to further direct and hereby directs that the trial of the persons who now stand committed for trial to the said Court of Session as aforesaid, or who may hereafter be committed for trial to the said Court of Session as aforesaid, shall be with the aid of assessors and not by jury."

In the opinion of the first assessor none of the accused were guilty. The second assessor found that only two were guilty. The Judge, differing from the assessors, convicted all the accused, and sentenced them to different terms of imprisonment.

The accused preferred this appeal.

V. Krishnasami Ayyar and *K. Srinivasa Ayyangar* for the accused.

The Acting Advocate-General (Sir *V. Bhashyam Ayyangar*) and the Acting Public Prosecutor (*C. Sankaran Nayar*) in support of the conviction.

JUDGMENT.—It is objected on behalf of the appellants that the trial of this case ought to have been by the Sessions Judge and a jury, and not by the Judge and assessors, and that for that reason the conviction must be set aside. The appellants' vakil admits that the objection was not taken at the trial, but contends that inasmuch as his clients have been prejudiced by the alleged error the trial is invalid notwithstanding the language of section 536 (2) of the Criminal Procedure Code. His clients are

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prejudiced, as he contends, because the opinion of the assessors was in their favour and that opinion, if it had been taken in the form of a verdict from a jury, would have been conclusive as far as regards the facts. In other words he contends that full effect is to be given to the words of the sub-section only in the case in which the assessors agree with the Judge in finding the prisoner guilty.

If it had been the intention of the Legislature so to limit the operation of the sub-section, we think they would have used words such as are used in the next section 537 to make it clear that the omission to take the objection at the trial is to conclude the prisoner only in the case above stated. We think the omission is fatal to the appellants' contention, and for that reason alone should have to overrule it.

But the Advocate-General being desirous of having the main point settled has argued this case on the assumption that the objection was duly taken. The contention on the main point is that the "class of offences" referred to in section 269 of the Criminal Procedure Code must be ascertained according to some classification recognized by the Legislature—such as is found in the Penal Code, *e.g.*, offences against the State, against the person, or in the Criminal Procedure Code, *e.g.*, bailable offences, cognizable offences. There is no reason shown for putting this narrow construction on the words. No reason is suggested why offences should not be classified according to the persons who commit them, *i.e.*, the offences, the offenders, or according to the person or property against whom or which the offences are committed, or in regard to the particular occasion in connection with which they are committed. Thus, the fact of offences having been committed by old offenders or members of criminal tribes, or having been committed against women or against public property, would afford reasonable ground for a classification.

Here, the fact with reference to which the distinction is made is the fact of an outbreak having taken place directed against a certain section of the population. The offences connected with the outbreak are treated as a class of offences, and in our opinion rightly so. It was accordingly competent to the Government with the consent of the Governor-General in Council to revoke the previous notification so far as it related to that class.

On the merits, we see no reason to doubt the truth of the case for the prosecution. The appeal is dismissed.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

1900. February, 12.

QUEEN-EMPRESS

v.

PANDARA TEVAN (AND ANOTHER).*

Criminal Procedure Code—Act V of 1898, s. 209—Examination of accused before committal—Discretion of Magistrate.

It is the duty of a Magistrate, before committing accused persons for trial, to examine them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of section 209 of the Code of Criminal Procedure is that it is not left to the discretion of the Magistrate who intends to commit to examine the accused. He is bound to examine them, and if he makes an order of commitment without such examination, the order is irregular.

PETITION to revise an order committing certain accused persons for trial. In a preliminary enquiry against the petitioners, who were charged with having committed offences under sections 436 and 395 of the Indian Penal Code, the Special Magistrate, after taking the evidence of eight prosecution witnesses, formed the conclusion that a *primâ facie* case had been made out, and committed the accused for trial before the Sessions Court on charges under sections 148, 454, 436 and 397 of the Indian Penal Code. The accused were not examined before committal, and one of them filed an affidavit to that effect adding that they had waited for an opportunity to make statements, and that such statements by way of explanation would have satisfied the Magistrate that committal was unnecessary.

Against this order of committal the accused preferred this criminal revision petition.

Mr. *W. Barton*, (for Mr. *John Adam*,) for petitioners.

Mr. *N. Subrahmaniam*, (for the Acting Public Prosecutor on behalf of the Crown.

* Criminal Miscellaneous Petition No. 8 of 1900, praying the High Court to revise the order of A. Thompson, Special Magistrate of Satur, in Referred Case No. 20 of 1899, committing the petitioners for trial by the Sessions Court of Tinnevelly in Sessions Case No. 33 of 1899.

JUDGMENT.—In our opinion, it was the duty of the Magistrate, before committing the accused persons for trial to have examined them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of section 209 of the Code of Criminal Procedure is that it is not left to the discretion of a Magistrate who intends to commit to examine the accused person. He is bound to examine him, and if he makes an order of commitment without examining him the order is irregular.

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Before, however, we can quash the order of commitment, we have to be satisfied that the irregularity has occasioned a failure of justice.

We have carefully considered the evidence before the Magistrate, and having regard to the nature of this evidence and also to the fact that the accused persons have allowed four months to elapse before applying to quash the order, we cannot say that any failure of justice has been occasioned and we accordingly dismiss the application.

ORIGINAL CIVIL.

Before Mr. Justice Shephard.

1900. February 13.

THE COMMERCIAL BANK OF INDIA (LIMITED), (PLAINTIFFS),

v.

ATEENDRULAYYA AND OTHERS (DEFENDANTS).*

Transfer of Property Act—Act IV of 1882, ss. 86, 88—Decree for sale—Provision for interest at contract rate until six months from date of decree.

Defendants promised to pay plaintiffs a sum of money for value received, with interest thereon from the date of the promise until demand at the rate of 8 per cent. per annum, and, after demand, at the rate of 15 per cent. per annum until payment in full; and as further security for such re-payment deposited with plaintiffs the title-deeds of certain immoveable property. Demand was made, but was not complied with; whereupon plaintiffs informed defendants by letter that their account carried interest at the higher rate provided for in the promissory note. Plaintiffs now sued for the amount due in respect of principal and interest at the rate of 15 per cent. per annum from the date of their letter till payment: and asked that in default of payment on a day to be fixed by the Court the property might be sold. A decree having been passed in plaintiffs'

* Civil Suit No. 250 of 1899.

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favour provision was made therein ordering defendants to pay the amount of principal and interest due at the date of the decree, with interest thereon at the rate of 15 per cent. per annum from that date to a date six months thereafter. Objection having been taken to the form of this decree on the ground that payment of interest at the contract rate was only provided for up to the termination of six months from the date of decree, instead of till payment:

Held, that the decree was correctly drawn. In principle there is no difference between a mortgage decree which has become absolute and an ordinary decree for money. After the day fixed for payment, or on the passing of the decree, as the case may be, the rights of the parties under the contract become merged in the decree, and afterwards there is no more reason for giving interest at the contract rate in the one case than in the other.

Rameswar Koer v. *Syed Nawab Mehdi Hossein Khan*, (L.R., 25 I.A., 179; I.L.R., 26 Calc., 39), and *Bakar Sajjad* v. *Udit Narain Singh*, (I.L.R., 21 All., 361), referred to.

SUIT to recover money secured by the deposit of title-deeds of immoveable property. Plaintiffs alleged that defendants had, on 29th August 1898, jointly and severally promised to pay to plaintiffs the sum of Rs. 9,000, for value received, with interest thereon from that date until demand at the rate of 8 per cent. per annum, with half-yearly rests, and, after demand, at the rate of 15 per cent. per annum until payment in full: that as further security for the re-payment of the said sum the first defendant had deposited with the plaintiffs the title-deeds of a piece of land and buildings thereon; that the rules and by-laws of the plaintiffs' bank, which the defendants agreed to be bound by, provided amongst other things, that constituents who failed either to pay off or renew a bond, bill or promissory note in terms of a letter demanding payment would be liable to pay interest at the rate of 15 per cent. per annum upon the balance of the account from the date of such letter. The plaint averred that by a letter, dated 24th August 1899, demand had been made from each of the defendants of the balance of principal and interest then due on the said promissory note, but that such defendants had failed to pay such balance or any part thereof and that subsequently by their letter, dated 1st September 1899, plaintiffs had informed each of the defendants that the account then carried interest at the higher rate provided for in the said promissory note. On 30th June 1899 a sum of Rs. 9,330-12-10 was due to plaintiffs from defendants and between that date and 18th November 1899, plaintiffs made payments on behalf of the defendants, the amount due to plaintiffs on the latter [illegible] the security of the said promissory note and title-deeds

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for principal, and interest and payments being Rs. 9,861-11-10. Plaintiffs prayed that a decree might be passed as against both defendants for that amount with further interest on the sum of Rs. 9,330-12-10 at the rate of 15 per cent. per annum from 31st August 1899, until payment and for costs; that the property referred to might be decreed to be well charged with the payment of the said principal, interest and payments and costs; that in default of payment by the defendants or one of them on a day to be fixed by the Court the said property might be sold and the proceeds applied in and towards payment thereof; and that if such proceeds should not be sufficient for the payment in full of such amount the defendants or some or one of them should pay the plaintiff the amount of the deficiency with interest thereon.

The case came on for settlement of issues on 13th February 1900, in the presence of the attorneys for the plaintiffs, the defendants not appearing in person or by pleader.

A decree was then passed, of which the following are the material portions:—"Claim for Rs. 9,861-11-10 due in respect of a promissory note in the plaint mentioned with interest on Rs. 9,330-12-10 at the rate of 15 per cent. per annum from 31st August 1899 until payment and for costs of suit; and in default of such payment the property in the plaint mentioned be sold. . . . . It is declared that by virtue of the deposit of title-deeds in the plaint mentioned the sum of Rs. 10,226-7-10 and costs and further interest hereinafter mentioned are charged on the immoveable property in the schedule hereto mentioned and it is ordered and decreed that . . . . , the defendants, do pay to the plaintiffs the sum of Rs. 10,226-7-10, with interest thereon at the rate of fifteen per cent. per annum from this day (13th February 1900) to the 13th day of August 1900, and also the costs of this suit when taxed and noted in the margin hereof together with interest thereon at the rate of six per cent. from the date of taxation to the date aforesaid . . . . . ; but in default of the defendants paying into Court such principal, interest and costs as aforesaid by the date aforesaid, then it is ordered that the said mortgaged premises be sold with the approbation of the Registrar to the best purchaser that can be got for the same, provided the officer or other person conducting the sale shall consider that a sufficient sum has been offered and that the money to arise by such sale be paid into Court to the credit of

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this suit. And it is further ordered that upon payment into Court as aforesaid, the plaintiffs shall be at liberty to apply in chambers for payment of the amount due for principal, interest and costs as aforesaid and for further interest on the said principal sum and costs, and the defendants shall be at liberty to apply in chambers for payment of the balance (if any) of the said monies. And it is further ordered that if the money to arise by such sale shall not be sufficient for the payment in full of the amount of principal, interest and costs payable under this decree the defendants do pay the amount of deficiency."

Objection being taken to the form of the decree in so far as it related to interest, it was referred to the Court, whereupon his Lordship passed the following

JUDGMENT.—Exception is taken to the form in which this decree is drafted on the ground that interest at the contract rate is given only up to the end of the six months, whereas interest at that rate ought, according to the contention on behalf of the plaintiff, to run up to the date of payment. The contention is founded upon some observations of the Judicial Committee in a recent case *Rameswar Koer* v. *Syed Nawab Mehdi Hossein*(1), and on the interpretation which has been put upon them by the Allahabad High Court (*Bakar Sajjad* v. *Udit Narain Singh*(2)). In the case before the Judicial Committee the defendants appealed on the ground that the High Court had varied the decree against them by ordering 12 per cent. instead of 4 to be paid from the date of suit up to the date fixed for payment, interest from that date until payment at 4 per cent. being allowed (see copy decree in *Bakar Sajjad* v. *Udit Narain Singh*(2)). Inasmuch as 12 per cent. was the contract rate the Judicial Committee held that it was rightly allowed and accordingly the appeal was dismissed. It is observed with regard to sections 86 and 88 of the Transfer of Property Act that they clearly indicate "that the ordinary decree in a suit of the kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization," and then after four sentences which are omitted in the citation made in the Allahabad judgment comes this passage:—"No peculiarity has been shown to exist in this case for cutting down the mortgage

(1) L.R., 25 I.A., 179 at p. 181; I.L.R., 26 Calc., 39.
(2) I.L.R., 21 All., 361 at pp. 371, 372.

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rate of interest. If the High Court has allowed something less, the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay." The judgment of the Judicial Committee affirms two propositions, one of which is that a mortgagee is entitled to interest at the contract rate up to the date fixed in the decree, the other that the Court may award subsequent interest. Neither of those propositions has, as far as I am aware, been disputed in this Court. In Allahabad the latter proposition was for some time denied and the effect of the decision in *Bakar Sajjad* v. *Udit Narain Singh*(1) is to re-establish it. It does not appear to have been necessary in that case any more than it was in the case before the Judicial Committee to decide at what rate subsequent interest should be allowed. The learned Chief Justice however considers that in the observations above quoted the Judicial Committee did decide that question in favour of the mortgagee and quoting the words "If the High Court has allowed something less," he says they must mean something less than the mortgage rate of 12 per cent. from the date fixed for payment until realization. With great deference to the learned Chief Justice, I am unable to agree with him. I think the words just quoted may well refer to some point taken in the argument, but not mentioned by the reporter, regarding the sum allowed by the Subordinate Judge as to which evidently some question had arisen (see *Rameswar Koer* v. *Syed Nawab Mehdi Hossein*(2)). There is nothing to show that they refer to subsequent interest. If the paragraph had stopped with the sentence that precedes, the question could hardly have been raised, for in the rest of the paragraph including that sentence the Judicial Committee were dealing solely with the contention that 12 per cent. ought not to have been allowed up to the date fixed for payment. In that statement of the case (*Rameswar Koer* v. *Syed Nawab Mehdi Hossein*(2)) no notice is taken of the 4 per cent. interest allowed by the High Court after that date. Lord Hobhouse refers to the sections 86 and 88 of the Transfer of Property Act in order to show that the decree of the High Court was in accordance with the law there enacted, and in paraphrasing section 86, which is the section prescribing the form for foreclosure decrees, he speaks of the date of

(1) I.L.R., 21 All., 361.
(2) L.R., 25 I.A., 179 at p. 186; I.L.R., 26 Calc., 39.

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realization as the date up to which accounts on the footing of the mortgage are directed to be taken. It is simply because the phrase "date of realization", instead of date fixed by the Court for payment, is used that it is thought that the Judicial Committee had in mind subsequent interest. The context, in my opinion, shows that this cannot have been the case, for the only dates mentioned in the section are the date of the decree and the day fixed by the Court, and the section contains no reference to subsequent interest. Redemption or foreclosure follows according as the amount calculated up to the day fixed by the Court is or is not paid. By date of realization I think Lord Hobhouse must have meant the date mentioned in the section to which he was referring, and I cannot believe that there was any intention to sanction an abrupt departure from well-established practice (see *e.g.*, *Muthura Das* v. *Raja Narindar Bahadur*(1); *Orde* v. *Skinner*(2)). In principle I conceive there is no difference between a mortgage decree which has become absolute and an ordinary decree for money. After the day fixed for payment or on the passing of the decree, as the case may be, the rights of the parties under the contract become merged in the decree, and afterwards there is no more reason for giving interest at the contract rate in the one case than there is in the other. For these reasons, I am of opinion that the decree which is drawn in the form that has been current for some time past in this Court is not open to objection.

Messrs. *Barclay, Orr & David.*—Attorneys for the plaintiffs.

(1) L.R., 23 I.A., 138; I.L.R., 19 All., 39.
(2) L.R., 7 I.A., 196; I.L.R., 3 All., 91 at p. 107.

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ABKARI ACT (MADRAS)—ACT I OF 1886, s. 56 (*b*)—*License to keep toddy shop—Failure to keep shop open—Omission not constituting an act:*

By section 56 (*b*) of the Abkári Act (Madras), 1886, whoever, being the holder of a license or permit granted under the Act, "does any act in breach of any of the conditions of his license or permit not otherwise provided for in this Act" may be punished with fine or imprisonment or with both. The holder of a license to keep a shop for the sale of toddy having been convicted for failing to keep his shop open, in breach of one of the conditions of the license:—*Held*, that even if the licensee was under an obligation to keep open his shop (which did not appear to be the case), an omission to do so did not amount to an act in breach of the conditions of the license; and that the conviction must in consequence be set aside.

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APPEAL—*Execution proceedings—Order made in the course of execution proceedings and not appealed against—Right to raise the question as to its propriety in the appeal against the final order:*

A decree having, in 1894, been passed in favour of the plaintiff in a suit against a number of defendants for the recovery of land with mesne profits, the amount of such mesne profits was ordered to be fixed in execution. In 1897, an order was passed declaring that all the defendants were liable jointly and severally for such mesne profits, which order was not appealed against. Later in the same year a Commissioner was appointed to ascertain the amount of the said mesne profits, and in due course a final order in execution was passed by the District Court. At the time when the last-mentioned order was passed, certain of the defendants desired to re-open the question of their joint liability, but were not permitted to do so:—*Held*, that even assuming that the order declaring the defendants to be jointly and severally liable was one from which an appeal could have been preferred,— as to which there might be some doubt,—it was a determination of one of the questions which had to be determined before the particular application for execution could be finally disposed of; and the question of the propriety of the order was one that need not be at once raised by appeal, but could be raised in the appeal against the final order. *Caussanel* v. *Soures*, (I.L.R., 23 Mad., 260), referred to.

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ATTORNEY—*Rules of Madras High Court, rule No. 320—Leave of Court for proposed change of attorney—Grounds upon which leave will be given or withheld—Payment of costs due to attorney:*

Leave will not be given by the Court for a change of attorney under rule No. 320 of the Rules of the Madras High Court (which provides that leave must be obtained before such a change of attorney can be made) until the costs of the attorney are first paid or provided for.

Ramasami Chetti v. *Subbu Chetti* 134

BREACH OF CONTRACT—*Agreement to discharge a debt due by debtor to a third party—No time fixed for performance—Failure to perform within a reasonable time—Cause of action—Measure of damages:*

Defendant agreed to discharge a debt due by plaintiff to a third party, secured by a mortgage of a village which was held by plaintiff on lease and which had been sub-let by him to defendant after the mortgage to the third party had been granted. The agreement provided that if the defendant failed to discharge the debt he should be liable to plaintiff for any damage which the latter might sustain. No time was fixed for the performance by the defendant of this obligation, and he, in fact, failed to perform it for a period of nearly three years, whereupon this suit was brought:—*Held*, that the agreement was not a mere contract to indemnify; that defendant was bound to discharge the debt within a reasonable time, and that his failure to do so during three years was a breach of the contract, notwithstanding the fact that the third party had not enforced his claim against the plaintiff. The measure of damages payable in consequence of such breach would be the amount of the debt which defendant had undertaken to discharge.

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CASTE DISABILITIES REMOVAL ACT—ACT XXI OF 1850, s. 1—*Hindu Law—Estate of deceased widow who lived a life of unchastity—Right of step-son to inherit:*

The step-son of a deceased Hindu widow sued as her heir for possession of certain property. The defence was that the widow had deserted her husband in his lifetime and lived a life of unchastity and that the plaintiff's right of inheritance was in consequence destroyed:—*Held*, that assuming the widow to have been guilty of unchastity and to have been actually degraded for it, plaintiff's right to inherit her property in the absence of nearer heirs could not be affected by such degradation. *Held also*, that though Act XXI of 1850 gives relief against the forfeiture of rights of persons deprived of caste on other grounds besides that of renouncing or being excluded from the Hindu religion, it does not restore to an outcaste all the rights which he, as a casteman, could have civilly enforced; nor does it contemplate the restoration of privileges the granting of which would amount to an interference with the autonomy of caste; nor does it interfere with the forfeiture of such a right, as, *e.g.*, to participate with other members of a caste in the benefits of a religious institution appropriated to the members of the caste, or to participate jointly with fellow castemen in the benefit of a caste institution; nor can it apply where the question is, not as to the rights of a degraded person, but as to who is entitled to the property of a degraded person. *Kery Kolitany* v. *Moneeram Kolita* (13 B.L.R., 1) referred to. *Held further*, that though under the Hindu law a loss of caste by expulsion for specified reasons causes forfeiture of rights, it has never broken the relationship of the person expelled to those who remain within the caste, degradation having merely the effect of rendering the tie of kindred but dormant; and, *e.g.*, the degradation of either spouse does not dissolve the tie of marriage. It is impossible to construct out of the smritis and commentaries a consistent doctrine of "civil death" or "fiction of death." Prostitution does not sever the legal relation, and therefore the degradation of a woman in consequence of her unchastity does not in law entail a cessation of the tie of kindred between her and the members of her natural family or between her and the members of her husband's family. Nor does a wife's adultery, unattended by degradation, dissolve the marriage. *In re Kamineymoney Bewah*, (I.L.R., 21 Calc., 697), referred to:—*Held*, therefore, that the step-son was entitled to inherit the property, as sapinda of the widow's late husband in the absence of nearer heirs.

Subbaraya Pillai v. *Ramasami Pillai* 171

CITY OF MADRAS MUNICIPAL ACT (MADRAS)—ACT I OF 1884, ss. 103, 110—*Profession tax—Liability of member of a firm to pay separate tax in respect of a Government appointment, his qualification for such appointment being the profession which he also carries on jointly with the firm—Meaning of "person" under the Act:*

A member of a firm of Attorneys-at-Law and Notaries Public, which paid the profession tax leviable under section 103 of the City of Madras Municipal Act, 1884, also held the appointment of Government Solicitor. He practised no other profession or business than that exercised by his firm; and the duties of Government Solicitor could not be performed by any person other than a practising attorney. The municipality of Madras having demanded profession tax in respect of the appointment of Government Solicitor in addition to the tax paid by the firm of which the holder of the appointment was a member:—*Held*, that the tax was rightly levied.

Barclay v. *President, Municipal Commission, Madras* 529

2. ——————————, **s. 307—*Prohibition against depositing stable refuse in a street—Deposit of stable refuse in a dust-bin—Liability of person so depositing:***

By the first clause of section 307 of the City of Madras Municipal Act, 1884, the president of the municipality "shall provide in the streets of the city suitable and sufficient dust-bins for the temporary deposit of dust,

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dirt, ashes, kitchen refuse and other inoffensive matter excepting building, stable and garden refuse which shall be removed by the owner thereof." By the second clause of the same section "whoever, after such provision has been made, deposits any of the said matters or any building, stable or garden refuse in any street, pavement or verandah of any building". . . is rendered liable to fine. Petitioner having deposited stable refuse in one of the dust-bins provided in accordance with the Act was charged before a Magistrate and fined under the latter clause of the said section :—*Held*, that the dust-bin was not a part of the street and that the throwing of stable refuse into the dust-bin was not a deposit of such refuse in the street so as to constitute an offence under the said section.

Perumal v. *Municipal Commissioners for the City of Madras* 164

CIVIL COURTS ACT—ACT III OF 1873, ss. 12, 13—*Civil Procedure Code—Act XIV of* 1882, *s.* 566—*Appeal—Transfer to Subordinate Judge of appeal petition heard by and pending before District Judge—Jurisdiction of Subordinate Judge to hear and determine the appeal—Jurisdiction is not conferred by waiver when Court has no inherent jurisdiction :*

An appeal, having been entered in a District Court, against the decision of a District Munsif, was heard in part by the District Judge, who remanded the suit to the District Munsif for findings on fresh issues. Findings having been duly returned, the District Judge transferred the appeal to the Subordinate Judge, who heard and determined it :—*Held*, that the District Judge had no power to transfer to a Subordinate Judge an appeal which was part heard and pending before him. The only inherent jurisdiction that a Subordinate Judge has is in original suits, under section 12 of the Civil Courts Act. In appeals he only acquires jurisdiction under the last clause of section 13 of the said Act, which enables a District Judge to transfer appeals to him, and unless that section is complied with the Subordinate Judge has no jurisdiction to hear or determine any appeal. Section 13 does not authorise the transfer to a Subordinate Judge of an appeal part heard and pending before the District Judge. The fact that objection was not taken to the jurisdiction of the Subordinate Judge did not confer jurisdiction upon him, the Subordinate Court not having inherent jurisdiction.

Kumarasami Reddiar v. *Subbaraya Reddiar* 314

CIVIL PROCEDURE CODE—ACT XIV OF 1882, ss. 2, 244, 588—*Application to stay sale in execution proceedings on ground of under-valuation—Order dismissing application—Appeal against order of dismissal—Decree :*

An application was made by certain defendants, against whom a decree had been passed, for an order that a sale at the instance of the decree-holder, in execution of his decree, should not be proceeded with, on the ground that in the sale proclamation the value of the property had been under-estimated. The Subordinate Judge held the under-valuation to be immaterial and dismissed the application, whereupon the judgment-debtor appealed to the High Court. On the preliminary objection being there taken that no appeal lay from the order of dismissal :—*Held*, that an appeal lay, the order having been made with reference to a question which related to the execution, and the question being one arising between the parties to the suit in which the decree was passed and relating to its execution, within the meaning of section 244 of the Code of Civil Procedure. On a sale of property in execution of a decree the value stated in the sale proclamation is a material fact within sub-section (*e*) of section 287 of the Code of Civil Procedure. Under-valuation of such property is a material irregularity in publishing or conducting the sale.

Sivasami Naickar v. *Ratnasami Naickar* 568

2. ——————————, **s. 13**—Res judicata—*Suit for land based on plaintiff's title—Previous suit as lessor—Omission to make title a ground of attack in previous suit—No denial of plaintiff's title as landlord —Maintainability of suit :*

In a previous suit, brought in 1890, plaintiff had sued for the recovery of certain land which he alleged to have been let verbally to the defendants

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in 1886. Defendants denied the verbal letting and pleaded that they held the land from plaintiff's predecessor under a written agreement of 1876. The Court passed a decree in plaintiff's favour, holding that the lease under the written agreement had expired prior to 1886, and that the subsequent enjoyment of the land was under a verbal agreement. No steps were taken to execute that decree. Plaintiff now sued defendants for the recovery of the same land, together with arrears of rent, basing his claim on the same written agreement of 1876, and also on his title as owner thereof. The District Court held the claim on the written agreement to be *res judicata*, and that plaintiff could not now sue upon his title as that should have been made a ground of attack in the former suit. On appeal to the High Court :—*Held*, that inasmuch as plaintiff's title as landlord was recognised in the suit of 1890, the defendants could not have acquired a prescriptive title as against him in 1898, when the present suit was filed ; and that plaintiff was therefore entitled to recover the land upon his title independently of any letting by him to the defendants. That the claim for arrears of rent under the old written agreement was *res judicata* by reason of the former suit, but that plaintiff's omission to sue on the strength of his general title in the former suit was no bar to the present suit, inasmuch as his title as landlord had never been disputed. *Zamorin of Calicut* v. *Narayanan Mussad*, (I.L.R., 22 Mad., 323), referred to.

Kutti Ali v. *Chindan* 629

3. ——————————, **ss. 15, 539**—*Religious Endowments Act—Act XX of* 1863, *ss.* 14, 15, 18—*Suit by a general trustee and a worshipper for removal of trustees :*

A suit was filed in a District Court by the general trustee of a temple and a worshipper therein praying that certain trustees might be declared incompetent and removed, that others might be appointed in their place, that the properties belonging to the endowments of the temple might be vested in them, and that a scheme might be settled for the management of the trust. Leave to file the suit had been obtained under the Religious Endowments Act, 1863, and under section 539 of the Code of Civil Procedure :—*Held*, that the suit was maintainable.

Narayana Ayyar v. *Kumarasami Mudaliar* 537

4. ——————————, **s. 17**—*Suit on a foreign judgment—"Carrying on business" within the jurisdiction—Business carried on by the managing member of a Hindu family—"Principal and agent" with reference to section* 17 *of Civil Procedure Code—Application of Civil Procedure Code to non-resident foreigner :*

Plaintiff having obtained judgment against defendant in a suit on a bond in the Civil Court at Pondicherry, sued him on the said judgment in a District Court in British India. The date of the foreign judgment was 20th March 1896, and that of the suit in British India, 9th October 1896 ; but in the meanwhile, namely, on 20th July 1896, defendant had been declared an insolvent in Pondicherry, and a syndic had been appointed to take charge of and administer his property. The ground of jurisdiction relied on by plaintiff was that defendant was carrying on a business within the jurisdiction of the District Court, the said business being conducted by his cousin ; and that, the cousin being the manager of a Hindu family, the presumption was that the business was carried on with the consent of the defendant as well as for his benefit :—*Held*, that the District Court had no jurisdiction to entertain the suit. Inasmuch as defendant and his cousin had, as a fact, become partially divided prior to the commencement of the business, and as there was no evidence of his consent, the presumption contended for could not arise. But even if the facts had been otherwise, and the defendant had been entitled to claim an interest in the business on the ground that it was carried on by one who was the managing member of his family at the time, defendant would not be "carrying on business" within the meaning of section 17 of the Code of Civil Procedure. To bring a principal within the operation of section 17, the person acting as the agent within the jurisdiction should be an agent in the strict and correct sense of the term.

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Semble, that a member of a joint family who actually consents to a trade being carried on within the jurisdiction on his behalf, or by his conduct puts himself in the position of a joint trader, carries on business within, though he may live outside, the jurisdiction. By section 443 of the Code de Commerce the effect of an adjudication of insolvency in French territory is to deprive the insolvent of the possession and management of his property, which is entrusted to a syndic, against whom alone all suits in respect thereof must be brought:—*Held*, that though the debt of an insolvent might not be extinguished by such a declaration of insolvency, so as to exempt him from future liability in respect of property which he might subsequently obtain, no suit could be brought against him in French territory, and, for that reason, outside French territory, so long as the adjudication of insolvency remained in force. *Quelin* v. *Moisson*, (1 Knapp., 265n), followed. Whether section 17 of the Code of Civil Procedure should be construed so as to exclude from its operation non-resident foreigners, even though they carry on business in British India through agents; and, if such construction be inadmissible, whether the said section of the Indian Legislature should be held with reference to such foreigners to be *ultra vires*,—*Quære*.

Murugesa Chetti v. *Annamalai Chetti* 458

5. ——————————————————, s. 30—*Religious endowment, suit relating to—Suit by worshippers—No leave to sue—Non-joinder of Advocate-General—Maintainability of suit:*

Four worshippers at a temple, who were also entitled to vote at the election of dharmakartas, filed a suit for a declaration that the election of certain persons to that office was void. Notice had not been given to the other worshippers, nor had leave of the Court been obtained prior to the institution of the suit:—*Held*, that the suit was maintainable notwithstanding that the Advocate-General had not been joined as a party; that section 30 of the Code of Civil Procedure being permissive and not prohibitive and dealing with procedure only, and not affecting substantive rights, the omission to state in the plaint that the suit was instituted on behalf of other worshippers having similar rights to sue as the plaintiffs was not fatal to the maintainability of the suit; that the Court was competent, with a view of adjudicating completely and definitively on the matter in dispute, to require an amendment of the plaint, and that the suit need not necessarily be dismissed; that the omission to apply for leave under section 30 of the Code of Civil Procedure is not in itself ground for dismissing a suit, but, on objection being taken, the suit should not be allowed to proceed except on the terms of the plaint being amended and the requisite leave being obtained; and that the granting of leave under section 30 is not a condition precedent, and may take place after the institution of the suit. *Jan Ali* v. *Ram Nath Mundul* (I.L.R., 8 Calc., 32) and *Thackersey Dewaraj* v. *Hurbhum Nursey* (I.L.R., 8 Bom., 432) considered.

Srinivasa Chariar v. *Raghava Chariar* 28

6. ——————————————————, s. 30—*Worshipper's suit to recover land—Trustee not a plaintiff—Non-maintainability of suit:*

An individual worshipper in a mosque is not entitled to sue for the recovery of possession of land belonging to the mosque. While there is a trustee who has not been removed from his office he is the only person entitled (irrespective of section 30 of the Code of Civil Procedure) to sue for the recovery of land belonging to the institution. *Zafaryab Ali* v. *Bakhtawar Singh* (I.L.R., 5 All., 497) considered.

Kamaraju v. *Asanali Sheriff* 99

7. ——————————————————, ss. 108, 540—*Decree passed* ex parte *through non-attendance of defendants—Appeal—Order for re-trial* de novo *on ground that defendants had insufficient opportunity for being heard—Illegality of such order:*

The defendants in a suit for possession of property and an injunction filed written statements but failed to appear, either in person or by pleader, when the suit came on for hearing in the District Munsif's Court. Evidence

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adduced by the plaintiff was taken and a decree passed in plaintiff's favour as prayed. Some of the defendants applied to the District Munsif for an order to set aside the *ex parte* decree, which application was refused; and the defendants then appealed against the original *ex parte* decree, when the Subordinate Judge reversed the said decree and remanded the suit for re-trial *de novo* on the ground that the defendants had not had a proper opportunity for being heard:—*Held*, that it was not competent for the Subordinate Judge to pass such an order: that he could only deal with the case on the materials on the record: and that the decree of the District Munsif must be restored.

Caussanel v. *Soures* 260

8 ——————————————————, ss. 211, 212, 244—*Parties to the suit in which the decree was passed—Application for sale of property of next friend in suit* in formâ pauperis—*Dismissal—Appeal against order of dismissal:*

An order having been made, in a decree dismissing a suit against the next friend of a minor plaintiff, to pay the Court fee due to Government in respect of the suit, the Collector attached the property belonging to the said next friend with a view to bringing it to sale. While the attachment was subsisting, the next friend died, and his son was thereupon brought upon the record. An application for an order for sale of the property of the son, as the legal representative of his father, having been dismissed, the Collector appealed against the order of dismissal:—*Held*, that the Collector was not a party to the suit in which the decree was passed within the meaning of section 244 (*c*) of the Code of Civil Procedure and that he had, therefore, no right of appeal; also, that in proceedings relating to the enforcement of an order under section 412 against a next friend, the next friend cannot be considered to be a party to the suit, and that, in consequence, there is no appeal under section 244 (*c*) of the Code of Civil Procedure from an order passed in such proceedings. Nor does section 440 apply to a case of an order passed under section 412.

Collector of Trichinopoly v. *Sivaramakrishna Sastrigal* 73

9. ——————————————————, s. 244—*Retention by the Court of property not the subject-matter of a decree in the course of its execution—Dismissal of petition for delivery of possession—Appeal from order of dismissal:*

A decree having been passed awarding to a plaintiff in a suit a moiety of certain jewels which were stored in family boxes in the possession of the defendant, the boxes containing the jewels were taken possession of by an officer of the District Court and a division was effected by a commissioner appointed for that purpose by that Court. After the division certain jewels remained which had been set aside by the commissioner as not forming part of the subject-matter of the decree, and these continued in the custody of the District Court. The defendant thereupon presented a petition to the District Court praying that the jewels so remaining undivided might be returned to him. Plaintiff resisted the application but both parties were agreed that the said remaining jewels were not part of the subject-matter of the suit and were not dealt with by the decree. The petition was dismissed; whereupon the petitioner appealed. On objection being taken that no appeal lay against the order of dismissal on the ground that, since the jewels in question were not part of the subject-matter of the suit and were not dealt with in the decree, the question was not one relating to the execution of a decree and was not governed by section 244 of the Code of Civil Procedure:—*Held*, that the question as to what should be done with the boxes and their contents arose between the parties to the suit and related to the execution of the decree; that the order was passed under section 244 of the Code of Civil Procedure and that consequently an appeal lay. *Per* MICHELL, J.—The property having been interfered with in the course of the execution of a decree the question involved was one "relating to the execution of the decree." The general words in the

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section should be construed liberally. *Muttuvelu Pillai* v. *Vythilinga Pillai*, (5 M.H.C.R., 185), and *Madhan Mohan Singh* v. *Kangu Doss Chuckerbutty*, (12 B.L.R., 201), referred to.

Appa Rao v. *Venkataramanayamma* 55

10. ——————————————————, **s. 244**—"*Parties to the suit*"—*Subsequent suit by a defendant who had been exonerated in a former suit—Maintainability of such suit*:

A family consisted of plaintiff's father, first defendant's father, and second defendant's grand-father. Plaintiff's brother died, leaving a widow. Plaintiff's father then died and also left a widow (plaintiff's mother), him surviving. The brother's widow brought a suit for maintenance against the representatives of the first and second defendants' branches of the family, plaintiff's mother being joined as third defendant. A decree was passed against the two first-mentioned defendants, but plaintiff's mother was exonerated on the ground that, being a female, she was not liable. In execution of the decree, certain lands were brought to sale and purchased by the brother's widow, who transferred them to another person. At the death of plaintiff's mother, which occurred subsequently, the said lands would have vested in the plaintiff, who now brought this suit claiming that the sales referred to were not binding on her (plaintiff) inasmuch as her mother had not been a party to the decree under which they had taken place:—*Held*, that where a party defendant in a suit is exonerated from such suit, the suit being dismissed against him and a decree passed against a co-defendant in the suit, and in execution of that decree property belonging to, and in the possession of, the defendant who was so exonerated from the suit is attached and sold, the latter is not entitled to maintain a suit for recovery of possession of the property, and the question of his claim to, and to recover possession of, the property is a question falling within section 244 of the Code of Civil Procedure, so as to debar him from maintaining such suit. *Gadicherla China Seetayya* v. *Gadicherla Seetayya*, (I.L.R., 21 Mad., 45), explained.

Ramaswami Sastrulu v. *Kameswaramma* 361

11. ——————————————————, **ss. 244, 258**—"*Court executing a decree*" *includes proceedings initiated by decree-holder and by judgment-debtor—Transfer of Property Act—Act IV of* 1882, *ss.* 60, 88, 99—*Purchase by mortgagee holding decree for sale, of portion of mortgaged property, subject to mortgage—Impossibility of mortgagee freeing himself by such purchase from liability to be redeemed*:

A mortgagee having obtained a decree against his mortgagor for the sale of the mortgaged property, a portion of the latter was subsequently sold, subject to the said decree, in execution of a money decree obtained by a third party against the mortgagor. The mortgagee purchased the portion so sold, whereupon the mortgagor presented a petition under section 258 of the Code of Civil Procedure claiming that the mortgagee was bound to discharge his mortgage debt and should be called upon to certify satisfaction of his decree:—*Held*, that petitioner was not entitled to the relief prayed for, but only to proceed upon the footing that the portion of the mortgaged property which had been purchased by the mortgagee remained, notwithstanding such purchase, redeemable by petitioner together with the remainder of the property. On the question whether the purchase by a mortgagee of a portion of the mortgaged property at a Court sale in execution of the money decree of a third party, involves a taking advantage by the mortgagee of his fiduciary position as mortgagee:—*Held*, that the principle of the impossibility of a mortgagee freeing himself from his liability to be redeemed as affirmed in *Martand* v. *Dhondo* (I.L.R., 22 Bom., 624) and *Mayan Pathuti* v. *Pakuran* (I.L.R., 22 Mad., 347) was applicable, even in the absence of fraud or collusion between the mortgagee and the third party in execution of whose decree the purchase of the equity of redemption had been made, and that such a purchase contravened the principle underlying section 99 of the Transfer of Property Act and expressed in section 88 of the Indian Trusts

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Act. The provision in section 244 of the Code of Civil Procedure that questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of a decree shall be determined by order of the Court executing the decree, relates not only to proceedings initiated by the decree-holder but also to applications made by the judgment-debtor. Whether the subject-matter of the petition was an "adjustment" of the decree, within the meaning of section 258 of the Code of Civil Procedure—*Quære*.

Erusappa Mudaliar v. *Commercial and Land Mortgage Bank, Limited* ... 377

12. ——————————————————, **ss. 244, 278 to 283**—*Party to the suit—Order on claim by trustee for release of trust property attached under personal decree against trustee—Appeal from such order*:

A decree-holder having attached certain property in the course of execution, two of the defendants in the suit in which the decree had been passed presented a petition praying that the property might be released from the attachment on the ground that it had been set apart for charitable purposes and that it was held by defendants as trustees. The Subordinate Judge upheld the trust and ordered the properties to be released from the attachment. Plaintiff then appealed to the High Court, when objection was taken that no appeal lay against the order of the Subordinate Judge. The Court referred to a Full Bench the question whether an appeal lies against an order passed with regard to a party to a suit against whom there is a personal decree, in respect of a claim he may set up to hold property, attached in execution of that decree, as a trustee on behalf of third persons not parties to the suit:—*Held*, that such a claim falls under section 278 and not under section 244 of the Code of Civil Procedure and that no appeal lies against any order passed on it by the Court executing the decree. The claims of third parties whether put forward by themselves or by a party to the suit, must be dealt with under sections 278 to 283 of the Code of Civil Procedure, and not under section 244. *Roop Lall Dass* v. *Bekani Meah*, (I.L.R., 15 Calc., 437), referred to. Section 244 presupposes that the questions with which it deals are such as can be finally determined in the execution proceedings. If they cannot, it has no application. The Court should look to the substance of the objection and not to the accident that it is put forward by one person rather than another. *Upendra Bhatta* v. *Ranganatha Bhatta*, (I.L.R., 17 Mad., 399), considered; *Punchanun Bundopadhya* v. *Rabia Bibi*, (I.L.R., 17 Calc., 711), and *Murigeya* v. *Hayat Saheb*, (I.L.R., 23 Bom., 237), referred to.

Ramanathan Chettiar v. *Levvai Marakayar* **195**

13. ——————————————————, **ss. 246, 247**—*Execution of decree—Cross-decrees—Parties entitled under same decree to recover from each other*:

A plaintiff obtained a decree for the surrender to him of certain mortgaged property on his paying the defendants the mortgage amount within three months together with the value of improvements, and for the payment by defendants to him of the costs of suit. He applied to recover the said costs by the arrest of the defendants:—*Held*, that the defendants were entitled under section 247 of the Code of Civil Procedure to set off the amount payable by them to plaintiff by way of costs against the mortgage amount and value of improvements payable by plaintiff to them. *Bhagwan Singh* v. *Ratan* (I.L.R., 16 All., 395) approved.

Sankara Menon v. *Gopala Pattar* 121

14. ——————————————————, **s. 276**—*Kanom granted during a subsisting attachment—Subsequent discharge of judgment-debt, and other later attachments—Claim for rateable distribution—Effect of discharge in rendering first attachment inoperative as against all creditors*:

A kanom was executed by the karnavan of a tarwad in plaintiff's favour for valuable consideration for the discharge of judgment-debts decreed against the tarwad. On or before the date of the said kanom plaintiff's father had placed under attachment the properties covered by the kanom

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deed in execution of one of the said decrees; but the claim having been satisfied no Court sale followed. While the said attachment was still subsisting, and at a date later than that of the kanom, first defendant and other judgment creditors applied for and obtained orders for the attachment of the same properties. On plaintiff suing to establish the validity of his kanom, it was contended that in consequence of the said attachment first defendant would be entitled to rateable distribution, under section 295 of the Code of Civil Procedure, and that this was a claim enforceable under the attachment within the meaning of section 276:—*Held*, that the kanom was valid. The attachment subject to which the kanom had been granted ceased to be operative both as regards the attaching creditor and the other judgment creditors when the judgment-debt was discharged, and there could be no sale by the Court and no right on the part of the other creditors, in the circumstances, to apply for such a sale.

Kunhi Moosa v. *Makki* 478

15. ——————————————————————, ss. 287, 311—"*Material irregularity*," *in publishing or conducting a sale—Omission to state amount of Government tax payable—Right of person complaining to prove substantial loss:*

In a proclamation of intended sale issued under section 287 of the Code of Civil Procedure, the omission to state the amount of Government tax payable in respect of the land to be sold is a material irregularity within the meaning of section 311 of the Code. On such an irregularity being committed, the judgment-debtor whose lands have been sold is *prima facie* entitled to be given an opportunity for proving that he has sustained substantial loss by reason of it.

Madarsah Maracayar v. *Palaniappa Chetti* 628

16. ——————————————————————, s. 311—*Petition to have set aside a sale in execution—Position of decree-holder who has obtained leave to bid—Dissuasion of persons from bidding:*

A decree-holder who has obtained leave to bid at a judicial sale is, in regard to restrictions upon him, in the same position as any other purchaser. A charge against a bidder that he and those who have acted in concert with him have acted in such a manner as to prevent the best price from being obtained does not of itself amount to a charge of fraud, nor will proof of such concert invalidate the sale to him. The judgment of the High Court in *Woopendro Nath Sircar* v. *Brojendronath Mundul* ((1881) I.L.R., 7 Calc., 346), though a correct decision on the case, was too broadly expressed in comprehending any dissuasion by a bidder at a judicial sale of other persons from bidding, as a ground for setting aside the sale. The property of a judgment-debtor was sold in execution to the decree-holder, who, having obtained leave to bid, was declared purchaser at the auction sale at a price below its value. This decree-holder had on the day when the sale commenced agreed with a third person that, after it should be over, if he, the decree-holder, should have become the purchaser, he would then sell the property to that person for a specified sum. And these two combined that intending bidders should be dissuaded. The Judicial Committee affirmed the decision of the High Court that, on a petition for the setting aside of the judicial sale under section 311 of the Code of Civil Procedure, neither the fact of the above agreement, nor the dissuasion of bidders, afforded sufficient ground for making the order. But the High Court had decided, in favour of the petitioner, another point:—that there had been material irregularity, within that section, in an omission on the part of the decree-holding purchaser when he had applied for leave to bid. This had been that he had withheld information of the agreement from the Court which had granted the leave to bid not having been made aware of the arrangement. The omission to disclose this fact had, in the opinion of the High Court, amounted to a fraud upon the Court executing the decree, and entitled the petitioner to have the sale set aside on the ground that in point of law no leave to bid had been granted:—*Held*, by the Judicial Committee, that this ground had not been established by evidence on an issue between the parties, having been taken for the first time in the Court of

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appeal, with a change of the matter in controversy; and that the fraud on which alone the High Court's order could be sustained had neither been alleged nor proved.

Mahomed Mira Ravuthar v. *Savvasi Vijaya Raghunadha Gopalar* 227

17. ——————————————————————, ss. 365, 366—*Abatement of appeal—Decease of appellant—Application by representatives to be brought on record—"Legal representative"—More than one legal representative—Effect of application being made by some only of several legal representatives:*

During the pendency of an appeal two persons applied under section 368 of the Code of Civil Procedure to be brought on the record as legal representatives of the appellant, who had died. In their petition they stated that there were two other persons having interests equal to their own in the representation, who did not join in the application and were not made parties by the applicants for reasons that were given. The applicants were duly placed on the record as representatives of the deceased appellant within the time limited by article 175A of schedule II of the Limitation Act. After the period of limitation had elapsed the respondents applied under sections 366 and 582 of the Code of Civil Procedure for an order that the appeal had abated on the ground that the former petitioners had not added all the persons who had interests equal to their own in the representation. The Subordinate Judge held that the representation of the two applicants was sufficient to prevent the abatement of the appeal, but he made the other two representatives respondents on the record. He subsequently heard and allowed the appeal. On its being contended, on second appeal, that the appeal to the subordinate Court had abated and should have been dismissed by reason of the non-joinder of the other two representatives:—*Held*, that though, in article 175A of schedule II of the Limitation Act, the application is expressed to be an application under section 365 of the Code of Civil Procedure and section 366 is not mentioned, yet for the purpose of considering the question of abatement the two sections must be read together. When there are more than one legal representative of a deceased appellant, all those representatives must, so far as it is possible for this to be done, join in an application under section 365 and the words "legal representative" in section 365 of the Code of Civil Procedure, (and similarly the words "any person" and "the legal representative" in section 366) strictly construed must, in such a case, be read in the plural and as including all the legal representatives. But where all the representatives cannot be joined as applicants, sections 365 and 366 should not be construed so as to have the effect of rendering the application no application by "the legal representative" within the meaning of the sections so that the appeal must be held to have abated. *Bhikaji Ramchandra* v. *Purshotam*, (I.L.R., 10 Bom., 220), and *Ghamandi Lal* v. *Amir Begam* (I.L.R., 16 All., 211) considered.

Musala Reddi v. *Ramayya* 125

18. ——————————————————————, ss. 375, 622—*Compromise of suit—Dispute as to factum of compromise—Order dismissing suit in consequence of alleged compromise—Application to High Court by revision petition under section 622—Right of appeal against order dismissing suit—Appeal—Practice—Acceptance of civil revision petition as appeal on Court fee being paid:*

During the pendency of an appeal in a District Court a petition was filed by the pleaders of the plaintiffs and defendants in the suit, praying on behalf of their clients that the case might be struck off the file on the ground that the matter in dispute had been compromised. Two of the plaintiffs then filed a counter-petition denying that a compromise had been arrived at and praying that the appeal might be heard on its merits. The District Judge, after some intermediate orders, struck off the appeal, as prayed in the petition. The two plaintiffs preferred a civil revision petition to the High Court whereupon it was objected that the petition could not be entertained as an appeal lay against the order of the District Judge inasmuch as it was not a decree in pursuance of a compromise under section 375 of the Code of Civil Procedure, but an order passed on a dispute as to

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whether a compromise had in fact been arrived at. The petition had been presented within the time allowed for appeal:—*Held*, that inasmuch as the petition impeached the alleged compromise as not being a "lawful compromise" an appeal lay against the order of the District Judge; but that the petition might be treated as an appeal, on the Court fee being paid. Where a party to a suit impugns an alleged agreement or compromise by which he would be bound the Court must satisfy itself by evidence that the agreement or compromise is a lawful one and that its terms have been consented to by the parties to the suit before it can proceed under section 375 of the Code of Civil Procedure to record it and pass a decree in accordance therewith.

Sridharan Somayajipad v. *Puramathan Somayajipad* 101

19. ——————————————————, **ss. 492, 503**—*Guardians and Wards Act—Act VIII of* 1890, *ss.* 33, 43, 47, 48 *and* 49—*Appeal—Order purporting to be passed under appealable section—Appeal entertained though Judge had no power to pass orders under the section as he purported to do:*

By section 48 (4) of the Guardians and Wards Act, 1890, in case of disobedience to an order passed under sub-sections (1) and (2) of that section, in relation to the conduct or proceedings of guardians, the order may be enforced in the same manner as an injunction granted under section 492 or section 493 of the Code of Civil Procedure. On a petition being presented to a District Court, asking that the guardians of certain minors, who had been appointed by the Court under the Guardians and Wards Act, might be removed, the Judge passed an order in which he purported to issue an injunction under section 492 of the Code of Civil Procedure for the attachment of the estate of the minors and to appoint a receiver to manage the estate. On an appeal being preferred against the said orders it was contended that the Judge must be taken to have acted under the Guardians and Wards Act, 1890, and that inasmuch as no appeal was provided by that Act in respect of such an order, no appeal lay:—*Held*, that though both orders were passed without jurisdiction, the Judge purporting to have acted under section 492 of the Code of Civil Procedure as regards the issue of an injunction, and under section 503 as regards the appointment of a receiver, inasmuch as orders under either of these sections were appealable, the fact that the Judge had no power in this case to pass orders under them did not bar the High Court from treating the orders as having been passed thereunder for the purpose of entertaining an appeal against the orders, since there was no provision of law under which the Judge could pass orders attaching property or appointing a receiver without such orders being subject to appeal. *Hurrish Chunder Chowdhry* v. *Kali Sundari Debia* (L.R., 10 I.A., 4; I.L.R., 9 Calc., 482), referred to. 517

Abdul Rahiman Saheb v. *Ganapathi Bhatta* ... ...

20. ——————————————————, **s. 566**—*Civil Courts Act—Act III of* 1873, *ss.* 12, 13—*Appeal—Transfer to Subordinate Judge of appeal petition heard by and pending before District Judge—Jurisdiction of Subordinate Judge to hear and determine the appeal—Jurisdiction is not conferred by waiver when Court has no inherent jurisdiction:*

An appeal, having been entered in a District Court, against the decision of a District Munsif, was heard in part by the District Judge, who remanded the suit to the District Munsif for findings on fresh issues. Findings having been duly returned, the District Judge transferred the appeal to the Subordinate Judge, who heard and determined it:—*Held*, that the District Judge had no power to transfer to a Subordinate Judge an appeal which was part heard and pending before him. The only inherent jurisdiction that a Subordinate Judge has is in original suits, under section 12 of the Civil Courts Act. In appeals he only acquires jurisdiction under the last clause of section 13 of the said Act, which enables a District Judge to transfer appeals to him, and unless that section is complied with the Subordinate Judge has no jurisdiction to hear or determine any appeal. Section 13 does not authorize the transfer to a Subordinate Judge of an appeal part heard

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and pending before the District Judge. The fact that objection was not taken to the jurisdiction of the Subordinate Judge did not confer jurisdiction upon him, the Subordinate Court not having inherent jurisdiction.

Kumarasami Reddiar v. *Subbaraya Reddiar* 314

21. ——————————————————, **ss. 562, 564**—Ex-parte *decision in Court of First Instance after hearing plaintiffs' evidence—Order by Appellate Court reversing decree and remanding suit for decision after hearing further evidence—Validity of such an order:*

One of three defendants failed to appear at the final hearing of a case at the Court of a District Munsif, and the other two, though they appeared, adduced no evidence. The District Munsif, after hearing witnesses for the plaintiffs, passed a decree in their favour, as prayed. The absent defendant applied, unsuccessfully, under section 108 of the Code of Civil Procedure, that the decree might be set aside, and then appealed to the Subordinate Judge, who reversed the decree and remanded the suit for decision after taking such further evidence as the said defendants or other parties might produce. On its being contended that, under sections 562 and 564 of the Code of Civil Procedure, the Subordinate Judge had no power to remand the suit for re-trial:—*Held*, that notwithstanding sections 562 and 564 an Appellate Court has inherent power, in such a case, not only to reverse a decree passed on evidence given by the plaintiff only, the defendant being *ex parte*, but also to direct a re-trial of the case.

Perumbra Nayar v. *Subrahmanian Pattar* 445

22. ——————————————————, **ss. 562, 568, 569**—*Additional evidence by Appellate Court—Invalidity of order reversing decree of lower Court on account of exclusion of evidence:*

A trial took place in the Court of a District Munsif, who heard evidence, decided issues and passed a decree. On an appeal being preferred the Subordinate Judge reversed the decree and remanded the suit for re-trial on the ground that certain documentary evidence which had been tendered by a defendant had been excluded, and plaintiffs' witnesses who had been cited in the list had not been wholly examined. On an appeal being preferred against that order:—*Held*, that section 562 of the Code of Civil Procedure was inapplicable to such a case; and that the proper and only legal course for the Subordinate Judge to take under the Code of Civil Procedure was to act either under section 568 or section 569, by himself taking the evidence which he considered to have been wrongly excluded, or to direct the District Munsif to take it. *Perumbra Nayar* v. *Subrahmanian Pattar*, (I.L.R., 23 Mad., 445), distinguished.

Seshan Pattar v. *Seshan Pattar* 447

23. ——————————————————, **s. 583**—*Property taken from petitioner by process of Court under decree—Subsequent reversal of decree—Petition for restitution—Custody of third party—Principles on which restitution is ordered:*

Two trustees of a temple having been removed from office, a suit was brought against them by the newly-appointed trustees and a decree obtained restraining them from interfering with the affairs of the temple. In accordance with that decree property of the temple was taken from them by process of the Court and handed to the new trustees. On appeal to the High Court, however, the decree was reversed and restitution was now applied for by the survivor of the late trustees, from whom the property had been taken. In the meanwhile a third party had been appointed an additional trustee to the newly-appointed trustees:—*Held*, that the principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost; and it is the duty of the Courts to enforce that obligation, unless it be shown that restitution would be clearly contrary to the real justice of

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the case. That with reference to the position of innocent third parties, the rule that a plaintiff in an action to recover land cannot, by his writ of restitution or assistance, dispossess a stranger to the proceeding holding possession on an independent title or claim of title and not in collusion with the defendant, does not apply where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of the Court:—*Held*, therefore, that the trustee who had been dispossessed must be given an opportunity to prove whether any and which of the temple properties were in his custody as alleged and whether he was deprived of such custody under the decree which was reversed, and whether the newly-appointed trustees acquired the custody of them thereunder; and that, if substantiated, the claim for restitution could not be successfully resisted.

Dorasami Ayyar v. *Annasami Ayyar* 306

24. ——————————————————, s. 586—*"Suit of the nature cognizable in Courts of Small Causes"—Suit for rent other than house-rent—Second appeal:*

A suit for the recovery of rent other than house-rent is a suit of the nature cognizable in Courts of Small Causes, within the meaning of section 586 of the Code of Civil Procedure, and no second appeal lies from a decision therein when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees. So *held* (SUBRAHMANIA AYYAR, J., dissenting). *Vedachala Mudali* v. *Ramasami Raja*, (I.L.R., 22 Mad., 229), overruled.

Soundaram Ayyar v. *Sennia Naickan* 547

25. ——————————————————, s. 626—*Order for review—Omission to record reasons for granting—Validity of order:*

An order intended to operate as an order for review is not invalidated by an irregularity in its form by reason of which it purports to be an order made on an application to set aside a decree and restore a suit for trial. The provision in section 626 of the Code of Civil Procedure that a Judge granting an application for a review "shall record with his own hand his reasons for such opinion," is directory and an order is not necessarily invalidated by the fact that the reasons are not recorded, though there may be cases in which it is necessary in the interests of justice that the reasons should be recorded, and in such cases the record would be essential to the validity of the order.

Manicka Mudaliar v. *Gurusami Mudaliar* 496

CONTRACT ACT—ACT IX OF 1872, s. 25, cl. (3)—*Promise to pay a barred debt—Limitation Act—Act XV of 1877, s. 19, sched. II, art. 110:*

In defence to a suit for rent a tenant pleaded that a portion of the claim was barred by limitation. Plaintiff relied on a letter which had been signed by defendant, after the disputed portion had become barred, and in which the defendant, after referring to the periods in respect of which the arrears of rent were due, said "I shall send by the end of Vysakha month":—*Held*, that the document contained the ingredients required by section 25, clause (3), of the Contract Act, and that the claim was not barred by limitation. A document sufficiently complies with section 25 of the Contract Act when it is signed by the person to be charged, and refers to the debt in such a way as to identify it, and contains a promise to pay wholly or in part the debt referred to therein, or expresses an intention to pay which can be construed to be a "promise." To create a "promise" within the meaning of the section it is not necessary that there should be an accepted proposal reduced to writing, a written proposal, accepted before action, becoming by the definition clause, a promise when accepted. The words of the section show that it is the debt and not a sum of money in consideration of the barred debt that the promisor should refer to.

Appa Rao v. *Suryaprakasa Rao* 94

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2. ——————————————————, s. 69—*Hindu Law—Liability of undivided brother of deceased Hindu to defray expenses of his niece's marriage—Improper refusal—Performance by widow—Maintainability of suit brought by widow—"Person who is interested in the payment of money":*

The defendant having improperly refused to perform the marriage ceremony of his niece, the daughter of his undivided brother (deceased), the widow of the latter herself performed the ceremony, borrowing money for the purpose, and sued her late husband's said brother (the defendant) to recover the amount expended on the marriage. On its being contended that defendant was under no obligation to provide for the expenses of his brother's daughter's marriage:—*Held*, that defendant was liable, the marriage having been properly performed:—*Held, further*, that the suit was maintainable though it had been brought by the mother of the bride and not by the bride herself. *Semble*, that the mother was, within the meaning of section 69 of the Indian Contract Act, interested in making the payment which had given rise to the action. It was not necessary for her to prove that she had been compelled to make it, or that she had made it at the defendant's request.

Vaikuntam Ammangar v. *Kallapiran Ayyangar* 512

COURT FEES ACT—ACT VII OF 1870—*Suit for ejectment—Claim by tenants for improvements of greater value than plaint valuation—Appeal by tenants for improvements—Court fees payable on such appeal:*

In a suit for ejectment, in which the plaint land was valued at Rs. 50 and Court fee paid on that valuation, the tenants claimed Rs. 500 as compensation for improvements, which claim was disallowed. The tenants appealed on the ground that their claim for improvements should have been allowed, but only paid Court fee on the plaintiff's valuation. On a reference as to whether the value of the improvements ought not to be taken into account for the purpose of levying the Court fee:—*Held*, that as the claim for improvements was not the subject-matter of the suit, but was merely incidental to the decree for possession, and on grounds of convenience, the fee payable by an appellant in such a case should be that payable in a suit for possession of land.

Reference under Court Fees Act, s. 5 84

2. ——————————————————, s. 7, IV (c)—*Fee payable on appeal—Suit for declaratory decree—Possibility of valuing subject-matter—Original valuation by plaintiff:*

A plaintiff was granted a decree (which was affirmed on appeal to the Subordinate Court), declaring a sale deed invalid on the ground that it had been obtained by fraud, coercion, undue influence and without consideration. The suit had been originally valued by plaintiff at Rs. 800, but by an order of the Munsif's Court that figure was altered to Rs. 2,000, the amount mentioned in the deed. One of the defendants preferred a second appeal to the High Court, where a question arose as to the amount of duty payable on such appeal:—*Held*, that section 7, IV (c), of the Court Fees Act applied, and that the valuation given by the plaintiff was the valuation to be accepted. Whether the reference to an appeal in the sub-section applies to a case in which the subject-matter of the appeal is not co-extensive with the subject-matter of the suit.—*Quære*. *Karam Khan* v. *Daryai Singh*, (I.L.R., 5 All., 331), considered.

Samiya Mavali v. *Kinammal* 490

CRIMINAL BREACH OF CONTRACT ACT—ACT XIII OF 1859, s. 2—*Money advanced on account of work to be performed—Loan on condition that the workman should enter into a contract of service:*

A workman agreed in writing to work for the proprietors of an estate for four years and one month, from 1st March 1899 to 31st March 1903, for an initial advance of one rupee, which was not to be repaid till after the expiration of the agreement. The same person subsequently obtained

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an advance of Rs. 10, to be re-imbursed by a monthly deduction of one rupee from his wages. He worked from 1st March 1899 till 18th September 1899 when he ceased to work, leaving in all a sum of Rs. 5 to be accounted for in the adjustment of the total advance. He was subsequently charged and convicted under section 2 of the Criminal Breach of Contract Act XIII of 1859:—*Held*, that the initial advance of one rupee was not money advanced on account of work to be performed, but rather a loan made without interest on the condition that the workman would enter into a contract of service for the duration of the loan; and that the Criminal Breach of Contract Act, 1859, was inapplicable to this case; that, with reference to the ten rupees to be repaid out of wages, the Act applied, and an order should be made directing the workman to work until the expiration of the term of the contract on account of which this sum had been advanced.

Tangi Joghi v. *Hall* 203

CRIMINAL PROCEDURE CODE—ACT V OF 1898, s. 161—*Examination of witnesses by the Police—Legal obligation to speak the truth—Refusal to answer questions—Liability to punishment under sections* 176, 179 *and* 187 *of the Indian Penal Code:*

A refusal to answer questions asked by a Police officer under section 161 of the Code of Criminal Procedure is not punishable under sections 176, 179 and 187 of the Indian Penal Code.

Queen-Empress v. *Sankaralinga Kone* 544

2. ——————————————————, **s. 195**—*Sanction for prosecution—Notice to person to prosecute whom sanction is sought—Proceedings before Sessions Court—Proper exercise of discretion:*

A Sessions Court when granting sanction to prosecute under section 195 of the Code of Criminal Procedure should so frame the proceedings before it as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. Although notice is not invariably necessary in cases under the section referred to, the grant of an order sanctioning prosecution is a judicial act, and there may be circumstances—(such as in those cases in which there has been a difference of opinion as to the desirability for granting sanction)—in which a proper discretion cannot be said to have been exercised unless the persons sought to be prosecuted have been given an opportunity to be heard. An order of a Sessions Judge, sanctioning a prosecution, containing nothing from which the High Court could conclude that he had directed his mind to the real questions in such cases, namely, whether there was a *primâ facie* case on which a prosecution could be instituted with a fair chance of success, the High Court revoked the sanction.

Pampapati Sastri v. *Subba Sastri* 210

3. ——————————————————, **ss. 195, 476**—*Order by Deputy Magistrate sanctioning prosecution—Complaint by Deputy Magistrate—Jurisdiction of Sessions Court to interfere:*

A Deputy Magistrate having decided that certain witnesses (who had given evidence before himself and before two other Magistrates on different occasions relating to charges of rioting and causing hurt) had wilfully committed perjury on one occasion or another, ordered them to be prosecuted for perjury and bound them over to take their trial. The Sessions Judge set aside the said order, deeming it undesirable that sanction to prosecute should be given under the circumstances:—*Held*, that whether the Deputy Magistrate had intended to pass an order under section 476 or to make a complaint under section 195 (1) (*b*) of the Code of Criminal Procedure the Sessions Judge had no power to interfere: also that the power of revoking given under section 195 (*b*) is only in respect of sanctions, and not of complaints.

Queen-Empress v. *Ankunna* 205

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4. ——————————————————, **ss. 195, 476**—*Penal Code—Act XLV of* 1860, *s.* 193—*Intentionally giving false evidence at a judicial proceeding—Preliminary enquiry by a Magistrate:*

At a preliminary enquiry held by a Sub-Divisional Magistrate, at the direction of the District Magistrate, into the circumstances of a complaint against the police, a witness made a false statement on oath. Notice was subsequently issued calling upon the said witness to show cause why sanction should not be granted for his prosecution. The Magistrate having held that the witness was bound to tell the truth at the said enquiry and having granted sanction for his prosecution under section 193 of the Indian Penal Code:—*Held*, that the enquiry before the Magistrate in the course of which the alleged offence was committed was not a judicial proceeding within the meaning of section 193 of the Indian Penal Code, and the witness could not be convicted under that section.

Queen-Empress v. *Venkataramanna* 223

5. ——————————————————, **s. 197**—*Charge against village magistrate for alleged offence while acting not in a judicial capacity—Sanction:*

A village magistrate having been apprised of a disturbance in his village forcibly separated the combatants, one of whom thereupon preferred a charge against him of causing hurt. The complaint was taken by the Sub-Magistrate upon his file without any previous sanction of the Government or other authority mentioned in section 197 of the Code of Criminal Procedure. The village magistrate raised the objection that the prosecution could not legally be proceeded with until such sanction had been first obtained. The Sub-Magistrate held that such sanction was unnecessary and kept the case on his file and commenced to enquire into it. The village magistrate presented a petition to the District Magistrate raising the same ground of objection, whereupon the District Magistrate quashed the whole of the proceedings, holding that the Sub-Magistrate had no jurisdiction to try the case against a village officer without sanction having been first obtained:—*Held*, that sanction was not necessary under section 197 of the Code of Criminal Procedure. The village magistrate, while preventing an offence, was not acting in the capacity of a Judge, or a public servant not removable from office without the sanction of Government, and therefore the section referred to had no application:—*Held also*, that the order of the District Magistrate quashing the proceedings of the Sub-Magistrate was passed without jurisdiction. *Semble*, that a village magistrate exercising jurisdiction, and trying an offender under Regulation XI of 1816 is a Judge within the meaning of section 197 of the Code of Criminal Procedure and section 19 of the Indian Penal Code.

Kandasami Chetti v. *Soli Goundan* 540

6. ——————————————————, **s. 209**—*Examination of accused before committal—Discretion of Magistrate:*

It is the duty of a Magistrate, before committing accused persons for trial, to examine them for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of section 209 of the Code of Criminal Procedure is that it is not left to the discretion of the Magistrate who intends to commit to examine the accused. He is bound to examine them, and if he makes an order of commitment without such examination, the order is irregular.

Queen-Empress v. *Pandara Tevan* 636

——————————————————, **s. 248**—*Withdrawal of complaint—"Complainant":*

A complaint having been made to the police, the latter caused charges to be preferred under sections 143 and 504 of the Indian Penal Code against certain accused. The person who had complained to the police subsequently filed a petition praying the Second-class Magistrate to withdraw

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the charges under section 248 of the Code of Criminal Procedure. The Magistrate permitted the withdrawal and directed the accused to be set at liberty :—*Held*, that the order was bad, there being no "complainant" in the case and that consequently the Magistrate in purporting to act under section 248 had exceeded his powers.

Queen-Empress v. *Chenchayya* 626

8. ——————————————————, ss. 269 (1), 536 (2)—*Order directing trial by jury—"Particular class of offences"—Revocation of order—Jury case tried by assessors—Omission to take objection before finding recorded—Validity of trial :*

By section 269 of the Code of Criminal Procedure the local Government may, with the previous sanction of the Governor-General in Council, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order. In the Fort St. George Gazette, dated 30th August 1899, it was notified that, whereas by orders previously made the trial of persons charged with certain offences should, in certain districts of the Presidency, including that of Tinnevelly, be by jury; and whereas disturbances known as the anti-Shanar disturbances had taken place in the districts of Tinnevelly and Madura, and certain persons stood committed for trial and others might thereafter be similarly committed in connection therewith, the Governor in Council, with the previous sanction of the Governor-General in Council, directed, under section 269 of the Code of Criminal Procedure, that the said previous orders be revoked as regards the persons referred to, and that such persons should be tried with the aid of assessors and not by jury. Certain persons having been so tried for offences under sections 148, 454, 395 and 323 of the Indian Penal Code, one assessor gave it as his opinion that none of them were guilty: the other assessor finding some of them not guilty. The Additional Sessions Judge convicted and sentenced all the accused, whereupon the objection was taken, on appeal, in the High Court, that the trial should have been by jury and not with the aid of assessors and that the conviction should therefore be set aside. The objection was not taken at the trial:—*Held*, that the omission to take objection to the trial before the Court had recorded its findings was fatal to the contention now urged that the trial was invalid. *Held further*, that even assuming that objection had been duly taken, the offences connected with the outbreak had been rightly treated as a "class of offences," and that it was competent to the Government, with the consent of the Governor-General in Council, to revoke the previous notification so far as it related to that class.

Queen-Empress v. *Ganapathi Vannianar* 632

——————————————————, s. 271—*Evidence Act—Act I of 1872, s. 30—Confession by one of several persons jointly tried for the same offence—Plea of guilty by person so confessing—Discretion to continue trial after plea of guilty :*

The trial of an accused person does not necessarily end if he pleads guilty. Under section 271 of the Code of Criminal Procedure, where an accused pleads guilty "the plea shall be recorded," and the accused "may be convicted" thereon; but evidence may be taken in sessions cases as if the plea had been one of "not guilty," and the case decided upon the whole of the evidence including the accused's plea. When such a procedure is adopted the trial does not terminate with the plea of guilty, and therefore a confession by the person so pleading may be taken into consideration under section 30 of the Indian Evidence Act, 1872, as against any other person who is being jointly tried with him for the same offence. A trial does not strictly end until the accused has been either convicted or acquitted or discharged.

Queen-Empress v. *Chinna Pavuchi* 181

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10. ——————————————————, s. 436—*Fresh inquiry after improper discharge of accused persons—Jurisdiction of Sessions Judge after acquittal :*

Charges under sections 304 and 147 of the Indian Penal Code were brought by the Police against certain accused in the Court of a Deputy Magistrate, who took all the evidence for the prosecution but went on furlough without passing any order of committal or otherwise. His successor, considering the evidence insufficient to support the charges, altered them to charges under sections 325 and 147 of the Indian Penal Code, and after hearing evidence for the defence acquitted the accused. The Sessions Judge considering the alteration in the charges improper at such a stage ordered a fresh inquiry into the offence:—*Held*, that the Sessions Judge had exercised a jurisdiction not conferred upon him by law and that his order for a fresh inquiry must be set aside.

Queen-Empress v. *Hanumantha Reddi* 225

DISTRICT MUNICIPALITIES ACT (MADRAS)—ACT IV OF 1884, BYE-LAW No. 48—*District Municipalities Act Amendment Act (Madras)—Act III of 1897—Covering a drain without municipal permission :*

A bye-law of a municipality had been framed under the powers conferred by an Act of 1884 as amended by an Act of 1897, and was to the following effect:—"No public drain shall be covered without the permission of the municipal council." It had come into force in 1890. Prior to its coming into operation an earlier bye-law had subsisted, in substantially the same terms. An occupier of premises, who had covered a drain during the subsistence of the earlier bye-law, was charged with having committed an offence under the later bye-law, and contended by way of defence that he could not be convicted inasmuch as the act complained of had been committed before the passing of the Act under which the complaint was laid. He was convicted by a Bench of Magistrates:—*Held*, that the conviction was right. *Per* ARNOLD WHITE, C.J.—The bye-law applies to all drains which existed in a covered state at the time when it came into operation. The word "shall" is used throughout the bye-laws in the imperative, and not with reference to time, and this is the sense in which it is used in the bye-law in question. *Per* BENSON, J.—A bye-law similar in terms to that under which the accused had been convicted having been in existence under the then Municipal Act at the time when the accused first covered the drain in question, the liability then incurred by him continued, under the General Clauses Act (Madras) unaffected by the passing of the present Municipal Act. The contention that the accused could not be convicted because the act complained of was committed before the present Municipal Act was passed, therefore, failed.

Parimanam Pillai v. *Chairman, Municipal Council, Ootacamund* 213

2. ——————————————————, ss. 71 (2), 262 (2)—*Notice of intended insertion of name or property on assessment books—Substantial compliance with Act—Action to recover money paid in respect of tax :*

By section 71 of the Madras District Municipalities Act, 1884, the Chairman may, at any time, amend the assessment book in manner therein provided, but no person's name or property shall be inserted, nor any increase of assessment made unless notice thereof has been served on such person not less than thirty days previous to a day to be specified in such notice as the day upon which such notice will be revised. By section 262, no assessment made under the authority of the Act shall be impeached and no action shall be maintained in any Court to recover money paid in respect of any tax levied under the Act provided that the directions and provisions of the Act shall have been substantially complied with. A notice which was served upon plaintiff by a municipal council purported to be issued under section 71 (2) of the Madras District Municipalities Act, 1884, and was as follows:—"I have the honour to forward herewith a list showing the amount of land and water taxes due for 1895-1896 on devastanam lands within the limits of this municipality, and to request

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that you will be good enough to cause the amount to be remitted to this office at your earliest convenience"; —*Held*, that the notice was bad, that the terms of section 71 (2) had not been substantially complied with, and that consequently section 262 (2) had no application. *Municipal Council, Nellore* v. *Rangayya*, (I.L.R., 19 Mad., 10), explained.

Municipal Council, Tanjore v. *Umamba Boi Saheb* 523

DOCUMENT—*Construction of—Alteration in material part—Effect of alteration as vitiating document—Vesting of interest by execution of mortgage instrument:*

By an agreement entered into between plaintiff and defendants' predecessors in title plaintiff undertook to sell and convey certain lands to the purchasers and to allow half the purchase money to remain at interest for three years on security of the lands sold. Plaintiff's mother was alive, as also his son, who was then a minor. In order to protect the purchasers from any claims by the said mother or son as against the lands so agreed to be sold plaintiff further agreed to give the purchasers a bond indemnifying them from any such or other claims. Plaintiff in pursuance of the said agreement duly executed a conveyance of the lands; he also gave the purchasers an indemnity in respect of claims by his mother as against the lands. The purchasers executed a mortgage over the lands in plaintiff's favour, in which the indemnity to be furnished by plaintiff was at first referred to in general terms, but the document concluded with the words, "a security should be furnished for this sum on account of the minor only." The balance of purchase money so secured not having been paid plaintiff brought a suit for the sale of the mortgaged land and before doing so tendered an indemnity protecting the defendants against any claims that might be made as against the lands by the plaintiff's said minor son. It was found that the words "for the minor only" had been added to the mortgage instrument after its execution and without the mortgagor's consent. On its being contended that the alteration was a material one and vitiated the document, and that the suit, being based on the altered document, must fail; and that the tender of a general guarantee as originally agreed upon was a condition precedent to the plaintiff's right to sue:—*Held*, (O'FARRELL, J., dissenting), that on the execution of the mortgage instrument an interest in the property comprised therein at once became vested in the plaintiff; that such interest was not and could not have been devested from him by the subsequent addition of the words referred to, and that in asking for the sale of the land plaintiff was seeking to enforce, not a right resting on the contract or covenant, but one arising by operation of law with reference to the vested interest created by the instrument having been executed; that though reference was made in the plaint to the provisions relating to the mortgage instrument in its altered state, such reference was not an essential part of plaintiff's cause of action, and that the suit was not necessarily based on the altered instrument; that the execution of a security bond in terms of the mortgage instrument before it was altered was not a condition precedent and the suit was sustainable though no such security had been given before the institution of the suit; and that (the question of damages not arising) plaintiff was entitled to a decree on the mortgage instrument, which would also provide that he must furnish a proper security bond before an order absolute would be passed. *Per* COLLINS, C.J., and BENSON, J.—(in the order calling for a finding). That the mortgage instrument having provided for security to be given by plaintiff in general terms, the addition of the words for "the minor only" restricted the liability of the property to be given by plaintiff as security to claims made by the said minor son. It diminished the guarantee to be given by plaintiff against claims by the mother or others. It was thus an alteration in a material part of the document and would vitiate it as a basis for the plaintiff's suit unless the plaintiff could show that the alteration had been made with the consent of the mortgagors, who executed the document. *Per* O'FARRELL, J.—That inasmuch as the suit was based not on the transferred right but on the altered document and as no obligation had as yet attached under the unaltered document, the suit should be dismissed; that the defendants' liability was contingent upon the prior execution by plaintiff of a general

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guarantee and not of the limited one which he, relying on the fraudulent alteration, had tendered; that where an agreement has, as to one of the parties, been wholly executed, the altered contract may be given in evidence of the correlative obligations incurred by the other party; but that here the agreement so far as it related to repayment of the purchase money was executory and contingent upon the fulfilment by the plaintiff of the prior obligation to execute a proper guarantee; and that a conditional decree upon a proper security bond being executed could not be given.

Subrahmania Ayyan v. *Krishna Ayyan* 137

EJECTMENT SUIT—*Lands held on amaram tenure resumable at will on reasonable notice—What amounts to reasonable notice considered:*

A village and its hamlets had been given by a plaintiff's ancestors to the ancestors of the defendants on amaram service. Plaintiff now required the defendants to hand over the land, and had served two notices on them to that effect. The first of such notices had been served less than three months before the end of a fasli; in the second, suit was threatened in default of reply within ten days:—*Held*, that lands held on amaram tenure are resumable, and that the defendants had no permanent right of tenure. —*Held further*, that before such resumption of lands can take place reasonable notice must be given: and that the notices which had been served were insufficient.

Narasayya v. *Venkatagiri Rajah* 262

EVIDENCE—*Admissibility of receipt showing payment of money—Exclusion for want of registration—Document proving extinction of mortgage right:*

Plaintiff purchased a portion of certain land from two persons who owed him money on mortgage bonds, and took a mortgage over another portion, taking possession of the whole estate as security for the balance of his debt. He then permitted defendants to purchase a portion and to take a mortgage over the remainder of the lands, and gave them possession, on condition that they should pay to him the said balance that was due. Plaintiff, alleging that defendants had failed to pay him the balance, now filed this suit to recover possession of the land. Defendants contended that the balance had been duly paid, and in support of that contention produced a receipt which, however, was held to be inadmissible in evidence for want of registration. Oral evidence of the alleged payment was also excluded:—*Held*, that the receipt had been wrongly excluded. It did not purport to extinguish the mortgage right, and even if it did so it was receivable as evidence of the payment, oral evidence as to which was also admissible.

Appamma Nayuralu v. *Ramanna* 92

2.——————*Sale of land not joined in by all coparceners—Partial application of consideration towards debt binding on all—Suit for ejectment—Rights of purchaser:*

In a sale of land the consideration was expressed to be the discharge, by the purchaser, of a debt owing by the vendor and secured by mortgage on the land, and of sundry other debts which had been incurred by the vendor for family necessity. In a suit for ejectment by the vendor's coparceners, who were minors at the time and had not joined in the sale, it was held that there had been no legal necessity for the sale, which was accordingly declared to be not binding on the plaintiffs. It was, however, found that a portion of the consideration had been applied to the discharge of a mortgage debt which would have been also binding on the plaintiffs. On its being contended that plaintiffs' interest in the property comprised in the sale should be held liable to the extent of their share of the mortgage debt:—*Held*, that, in making the purchase, defendant was, with reference to plaintiffs, a mere volunteer, and could not, as against them, claim by way of equity a charge on their shares even though part of the consideration had been applied towards the discharge of their joint debt; also that

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if a purchaser wishes to stand by a sale which is only partially valid, he must be content with the vendor's share; and that if he wishes to repudiate the transaction altogether his only remedy is by suit against the vendor for the return of the price paid on the ground that the consideration for the same has failed.

Marappa Gaundan v. *Rangasami Gaundan* 89

EVIDENCE ACT—ACT I OF 1872, s. 30—*Confession by one of several persons jointly tried for the same offence—Plea of guilty by person so confessing—Criminal Procedure Code—Act V of* 1898, *s.* 271—*Discretion to continue trial after plea of guilty:*

The trial of an accused person does not necessarily end if he pleads guilty. Under section 271 of the Code of Criminal Procedure, where an accused pleads guilty, "the plea shall be recorded," and the accused "may be convicted" thereon; but evidence may be taken in sessions cases as if the plea had been one of "not guilty," and the case decided upon the whole of the evidence including the accused's plea. When such a procedure is adopted the trial does not terminate with the plea of guilty, and therefore a confession by the person so pleading may be taken into consideration under section 30 of the Indian Evidence Act, 1872, as against any other person who is being jointly tried with him for the same offence. A trial does not strictly end until the accused has been either convicted or acquitted or discharged.

Queen-Empress v. *Chinna Paruchi* 151

2.———————————, **s. 74 (1) (iii)**—*Document purporting to be a certified copy of a will taken from the Protocol of record in Ceylon—No proof that it had been made from or compared with the original—Inadmissibility of document:*

In support of a claim instituted in a Court in British India for a share in her deceased father's estate, plaintiff tendered in evidence a document which purported to be a certified copy of a will executed by her late father at Colombo, where he was said to have been at the date of the execution of the alleged will. The document was filed as an exhibit in the suit, but the Subordinate Judge held that it was not admissible in evidence. It bore an endorsement purporting to be signed by the Assistant Registrar-General for Ceylon to the effect that it was a true copy of a last will and testament made from the Protocol of record filed in his office. No evidence was tendered before the Subordinate Judge that the copy had been made from and compared with the original. On the question of the admissibility in evidence of the said document:—*Held*, that it was inadmissible; that it was not a public document within the meaning of section 74 (1) (iii) or (2) of the Evidence Act, and that in the absence of evidence that it had been made from and compared with the original, the provisions of that Act relating to secondary evidence of public documents were inapplicable. Whether section 35 of the Evidence Act applies to an entry in a public register or record kept outside British India—*Quære.*

Ponnammal v. *Sundaram Pillai* 499

GANJAM AND VIZAGAPATAM AGENCY COURTS ACT—ACT XXIV OF 1839—*Agency Rules passed under the Act—Agent's Court at Vizagapatam—Court of lowest grade—Jurisdiction:*

The Agent to the Governor at Vizagapatam has jurisdiction over all suits of a civil nature arising in the Agency. The rule regarding the institution of suits of a lesser pecuniary value than Rs. 5,000 in the Divisional Assistant's Court is, like the analogous rule contained in section 15 of the Code of Civil Procedure, one of procedure and not of jurisdiction. *Velayudam* v. *Arunachalam* (I.L.R., 13 Mad., 273), considered.

Gourachandra Patnaikudu v. *Vikrama Deo* 867

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——————————————— *Validity of Agency Rule No. XXII passed under the Act—Jurisdiction of High Court to transfer suit pending in the Agent's Court to the District Court—Indian Councils Act—24 & 25 Vict., cap.* 67, *s.* 25—*Letters Patent, s.* 15:

An order was made by a single Judge, by consent of the parties, transferring a case from the Court of an Agent to the Governor, Vizagapatam, to a District Court. A further order was made by a single Judge which, though in form an order dismissing a review petition against the first-mentioned order, was in substance an adjudication upon the question whether the High Court has jurisdiction to order the transfer of a suit from the Court of such an Agent to a District Court:—*Held*, (1) that both orders were "judgments" within the meaning of section 15 of the Letters Patent and that an appeal lay therefrom; (2) that the High Court has no jurisdiction to transfer a suit pending in the Court of the Agent to the Governor, Vizagapatam, to the District Court of Vizagapatam; (3) that Agency Rule No. XXII, made in 1840, under the powers conferred by Act XXIV of 1839, is a valid rule.

Maharajah of Jeypore v. *Papayyamma* 329

GUARDIANS AND WARDS ACT—ACT VIII OF 1890, ss. 33, 43, 47, 48, and 49—*Civil Procedure Code—Act XIV of* 1882, *ss.* 492, 503—*Appeal—Order purporting to be passed under appealable section—Appeal entertained though Judge had no power to pass orders under the section as he purported to do:*

By section 43 (4) of the Guardians and Wards Act, 1890, in case of disobedience to an order passed under sub-sections (1) and (2) of that section, in relation to the conduct or proceedings of guardians, the order may be enforced in the same manner as an injunction granted under section 492 or section 493 of the Code of Civil Procedure. On a petition being presented to a District Court, asking that the guardians of certain minors, who had been appointed by the Court under the Guardians and Wards Act, might be removed, the Judge passed an order in which he purported to issue an injunction under section 492 of the Code of Civil Procedure for the attachment of the estate of the minors and to appoint a receiver to manage the estate. On an appeal being preferred against the said orders it was contended that the Judge must be taken to have acted under the Guardians and Wards Act, 1890, and that inasmuch as no appeal was provided by that Act in respect of such an order, no appeal lay:—*Held*, that though both orders were passed without jurisdiction, the Judge purporting to have acted under section 492 of the Code of Civil Procedure as regards the issue of an injunction, and under section 503 as regards the appointment of a receiver, inasmuch as orders under either of these sections were appealable, the fact that the Judge had no power in this case to pass orders under them did not bar the High Court from treating the orders as having been passed thereunder for the purpose of entertaining an appeal against the orders, since there was no provision of law under which the Judge could pass orders attaching property or appointing a receiver without such orders being subject to appeal. *Hurrish Chunder Chowdhry* v. *Kali Sundari Debia* (L.R., 10 I.A., 4; I.L.R., 9 Calc., 182), referred to.

Abdul Rahiman Saheb v. *Ganapathi Bhatta* 517

HINDU LAW—*Adoption—Preference of the adoptive mother, in the inheriting the family estate through the adopted son, over a senior co-wife:*

A Hindu, having two wives, adopted a son in conjunction with the co-wife who was the junior in marriage of the two, having chosen her to be present at the adoption with himself. The husband next died; and after him the adopted child, having inherited the impartible family estate, also died. The two widows survived them both:—*Held*, affirming the decisions of the Courts below, that the junior co-wife, having taken part in the adoption by her husband at his selection, inherited the impartible

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family estate upon the death of the adopted son, in preference to the co-wife who was senior in marriage, but who had not been conjoined in the adoption. *Kasheeshuree Debia v. Greesh Chunder Lahoree* ((1864) W.R. (Sup. Vol.) 71), referred to and approved.

Annapurni Nachiar v. *Forbes* 1

2. ———— *Adoption by widow—Assent of a majority of sapindas—Presumption of* bona fides*—Degree of relationship of sapindas to husband of adopting widow :*

A widow having survived her son, (who died unmarried and issueless), succeeded to his estate, and made an adoption with the assent of three out of the four of her late husband's sapindas who were living at the time and who had been divided from the deceased and from each other. The fourth sapinda, who had refused his consent (apparently without giving reasons for such refusal), now impugned the adoption on the ground that the consent of all existing sapindas was necessary to render it valid, at all events when all stood in the same degree of relationship to the husband of the adopting widow, as was the case here :—*Held*, that the assent of every existing sapinda in such a case was not necessary : and that that of a majority would suffice. *Collector of Madura* v. *Mootoo Ramalinga Sathupathy*, (12 M.I.A., 397), and *Parasara Bhattar* v. *Rangaraja Bhattar*, (I.L.R., 2 Mad., 202, referred to and considered. Adoption being a proper act it will be presumed that when the majority give their assent such assent was given on *bonâ fide* grounds. If, however, it be shown that the majority gave or withheld their assent from improper considerations such assent or dissent will be of no avail to the party relying on it. Any distinction based upon the degree of relationship as to whose assent is or is not essential becomes immaterial.

Venkatakrishnamma v. *Annapurnamma* 466

3. ———— *Bequest for immoral consideration—Condition of future cohabitation—Invalidity of bequest—Succession Act—Act X of* 1865, *s.* 114 :

A bequest by a Hindu testator, made conditional on the continuance of immoral relations between himself and the legatee, is void.

Tayaramma v. *Sitharamasami Naidu* 613

4. ———— *Estate of deceased widow who lived a life of unchastity—Right of step-son to inherit—Caste Disabilities Removal Act—Act XXI of* 1850, *s.* 1 :

The step-son of a deceased Hindu widow sued as her heir for possession of certain property. The defence was that the widow had deserted her husband in his lifetime and lived a life of unchastity and that the plaintiff's right of inheritance was in consequence destroyed :—*Held*, that assuming the widow to have been guilty of unchastity and to have been actually degraded for it, plaintiff's right to inherit her property in the absence of nearer heirs could not be affected by such degradation :—*Held also*, that though Act XXI of 1850 gives relief against the forfeiture of rights of persons deprived of caste on other grounds besides that of renouncing or being excluded from the Hindu religion, it does not restore to an outcaste all the rights which he, as a casteman, could have civilly enforced; nor does it contemplate the restoration of privileges the granting of which would amount to an interference with the autonomy of caste; nor does it interfere with the forfeiture of such a right, as, *e.g.*, to participate with other members of a caste in the benefits of a religious institution appropriated to the members of the caste, or to participate jointly with fellow castemen in the benefit of a caste institution; nor can it apply where the question is not as to the rights of a degraded person, but as to who is entitled to the property of a degraded person. *Kery Kolitany* v. *Monecram Kolita* (13 B.L.R., 1) referred to :—*Held, further*, that though under the Hindu Law a loss of caste by expulsion for specified reasons causes forfeiture of rights, it has never broken the relationship of the person expelled to those who remain within the caste, degradation having merely

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the effect of rendering the tie of kindred but dormant; and, *e.g.*, the degradation of either spouse does not dissolve the tie of marriage. It is impossible to construct out of the smritis and commentaries a consistent doctrine of "civil death" or "fiction of death." Prostitution does not sever the legal relation, and therefore the degradation of a woman in consequence of her unchastity does not in law entail a cessation of the tie of kindred between her and the members of her natural family or between her and the members of her husband's family. Nor does a wife's adultery, unattended by degradation, dissolve the marriage :—*Held*, therefore that the step-son was entitled to inherit the property, as sapinda of the widow's late husband in the absence of nearer heirs.

Subbaraya Pillai v. *Ramasami Pillai* 171

5. ———— *Liability of undivided brother of deceased Hindu to defray expenses of his niece's marriage—Improper refusal—Performance by widow—Maintainability of suit brought by widow—Contract Act—Act IX of* 1872, *s.* 69—*"Person who is interested in the payment of money" :*

The defendant having improperly refused to perform the marriage ceremony of his niece, the daughter of his undivided brother (deceased), the widow of the latter herself performed the ceremony, borrowing money for the purpose, and sued her late husband's said brother (the defendant) to recover the amount expended on the marriage. On its being contended that defendant was under no obligation to provide for the expenses of his brother's daughter's marriage :—*Held*, that defendant was liable, the marriage having been properly performed :—*Held, further*, that the suit was maintainable though it had been brought by the mother of the bride and not by the bride herself. *Semble*, that the mother was, within the meaning of section 69 of the Indian Contract Act, interested in making the payment which had given rise to the action. It was not necessary for her to prove that she had been compelled to make it, or that she had made it at the defendant's request.

Vaikuntam Ammangar v. *Kallapiran Ayyangar* 512

6. ———— *Maintenance—Right of discarded concubine to claim :*

A woman who has been kept by a man as his concubine for a number of years continuously and then discarded is not entitled under the Hindu Law to claim maintenance from him.

Ramanarasu v. *Buchamma* 282

7. ———— *Promissory note by member of an undivided Hindu family—Liability of other member—Negotiable Instruments Act—Act XXVI of* 1881, *ss.* 4, 26, 27 :

The maker of a promissory note (executed in plaintiff's favour), being a member of an undivided Hindu family, had borrowed from plaintiff the money represented by the note and purchased therewith land for the benefit of the family, which consisted of himself (the maker of the note), an uncle and the sons of the uncle. The uncle had always recognised the debt as a family debt, and the land purchased with the money borrowed had, in a subsequent division of property, been allotted to the uncle and his sons, who had also agreed with the maker of the note that they would discharge the debt. On a suit being brought against the maker of the note, as well as the uncle and his sons :—*Held*, (DAVIES, J., dissenting), that all the members of the undivided family were liable. *Per* SUBRAHMANIA AYYAR, J.—Even assuming that the maker of the note was not the manager of the family, he was the agent of his coparceners when buying the land and raising the loan, and his acts as such agent bound the uncle who expressly assented to them; also that inasmuch as the uncle was liable, his sons must be also held liable for the debt to the extent to which they were interested in the family property, and that even if they were minors when the money was borrowed. Whether, having regard to sections 233 and 234 of the Indian Contract Act, a principal cannot be proceeded against upon

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a negotiable instrument executed by an agent in his own name.—*Quære.* *Per* DAVIES, J., (1) Had the suit been brought on a bond, or on the debt of which the promissory note afforded evidence, other members of the family might have been held liable as well as the maker of the note, on the ground that the latter represented them. But in the case of a suit on a promissory note (as this suit was) no such representation could be alleged unless the persons said to be represented appeared by name on the face of the document; (2) Where the name of only one person appears on a promissory note and he does not purport to make it on behalf of any one but himself, none but the maker can be held liable to discharge it.

Krishna Ayyar v. *Krishnasami Ayyar* 597

8. ———— *Purchase by stranger from one of two daughters jointly entitled to their father's property—Decree for partition:*

A purchaser, having purchased certain property from one of two sisters jointly entitled to their deceased father's property, under the Hindu Law, re-sold it, whereupon the other daughter sued for a declaration that such sales were invalid as against her, and that the property might be restored to her and her sister, or that there might be a partition of it:—*Held*, that while one of two daughters cannot by any alienation alter the character of the daughters' estate so far as the right of survivorship or that of the reversioners is concerned, she may alienate her interest in the property, or have that interest taken and sold in execution of a decree against her. Also that, subject to the same condition, she may demand a partition of the property.

Kanni Ammal v. *Ammakannu Ammal* 501

9. ———— *Sapindas tracing relationship to common ancestor through two females:*

The widow of a Hindu having acquired property from her husband, and having died issueless, without disposing of it, the plaintiffs claimed, as the heirs of the husband, to recover it from the defendants, who were the brother and sister of the widow. The plaintiffs were found to be the sons of the daughter's daughter of the husband's paternal grandfather:—*Held*, that inasmuch as plaintiffs were sapindas of the deceased husband, it was immaterial that their relationship to the common ancestor should have to be traced through two females. They must therefore be held to be his bandhus and as such entitled to succeed to the property left by the widow.

Venkatagiri v. *Chandru* 123

10. ———— *Sudras—Sons born of a kept woman entitled to equal shares with legitimate sons in partition, the father so desiring:*

Sons born of a woman continuously kept by their father as a concubine (and whose connection with their father is neither adulterous nor incestuous), are, in the case of a Sudra's estate, entitled to equal shares with legitimate sons in a suit for partition, if it is the wish of the father that they should so participate. Clause 2 of section XII, Chapter I, Part II, of the Mitakshara, does not refer alone to the self-acquired property of the father.

Karuppannan Chetti v. *Bulokam Chetti* 16

11. ———— *Suit by managing member on behalf of his undivided family, other members not being joined—Maintainability of suit:*

The managing member of an undivided Hindu family sued in his own name for the recovery of certain land and asked for a declaration that it belonged to the plaintiff's family. Plaintiff had an undivided brother, and there was no evidence that he assented to or acquiesced in the institution of the suit:—*Held*, that the plaintiff was not entitled to sue without making his brother, the other member of the undivided family, a party to the suit. *Alagappa Chetti* v. *Vellian Chetti*, (I.L.R., 18 Mad., 33), followed; *Mahabala Bhatta* v. *Kunhanna Bhatta*, (I.L.R., 21 Mad., 373), distinguished.

Angamuthu Pillai v. *Kolandavelu Pillai* 190

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12. ———— *Suit for partial partition—Family property available for partition at the time—Property mortgaged with possession to third party not included—Maintainability of suit:*

One of two undivided brothers composing a Hindu family sold the whole of a house, which was in fact joint family property, alleging family necessity in justification of the sale. The other brother subsequently sold his undivided half share to two persons who now sued as plaintiffs for partition and possession of one-half of the house. The family owned another house which had, however, for some time been mortgaged with possession to a third party and was not available for partition at the time. On the plea being raised that the suit was one for partial partition and could not be sustained:—*Held*, that the suit was maintainable. Inasmuch as the other house was mortgaged with possession to a third party and therefore no longer available for immediate partition, the suit was one for partition of the whole of the family property liable to partition at the time. *Narayan Babaji* v. *Pandurang Ramchandra*, (12 Bom. H.C.R., 148), followed.

Kristayya v. *Narasimham* 608

13. ———— *Will—Construction—Devise of lands to brother to be enjoyed jointly with the testator's widow—Power of alienation during widow's lifetime:*

A testator, by his will, directed that his lands should be enjoyed by his brother from generation to generation and for ever, with power to alienate the same by sale, gift or otherwise, but that he should enjoy them jointly with the testator's wife. Upon its being contended that the provision in favour of the wife merely conferred upon her, or recognised, a right to maintenance and that the power of the brother to alienate was as extensive during the life of the widow as after her death:—*Held*, that on the true construction of the will the testator did not intend the brother to have any power of alienation during the widow's lifetime.

Periya Ayal v. *Narayana Padayachi* 256

INDIAN COUNCILS ACT—24 and 25 Vict., Cap. 67, s. 25—*Letters Patent, s. 15—Ganjám and Vizagapatam Agency Courts Act—Act XXIV of* 1839*—Validity of Agency Rule No. XXII passed under the Act—Jurisdiction of High Court to transfer suit pending in the Agent's Court to the District Court:*

An order was made by a single Judge, by consent of the parties, transferring a case from the Court of an Agent to the Governor, Vizagapatam, to a District Court. A further order was made by a single Judge which, though in form an order dismissing a review petition against the first-mentioned order, was in substance an adjudication upon the question whether the High Court has jurisdiction to order the transfer of a suit from the Court of such an Agent to a District Court:—*Held*, (1) that both orders were "judgments" within the meaning of section 15 of the Letters Patent and that an appeal lay therefrom; (2) that the High Court has no jurisdiction to transfer a suit pending in the Court of the Agent to the Governor, Vizagapatam, to the District Court of Vizagapatam; (3) that Agency Rule No. XXII, made in 1840, under the powers conferred by Act XXIV of 1839, is a valid rule.

Maharajah of Jeypore v. *Papayyamma* 329

INSOLVENT ACT—11 and 12 Vict., Cap. XXI, s. 30—*Bankruptcy Rules of* 1848*, Rule XXV—"Person interested"—Liability for costs of unsuccessful motion—Deponent of an affidavit:*

A sale of property forming portion of the estate of certain insolvent debtors having been authorised by the Court, the Official Assignee moved to set it aside, relying in support of his application on affidavits which had been filed in Court and in which the deponents alleged that the property was worth a great deal more than the price at which the sale had been authorised. The Court having dismissed the motion, and ordered the deponents to pay the costs of the Official Assignee and the purchasers:—*Held*, that the deponents could not be made liable for costs, and that

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Rule XXV of the Bankruptcy Rules of December 1848 did not apply to such a case. The deponents were not "persons interested in the insolvent's estate," nor could they be said to have "applied" or appeared on an application. The Official Assignee should be made liable for the costs of such an unsuccessful application, he being left to take such steps as might be necessary to indemnify himself.

Ramanna Naidu v. *Brahmayya Chetti* 26

INTEREST ACT—ACT XXXII OF 1839, s. 1—*Notice of intention to claim interest—Demand of interest already due:*

A letter demanding interest on an outstanding debt, from which the intention of the creditor to claim interest up to date of payment is made clear, is a sufficient notice, within the meaning of the Interest Act, 1839, to entitle the creditor to claim interest prospectively from the date of the letter, though the demand be made retrospectively in respect of interest alleged to be then already due.

Kuppusami Pillai v. *Madras Electric Tramway Company, Limited* 41

LETTERS PATENT, s. 15—*Appeal from order of refusal to send for records—Dismissal on ground that no appeal lies:*

An order refusing to send for the record on a petition filed under section 25 of the Provincial Small Cause Courts Act, 1887, is not a judgment, and no appeal lies therefrom.

Venkatarama Ayyar v. *Madalai Ammal* 169

2. ——————————**s. 15**—*Ganjám and Vizagapatam Agency Courts Act—Act XXIV of* 1839*—Validity of Agency Rule No. XXII passed under the Act—Jurisdiction of High Court to transfer suit pending in the Agent's Court to the District Court—Indian Councils Act—24 & 25 Vict., Cap. 67, s. 25:*

An order was made by a single Judge, by consent of the parties, transferring a case from the Court of an Agent to the Governor, Vizagapatam, to a District Court. A further order was made by a single Judge which, though in form an order dismissing a review petition against the first-mentioned order, was in substance an adjudication upon the question whether the High Court has jurisdiction to order the transfer of a suit from the Court of such an Agent to a District Court:—*Held*, (1) that both orders were "Judgments" within the meaning of section 15 of the Letters Patent and that an appeal lay therefrom; (2) that the High Court has no jurisdiction to transfer a suit pending in the Court of the Agent to the Governor, Vizagapatam, to the District Court of Vizagapatam; (3) that Agency Rule No. XXII, made in 1840, under the powers conferred by Act XXIV of 1839, is a valid rule.

Maharajah of Jeypore v. *Papayyamma* 329

LIMITATION—*Decree against father for money due, the sons not being joined as defendants—Death of father after original debt barred by limitation, the decree subsisting—Suit against the sons on the decree—Period of limitation how calculated—One cause of action:*

Certain creditors having, in 1882, obtained a decree, kept alive that decree until 1893, when the judgment-debtor died. They then sought to make liable the property of the deceased in the hands of the defendants, his sons and representatives, stating the cause of action against the said defendants as having arisen in 1893, the date of their father's death. The sons pleaded limitation, and the question was whether the period of limitation against the sons began to run from the date of death of their father or from the date at which the debt originally became due. On a reference being made to a Full Bench as to "whether a creditor in the position of the plaintiff has a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's life-time for such debt":—*Held*, that in such a case there are

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not two causes of action, and such a creditor has not a further right to sue the son for his father's debt on the death of the father, apart from the right to sue him in the father's life-time for such debt, and that, in consequence, the suit was barred by limitation. *Arunachala* v. *Zamindar of Sivagiri*, (I.L.R., 7 Mad., 328), *Natasayyan* v. *Ponnusami*, (I.L.R., 16 Mad., 99), and *Ramayya* v. *Venkataratnam*, (I.L.R., 17 Mad., 122), considered.

Mallesam Naidu v. *Jugala Panda* 292

LIMITATION ACT—ACT XV OF 1877, s. 14, arts. 29, 49—*Time occupied in prosecuting suit in another Court—Dismissal of suit through defect of jurisdiction or other cause of like nature—Court unable to entertain suit because misconceived:*

Defendants having attached certain goods on 12th June 1895, in execution of a decree obtained by them against M., a claim was preferred by plaintiff, on 19th June 1895, and disallowed. Plaintiff thereupon brought a declaratory suit on 2nd August 1895 in the City Civil Court, Madras, and obtained an injunction to stop the sale of the goods, which, however, was dissolved on 27th August 1895, the goods being sold on 5th October 1895, while the suit in the City Civil Court was pending. On 4th December 1896 the City Civil Court declared plaintiff to be the sole owner of the property, which decree was upheld by the High Court on 7th February 1898. On 4th December 1897, plaintiff brought a suit in the Court of Small Causes, Madras, to recover from the defendants the goods or their value, which was dismissed on 2nd May 1898. The dismissal was upheld by a Full Bench of the Court of Small Causes on 22nd October 1898 and by the High Court, on 13th April 1899. In these decisions it was held that plaintiff's suit was not maintainable. Plaintiff filed the present suit on 28th April 1899, in the Court of Small Causes, Madras, and claimed that the cause of action had arisen on 7th February 1898, the date on which plaintiff's right to the specific moveable property had been finally declared. He also claimed that the time occupied in the proceedings in the Court of Small Causes should be deducted under section 14 of the Limitation Act:—*Held*, that the suit was barred; and that plaintiff was not entitled to have the time spent in prosecuting the previous small cause suit deducted from the period of limitation. That suit had been dismissed, not because the Court, through defect of jurisdiction or other cause of a like nature, was unable to entertain it, but because it was misconceived.

Murugesa Mudaliar v. *Jattaram Davy* 621

2. ——————————————————, **s. 14, arts. 120, 127**—*Dismissal of former suit on substantive ground of failure to establish cause of action—Claim by contributors to a common fund:*

An agreement was entered into between an uncle and his nephews, in 1879, that their earnings should be put into a common fund, which fund should be utilized for family requirements. No provision was, however, made for the division of any surplus that might arise. The agreement was acted upon until 1894, by which time a sum of Rs. 37,723-8-0 had accumulated. Upon a claim being made by the nephews in 1894 for a distribution of this fund, the uncle denied their right to participate in it. The uncle, who was working in partnership with others, in the same year, 1894, instituted a suit against his partners for an account and for his share of profits. He claimed the said accumulated fund of Rs. 37,723-8-0 as his share. While his suit was pending, namely, in December 1895, he assigned its subject-matter to the present ninth defendant, (a banking corporation). The partners, in defence, alleged that the present plaintiffs were entitled to share equally in the Rs. 37,723-8-0 and that they held the fund as stakeholders. In December 1894, present plaintiffs filed a suit against their uncle, the said first defendant, and his partners, in which they claimed shares in the said sum of Rs. 37,723-8-0. The two suits were tried together. First defendant's suit against his partners was dismissed on the ground that he had claimed for himself alone and had not brought the proper parties before the Court. In plaintiffs' suit, the latter were declared to be entitled to shares in the said sum, as prayed. First

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defendant appealed in both suits, judgment being given by the Appellate Court on 19th October 1897. In the suit in which first defendant was plaintiff, the plaint was allowed to be amended and a decree was passed for the amount found due to him alone in the settlement of accounts. In the plaintiffs' suit, the Appellate Court found that plaintiffs had no cause of action as against first defendant's firm; and that as between plaintiffs and first defendant there were accounts to be settled, in addition to those which appeared in the books of the firm. The Appellate Court further declined to treat the suit as one for partition only, and dismissed it, intimating that plaintiffs could obtain relief by way of partition in a suit so framed as to embrace all the parties interested and all the property in which they were interested. On 30th January 1899, plaintiffs filed the present suit in which they claimed that their shares in the said fund of Rs. 37,723-8-0 should be determined and paid :—*Held*, (affirming BODDAM, J.) that plaintiffs were entitled to recover. *Held also*, that the time occupied in prosecuting the former suit could not be excluded when computing the period of limitation. Though the plaintiffs had acted with due diligence in instituting their former suit, it was dismissed—not on any technical ground of misjoinder of parties or of causes of action—but on the substantive ground that having regard to the frame of the suit, no cause of action had been established against any of the defendants; and the suit was not one which the Court from defect of jurisdiction or other cause of a like nature, was unable to entertain. *Held further*, that the claim was not barred by limitation. The title of the nephews was not based on contract, express or implied, but arose out of the fact that they were contributors to a common fund, which the Court was now asked to distribute. The claim was one which the Court must deal with on equitable principles and apart from any question of partnership or of contract, and was consequently one to which article 120 of the Limitation Act applied. *Also*, that the question was not one relating to joint family property, within the meaning of article 127. *Rani Mewa Kuwar* v. *Rani Hulas Kuwar*, (13 B.L.R., 312), referred to.

Commercial Bank of India v. *Allavoodeen Saheb* 583

3. ——————————, s. 19, sched. II, art. 110—*Contract Act—Act IX of 1872, s. 25, cl. (3)—Promise to pay a barred debt :*

In defence to a suit for rent a tenant pleaded that a portion of the claim was barred by limitation. Plaintiff relied on a letter which had been signed by defendant, after the disputed portion had become barred, and in which the defendant, after referring to the periods in respect of which the arrears of rent were due, said "I shall send by the end of Vysakha month" :—*Held*, that the document contained the ingredients required by section 25, clause (3), of the Contract Act, and that the claim was not barred by limitation. A document sufficiently complies with section 25 of the Contract Act when it is signed by the person to be charged, and refers to the debt in such a way as to identify it, and contains a promise to pay wholly or in part the debt referred to therein, or expresses an intention to pay which can be construed to be a "promise." To create a "promise" within the meaning of the section, it is not necessary that there should be an accepted proposal reduced to writing, a written proposal, accepted before action, becoming by the definition clause, a promise when accepted. The words of the section show that it is the debt and not a sum of money in consideration of the barred debt that the promisor should refer to.

Appa Rao v. *Suryaprakasa Rao* 94

4. ——————————, s. 28, sched. II, arts. 124, 144—*Religious foundation—Endowed property—Hereditary managers—Void alienation—Adverse possession :*

The hereditary managers of the property with which a religious foundation was endowed had purported to sell and assign the management and lands of the endowment to the representative of another institution, the first defendant's predecessor :—*Held*, that there not being any custom of the foundation allowing such an assignment, it was beyond their legal competence, conveying no title; *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* [(1876) L.R., 4 I.A., 76; I.L.R., 1 Mad., 235] referred to and followed. The possession delivered to the purchaser was adverse to the vendors. After the twelve years' period of limitation, which expired in the lifetime of the vendor, whose son now sued to recover the hereditary managership and possession of the lands of the endowment, the suit was barred under Limitation Act XV of 1877 :—*Held*, that there was no distinction between the claim to the office and the claim for the property, in regard to the application of article 124 of schedule II of the Act, and of section 28. If there were, article 144 would apply to the claim for the property. In order to fix the starting point for limitation at a date later than that of the transfer, it was contended that the office and title were held in successive life estates. If that contention had been right, the period of limitation would have commenced at the death of the plaintiff's father. The Judicial Committee were of opinion that it must be assumed that the origin of the endowment was by gift from the founder and that, in accordance with the ruling in *Juttendromohun Tagore* v. *Ganendromohun Tagore* [(1872) L.R., I.A., Sup. Vol., 47; 9 Beng. L.R., 377], heritable estates could not be created to take effect as successive life estates, and inconsistently with the general law. This applied to both the office and the property :—*Held*, that the law of inheritance did not permit the creation of successive life estates in this endowment; the above ruling being also contrary to the judgment in *Trimbak Bawa* v. *Narayan Bawa* [(1882) I.L.R., 7 Bom., 188]; and that the plaintiff could not claim to have been entitled otherwise than as heir to, and from, and through his father, in whose lifetime the title had been extinguished by lapse of time and adverse possession of the defendant.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram* 271

——————————, sched. II, art. 23—*Malicious prosecution—Termination of prosecution—Presentation of revision petition against acquittal—Commencement of period of limitation :*

A suit for damages for malicious prosecution was brought more than one year from the date of the plaintiff's acquittal, but within a year from the dismissal of a revision petition which had been filed against the acquittal. On its being contended that the period of limitation should be calculated from the date of the dismissal of the revision petition, as the prosecution was only then terminated within the meaning of article 23 of schedule II of the Limitation Act :—*Held*, that time began to run from the date of the acquittal. Whether it would be so in a case in which an appeal is preferred by Government against an acquittal, *Quære*.

Narayya v. *Seshayya* 24

——————————, arts. 113, 144—*Suit on an award—Meaning of "contract" in art.* 113—*Specific Relief Act—Act I of* 1877, *s.* 30 :

By an award bearing date 7th July 1893 plaintiffs were held to be entitled to certain immoveable property. On 15th November 1897, they filed a suit to enforce the award. On its being contended that the suit was barred by limitation, under article 113 of the Limitation Act, it being in fact for the specific performance of a contract :—*Held*, that the suit was not barred, the article applicable being article 144. A suit to enforce an award cannot be treated as a suit to enforce a contract, within the meaning of article 113, the word "contract" in that article being used in its ordinary sense. *Sukho Bibi* v. *Ram Sukh Das* (I.L.R., 5 All., 263), and *Raghubar Dial* v. *Madan Mohan Lal*, (I.L.R., 16 All., 3), referred to.

Sornavalli Ammal v. *Muthayya Sastrigal* 593

——————————, sched. II, art. 142—A suit for the proprietary possession of land was defended on the ground of limitation, resting on the defendant's possession, displacing the plaintiff's case that her predecessor in title had possessed the land within twelve years before the suit. The defendant had a possession which was admitted to have

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extended back for seven years before the suit. The documentary evidence showing that he had been in possession for more than five years immediately preceding those seven years was exactly similar to the evidence which accompanied his possession during that period. This evidence consisted of a series of documents such as were usually given to and received by the possessor of lands, and they extended throughout the period in dispute, going back far behind the twelve years which would bar. It was not necessary to consider whether the burthen of proof was shifted merely by the seven years' admitted possession, as the additional evidence raised the inference that the same possession had continued for more than twelve years:—*Held*, that the burthen of rebutting this inference had not been discharged by evidence given by the plaintiff, while the evidence for the defendant had amply sustained the burthen originally laid upon him to show his twelve years' possession.

Innasimuttu Udayan v. *Upakarath Udayan* 10

8. ——————————————, **sched. II, art. 179, cl. (2)**—*Final decree of Appellate Court—Decree against joint defendants—Appeal by one of two defendants against part of the decree—Decree against non-appealing defendant "imperilled":*

Plaintiff having, on 31st March 1891, obtained in a District Munsif's Court a decree rendering liable the property of two defendants, the second defendant appealed, making the plaintiff alone respondent, with the result that the District Court set aside the decree against the second defendant, and remanded the suit for trial as to his liability. Plaintiff appealed unsuccessfully to the High Court against this order of remand, the first defendant again not being made a party. On 23rd July 1894 the District Munsif delivered a revised judgment, in which he again held the second defendant's share liable, but gave both defendants two months' time for payment, which provision was not contained in the original decree. This revised judgment was upheld by the District Court on appeal, on 25th March 1895: and by the High Court on second appeal on 22nd February 1897, with the modification that the decree as against second defendant should be treated as a money decree. First defendant was again not a party to either appeal. On 7th August 1897, plaintiff applied for execution, whereupon first defendant pleaded limitation:—*Held*, that the decree as against the first defendant was not barred by limitation inasmuch as it had been imperilled by the appeal of the second defendant. *Per* MOORE, J.—Under article 179, clause (2), of schedule II of the Limitation Act, it is immaterial whether some only or all of several judgment-debtors prefer an appeal. There is only one decree that can be executed and that is the final decree of the Appellate Court. *Per* O'FARRELL, J.—On the general question as to the construction of article 179, schedule II, of the Limitation Act, the plain words of the Act have been unduly narrowed by the decision in *Muthu* v. *Chellappa* (I.L.R., 12 Mad., 479); the consideration of such subtle points as whether a decree was or was not "imperilled" by an appeal was foreign to the intention of the legislature.

Viraraghava Ayyangar v. *Ponnammal* 60

LOCAL BOARDS ACT (MADRAS)—ACT V OF 1884, ss. 64, 73, 155—*Tax payable on land—Favourable tenure—Claim by landholder of more than one-half of the tax from tenant—Invalidity of custom for tenant to pay whole tax:*

A tenant paid an annual rent of Rs. 64 to the landholder, the tenure being of a nature dealt with by sub-section (iii) of section 64 of the Local Boards Act (Madras), 1884. The landholder distrained on the tenant's property in respect of the whole amount of local cess payable in respect of the land, contending that it should be calculated on the rent value, which was admittedly Rs. 710. It was found that under a custom subsisting in the district the whole amount of the local cess was payable by the tenant:—*Held*, that having regard to section 73 of the said Act, such a custom must be unreasonable and invalid. The words 'favourable rent' in section 64, sub-section (iii), of the Act, mean rent which at the time of the assessment being fixed is favourable as compared with the ordinary rent of similar lands in the vicinity, and has nothing to do with the question whether the rent, as fixed at the time when the lease was granted, was favourable or unfavourable.

Bhupatirazu v. *Ramasami* 268

MADRAS HARBOUR TRUST ACT (MADRAS)—ACT II OF 1886, ss. 33, 60, 61, 87—*Maintenance of harbour causing encroachments on seashore—Liability of a Public Body for maintaining works authorised by statute—Common law liability where not expressly excluded by statute—Limitation:*

A harbour, which was in the first instance constructed by Government, was, by the Madras Harbour Trust Act, 1886, vested in trustees, together with the foreshore within the limits of the port. Prior to the date of the Act, an erosion, by the action of the sea, of a portion of the foreshore had commenced, in consequence of the existence of the harbour; and a revetment or barrier of stones had been built to counteract it. The trustees subsequently, but prior to 1891, extended the arms of the harbour, and in 1895 the result of the continuous encroachment of the sea was that a part of the said revetment or barrier of stones and some land was washed away. Plaintiff was the owner of land adjoining that which was so washed away, and the sea also encroached upon and injured plaintiff's land and the buildings upon it. The Madras Harbour Trust Act contains no provision for the payment of compensation by the trustees. By section 61, the trustees are empowered to perform all works necessary to carry out the objects of the Act. Plaintiff sued the trustees to recover damages for the injury caused to his land by their maintaining and extending the arms of the harbour, as erected when the Board of Trustees was created, without taking steps to erect such buildings as would prevent the sea from encroaching upon and injuring the plaintiff's land:—*Held* (affirming Shephard, J.), that the plaint containing the above averments of fact disclosed no cause of action. The dates upon which damage to the plaintiff's buildings was alleged to have occurred were 25th December 1897, and 9th and 10th April 1898, respectively. By section 87 of the Madras Harbour Trust Act, no suit shall be commenced against any person under the Act after six months from the accrual of the cause of such suit. The plaint was originally presented on 9th July 1898, and it was amended on 13th September 1898. On the day upon which the six months from 25th December 1897 expired, and until the day before the plaint was presented, the Court was closed. By the same section, it is provided that no suit or other proceeding shall be commenced against any person for anything done or purporting to have been done in pursuance of the Act without giving to such person one month's previous notice in writing of the intended suit or proceeding, and of the cause thereof. Two letters had been written on behalf of the plaintiff. The first of these, dated 14th April 1898, represented the damage caused to plaintiff's property as above set out, and notified, under section 87, if that section should apply, that if the amount of damage suffered and assessed by plaintiff in the said letter should not be paid on or before the expiry of one month from the date thereof, legal proceedings would be instituted to recover the damage without further notice. The second letter, dated 11th May 1898, referred to further damage suffered, and called upon defendants to pay an increased sum, failing which action would be brought to recover such sum together with a further sum representing any further damage that might be done to the property by the sea before the suit should be filed or heard. The letter stated the ground of complaint to be that the encroachment of the sea was the result of the harbour groynes by which the action of the sea had been affected, that defendants had acted illegally and negligently in maintaining and extending those groynes and so causing the encroachment, and that by so doing they had caused the foreshore vested in them to be washed away and the sea to be let into the plaintiff's premises, thus causing the damage complained of, which defendants had taken no steps to prevent:—*Held*, *per* SHEPHARD, J., that the plaintiff must be deemed to have commenced the suit in due time, since it was owing to the act of the Court itself that he was prevented from presenting his plaint till the day upon which

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it was filed. *Also*, that the notice was sufficient; and that on the facts of the case section 87 had no application. *Semble*, that though a special rule of limitation was prescribed by the Act, section 5 of the Limitation Act applied. *Per* O'FARRELL, J.—That the last clause of section 87, which provides that neither the Board nor any of its officers or servants shall be liable in damages for any act *bonâ fide* done or ordered to be done in pursuance of the Act, had no reference to the present case. That section applied only to cases of acts done without legal authority or in excess of legal authority, but under the *bonâ fide* belief that they were covered by such authority. *Per* BODDAM, J.—That the cases in which it has been held that that no action lies for non-feasance apply only to highways and have no application to the present case. *Per* DAVIES, J.—The liability of the trustees, in the absence of any statutory duty cast upon them to insure plaintiff from loss, was confined to the maintenance of the particular work they took over, and, if there was any general obligation to protect the plaintiff's property, it lay on the Government, who constructed the harbour, the legislature not having imposed it on the trustees.

Haji Ismail Sait v. *Trustees of the Harbour, Madras* 389

MADRAS HEREDITARY VILLAGE OFFICES ACT (MADRAS)—ACT III OF 1895, s. 5—*Attachment of growing crop:*

By section 5 of the Madras Hereditary Village Offices Act, the emoluments of village offices are not to be liable to attachment:—*Held*, that an attachment by a decree-holder of a crop growing on certain lands in a zamindari, which were the inam service lands held by the judgment-debter as a village servant, had been rightly set aside.

Kannam Naidu v. *Latchanna Dhora* 492

2. ——————————, **s. 21**—*Revenue Recovery Act (Madras)—Act II of* 1864, *ss.* 52, 54—*Emoluments due to village officers—Demand for payment under section* 52 *of Revenue Recovery Act—Payment under protest—Suit to recover amount paid—Legality of demand—Limitation:*

By the custom of a zamindari its tenants brought their produce to the threshing floor, where it was divided, *inter alia*, among the village servants. The lessees of the zamindari altered this system, directing the tenants to bring their produce direct to the granaries of the lessees, who promised to pay the village servants their fees from the said granaries. These fees having been only partly paid, the village servants complained to the Government revenue officials, who applied to the lessees for payment of the arrears, a demand for the same being ultimately issued under section 52 of the Revenue Recovery Act (Madras), 1864. The lessees thereupon paid the amount of the arrears under protest, and a year later filed a suit against the Secretary of State to recover the money so paid:—*Held*, that the lessees had made themselves liable for the fees, and the Collector was entitled to proceed under section 52 of the Revenue Recovery Act (Madras), 1864, to recover them. *Held also*, that inasmuch as the suit had not been brought within six months of the time when the alleged cause of action had arisen, it was barred under section 59 of the Revenue Recovery Act (Madras), 1864.

Orr v. *Secretary of State for India in Council* 571

MALABAR LAW—*Tenant's right to compensation—Mortgage by tenant without notice to landlord—Acceptance of surrender by landlord—Rights of landlord and mortgagee:*

The right of a tenant in Malabar to compensation is analogous to the right to a chose-in-action; and a transfer of such a right by a tenant to a third party cannot affect the landlord unless the latter has notice of the transfer when he accepts the surrender of the property demised and settles the account with his tenant in reference to arrears of rent and the amount

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due as compensation. Whether notice to a landlord of such a transfer would affect his right to set off arrears of rent due to him against the amount payable as compensation, *Quære.*

Vasudeva Shenoi v. *Damodaran* 86

MORTGAGE—*Construction of documents—Sale-deed with counter-deed undertaking to retransfer land in event of payments being made:*

In a document described as a sale-deed, plaintiff's father professed to give "in absolute sale" certain lands to the defendant, inasmuch as he was unable to pay a debt owing by him to the defendant. On the same day defendant executed a counter-deed in which he referred to the said sale-deed and undertook to get the said lands transferred to plaintiff's father in the event of the latter paying the said debt within a certain time, together with interest till date of payment: and in that event to cancel the said sale-deed and deliver the same to plaintiff's father. The counter-deed further provided that plaintiff's father should pay the principal and interest of the said debt by instalments, and that, in default of payment of any instalment, plaintiff's father should pay the whole amount due: and in default of payment in that manner, defendant should credit the land to himself according to the sale-deed, after getting the counter-deed cancelled:—*Held*, that on their true construction the documents showed nothing more than an intention to secure repayment of the debt; that though the provisions for payment by instalments and of the whole amount in default of instalments were contained in the counter-deed signed only by the transferee of the land, they were equivalent to a covenant by the transferor so to repay, because, the two documents being parts of one transaction, both parties were bound by or could take advantage of every stipulation, whether contained in one or other of the deeds, as would have been the case if the transaction had been embodied in a single document:—*Held*, therefore, that the transferee had a right to recover the debt (with interest) from the transferor personally; and that the provision entitling the transferee to credit the land to himself in default of payment could not be construed as negativing that right. Two documents relating to the transfer and retransfer of land which were so connected as to constitute one transaction having been executed in the year 1882, prior to the passing of the Transfer of Property Act:—*Held*, that the transaction should be regarded as having been entered into with reference to the law as propounded in the course of Madras decisions commencing in 1858 and referred to in *Thambusami Mudali* v. *Hossain Ravuttan* (L.R., 2 I.A., 241; I.L.R., 1 Mad., 1), and that the documents must be construed accordingly.

Ramayya v. *Krishnamma* 114

MUHAMMADAN LAW—*'Hiba-bil-Iwuz'—Settlement in lieu of dower—Possession not transferred—Validity on passing of consideration:*

A Muhammadan executed a deed of settlement of certain land in lieu of dower on his wife, who left him shortly thereafter without ever acquiring possession. On his contending that the settlement was invalid:—*Held*, that a *bonâ fide* transaction by way of 'Hiba-bil-Iwuz' (as this was found to be) is supported by proof of the actual passing of the consideration agreed to be given; that the consideration in this case was the release by the wife of her right to dower from her husband, and that such release was completed by her acceptance of the transfer under the settlement.

Muhammad Esuph Ravutan v. *Pattamsa Ammal* 70

2. ——————————*Suit for dower—Dower prompt or deferred—Presumption:*

According to Muhammadan law, dower, being consideration for marriage, is, unless payment of the whole or part of it is expressly postponed, presumed to be prompt and exigible on demand. *Tadiya* v. *Hasanebiyari* (6 M.H.C.R., 9), followed.

Masthan Sahib v. *Assan Bivi Ammal* 371

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NEGOTIABLE INSTRUMENTS ACT—ACT XXVI OF 1881, ss. 4, 26, 27—*Hindu Law—Promissory note by member of an undivided Hindu family—Liability of other member:*

The maker of a promissory note (executed in plaintiff's favour), being a member of an undivided Hindu family, had borrowed from plaintiff the money represented by the note and purchased therewith land for the benefit of the family, which consisted of himself (the maker of the note), an uncle and the sons of the uncle. The uncle had always recognised the debt as a family debt, and the land purchased with the money borrowed had, in a subsequent division of property, been allotted to the uncle and his sons, who had also agreed with the maker of the note that they would discharge the debt. On a suit being brought against the maker of the note, as well as the uncle and his sons:—*Held*, (DAVIES, J., dissenting), that all the members of the undivided family were liable. *Per* SUBRAHMANIA AYYAR, J.—Even assuming that the maker of the note was not the manager of the family, he was the agent of his coparceners when buying the land and raising the loan, and his acts as such agent bound the uncle who expressly assented to them; also, that inasmuch as the uncle was liable, his sons must be also, held liable for the debt to the extent to which they were interested in the family property, and that even if they were minors when the money was borrowed. Whether, having regard to sections 233 and 234 of the Indian Contract Act, a principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name.—*Quære.* *Per* DAVIES, J., (1) Had the suit been brought on a bond, or on the debt of which the promissory note afforded evidence, other members of the family might have been held liable as well as the maker of the note, on the ground that the latter represented them. But in the case of a suit on a promissory note (as this suit was) on such representation could be alleged unless the persons said to be represented appeared by name on the face of the document; (2) Where the name of only one person appears on a promissory note and he does not purport to make it on behalf of any one but himself, none but the maker can be held liable to discharge it.

Krishna Ayyar v. *Krishnasami Ayyar* 597

2. ——————————————————————————, **ss. 79, 80—*Interest on promissory note—No mention of interest or rate of interest in instrument—Indent of goods—Failure to take delivery and re-sale in consequence—Liability for loss:***

Certain promissory notes, on which a suit was brought, were in the following terms:—"On demand we promise to pay ———— or order the sum of Rupees——for value received." Plaintiffs claimed interest. On its being contended that where an instrument is completely silent about interest section 80 of the Negotiable Instruments Act, 1881, has no application, and no interest can be allowed:—*Held*, that the mercantile usage which would have enabled the Court to award interest on such an instrument prior to the passing of the Negotiable Instruments Act, 1881, has not been abrogated by that Act, though the interest that can now be awarded is limited by section 80 to six per cent. Section 80 governs, alike, the case in which interest, but no rate of interest, is mentioned in the instrument, and that in which interest is not mentioned. In the case of a note payable on demand, the date of the demand, and not that of making the note, is the date from which interest must be taken to run. Plaintiffs had procured certain goods in pursuance of indents signed by defendants which provided that, in the event of defendants failing to take due delivery of the goods, plaintiffs should be at liberty to re-sell them on defendants' account and that defendants should pay to plaintiffs any deficiency arising from such re-sale. Goods were re-sold at a loss and in a suit to recover such loss it was contended, in defence, that the property in the goods had not passed to the defendants and that plaintiffs, only remedy was by way of damages:—*Held*, that a clause such as that contained in the indent came into operation notwithstanding that the property had not passed to the buyers; and that plaintiffs were entitled to recover the deficiency arising from the re-sale.

Best v. ***Haji Muhammad Sait*** 1

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PARTIES—*Devasom—Property vested in three sabhas—Suit by members representing two—Maintainability of suit:*

A temple was managed by three sabhas, and members representing two only of such sabhas brought a suit to recover land belonging to it, without alleging that the members of the third sabha had been consulted with reference to the suit, or that they had repudiated the right of the plaintiff to sue in conjunction with that sabha. Permission to sue as representing the whole of the members of the three sabhas had been refused:—*Held*, that the suit was not maintainable.

Puramathan Somayajipad v. *Sankara Menon* 82

PENAL CODE—ACT XLV OF 1860, s. 40—*Stamp Act—Act I of* 1879, *ss.* 61, 67—*Defrauding Government of Stamp revenue by a contrivance or device not otherwise specially provided for—Receipt of unstamped document—Abetment of an offence under section* 61 *of Stamp Act*, 1879:

Two letters were written to petitioner in which the writer recommended him to advance sums of money to the bearers of the letters and bound himself to repay those sums, if lent, in case of default on the part of the borrowers. The loans were made by petitioner, who kept the letters. A prosecution having been subsequently commenced against petitioner under section 67 of the Stamp Act, 1879, for defrauding Government of stamp revenue by an illegal device, and he having been convicted on the ground that when the loans were granted the documents became letters of guarantee and as such liable to stamp duty:—*Held*, that the execution of a document which on its face required to be and was not stamped, could not be said to be "an act, contrivance or device not specially provided for by this Act or any other law for the time being in force;" and that punishment for the act of the executant of such a document, if it were punishable at all, was provided for under section 61 of the Stamp Act, 1879, and it could not therefore be dealt with under section 67. Also that the act of a person receiving an unstamped document might amount to abetment of an offence, having regard to section 61 of the Stamp Act, 1879, and to the definition of an "offence" in section 40 of the Indian Penal Code, and, if so, would be an act provided for by "any other law for the time being in force," and so not within the terms of section 67 of the Stamp Act, 1879.

Queen-Empress v. *Somasundaram Chetti* 155

2. ——————————————————————————, **s. 193—*Criminal Procedure Code—Act V of* 1898, *ss.* 195, 476—*Intentionally giving false evidence at a judicial proceeding—Preliminary enquiry by a Magistrate:***

At a preliminary enquiry held by a Sub-Divisional Magistrate, at the direction of the District Magistrate, into the circumstances of a complaint against the police, a witness made a false statement on oath. Notice was subsequently issued calling upon the said witness to show cause why sanction should not be granted for his prosecution. The Magistrate having held that the witness was bound to tell the truth at the said enquiry and having granted sanction for his prosecution under section 193 of the Indian Penal Code:—*Held*, that the enquiry before the Magistrate in the course of which the alleged offence was committed was not a judicial proceeding within the meaning of section 193 of the Indian Penal Code, and the witness could not be convicted under that section.

Queen-Empress v. ***Venkataramanna*** 223

3. ——————————————————————————, **s. 373—*Obtaining a girl under the age of* 16 *for purposes of prostitution—Evidence of intent:***

In a charge against a dancing girl under section 373 of the Indian Penal Code for having purchased a young girl with intent that she would be used for the purpose of prostitution or knowing it to be likely that she would be so used, evidence was given of the fact of purchase for a consideration and

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that numerous other dancing girls residing in the neighbourhood were in the habit of obtaining girls and bringing them up as dancing girls or prostitutes, and that there were no instances of girls brought up by dancing girls ever having been married. On its being contended that there was no evidence of intent to support a conviction under section 373 of the Indian Penal Code:—*Held*, that there was evidence before the Court to support the conviction.

Queen-Empress v. *Papa Sani* 159

POST-DIEM INTEREST—*Amount secured by mortgage bond with interest repayable by three instalments—Whole amount to become due on failure to pay any instalment—No provision for* post-diem *interest:*

By a registered mortgage bond it was stipulated that the mortgage debt secured thereby and interest thereon at one per cent. per annum should be repaid by three annual instalments, the first of which was to become due on a certain date; and it was provided that if default should be made in payment of any instalment, the whole amount secured by the bond should at once become payable. The bond contained no provision for the payment of *post-diem* interest. Default having been made, the mortgagee sued for the principal and for *post-diem* interest:—*Held*, that the covenant must be construed to be one for the payment of interest as long as the principal sum was improperly withheld. *Moti Singh* v. *Ramohari Singh* (I.L.R., 24 Calc., 699), considered.

Ghantayya v. *Papayya* 534

PROBATE AND ADMINISTRATION ACT—ACT V OF 1881, ss. 2, 4—*Document in form of will passing no property and only appointing guardians:*

A document in the form of a will, which was presented for probate, dealt with no property, the petition stating that the family of which the testator had been managing member was undivided, and that the testator's property had devolved by survivorship on his sons and nephews. The document, however, appointed persons to manage the family business during the minority of the said minors:—*Held*, that it was not a document of which probate could be granted.

In re Bukthawar Mull Sowcar 133

PROMISSORY NOTE—*Suit by assignee by invalid endorsement—Claim also on the original debt in respect of which note was given—Maintainability of suit:*

The purchaser of the assets of a bank in liquidation, which assets included a debt due by defendants to the late bank and a promissory note given in respect of that debt, sued defendants on the promissory note as well as on the original debt in respect of which the note had been given. The note had not been endorsed until after the bank had been wound up and had ceased to exist, and the endorsement had been held to be invalid:—*Held*, that plaintiffs were entitled to sue for the original debt even though they were not entitled to sue on the promissory note. *Pothi Reddi* v. *Velayudasivan* (I.L.R., 10 Mad., 94), referred to.

Ramachandra Rao v. *Venkataramana Ayyar* 527

REGISTRATION ACT—ACT III OF 1877, s. 17, cl. (*b*)—*Document compulsorily registrable—Valuation—Least sum payable—Sum repayable before expiry of stated term—Principal sum without interest:*

A charge on certain property to secure Rs. 50 was given by the jenmis in favour of defendant No. 1, who held a kanom on the property granted three years previously, containing the following terms:—"This amount of Rs. 50, together with the customary interest thereon, will be added to the kanom amount when, after the expiry of the period of demise of the paramba, a renewal is effected or the paramba is caused to be surrendered. The jenmam right over the said paramba has been mortgaged to you for this

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Rs. 50 and the interest thereon." The document was not registered. It was contended that the document was one compulsorily registrable under section 17 of the Registration Act, 1877, inasmuch as payment under it was postponed for at least nine years (*i.e.*, the balance of the term granted by the kanom), by the end of which period the accumulations of interest would have amounted to Rs. 54 in addition to the principal sum of Rs. 50, making Rs. 104 in all:—*Held*, that the document did not contain a clear expression of intention that the sum of Rs. 50 was not repayable except at the end of the previous kanom term. Full effect would and could be given to the words by construing them to mean no more than that, in the event of the amount remaining unpaid when the kanom became redeemable, the Rs. 50 with interest thereon should be treated as if it were part of the kanom amount so as to entitle the appellant to insist on redemption upon payment of such amount in addition to what might be found due under the kanom. That there was nothing in the document to prevent the interest accruing under it from being paid from time to time, even if the unpaid capital were not repaid until the kanom was redeemable. And that the least sum payable being the test as to whether a document is compulsorily registrable, the document need not be registered under section 17 of the Registration Act, 1877. *Per* O'FARRELL and MICHELL, JJ., that under clause (*b*) of section 17 of the Registration Act, 1877, only the principal amount secured should be taken into consideration.

Kunhi Amma v. *Ahmed Haji* 105

2. ——————————, **s. 35**—*Representative of deceased settlor—Admission of execution of document by one out of three representatives—Defect of procedure in course of registration—Validity of registration:*

The mother of three sons executed a deed of gift in favour of one of them and then died. The donee alone registered the document, the other sons not appearing before the registering officer. The document having been subsequently put in evidence, it was contended that it was inadmissible on the ground that under section 35 of the Registration Act, the donor being dead, the execution of the document must be admitted by the representative of the deceased, and that an admission by one out of three representatives is not an admission within the meaning of the Act:—*Held*, that assuming that the three sons of the deceased donor ought to have joined in admitting the execution of the document and that the registering officer was in error in considering one of them the due representative of the deceased, such error was a defect in procedure in the course of registration and the registration was not rendered invalid by reason thereof.

Pakran v. *Kunhammed* 580

3. ——————————, **s. 50**—*Unregistered sale of land valued under Rs.* 100—*Subsequent registered hypothecation—Possession of first purchaser for over twelve years—Registered hypothecation defeated by such possession:*

The owner of land having, in 1876, sold and given possession of it for Rs. 95 to the plaintiff under an instrument which was not registered, hypothecated it in 1878 to a third party, under a bond that was registered. The land was wrongly represented in the hypothecation bond as being in the original owner's possession. The third party, in 1882, sued the original owner on the hypothecation bond without making plaintiff a party, and obtained a decree, which, in 1893, he assigned to defendant, who purchased the land in the course of execution. On plaintiff suing for a declaration of his right to the land:—*Held*, that the hypothecation had been defeated by plaintiff's possession for a period exceeding twelve years prior to the institution of the suit. A hypothecation right so created is liable to be affected not only by lapse of time as between creditor and debtor, but also by possession of the hypothecated property for the requisite period by a third person on a claim inconsistent with the rights of both the creditor

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and the debtor. Nor does section 50 of the Registration Act interfere with the operation and effect of limitation and prescription governing such a case as this.

Nallamuttu Pillai v. *Betha Naickan* 37

RELIGIOUS ENDOWMENTS.—*Devastanam Committee—Dismissal of dharmakarta by three out of five members of committee without meeting—Legality of such dismissal:*

The dharmakarta of a temple was suspended and dismissed from office in the following manner: one member of the devastanam committee consisting of five initiated an enquiry, received petitions and took evidence, submitting the results of his enquiry to two other members successively, the three signing an order calling upon the dharmakarta to present himself at the office for the purpose of an enquiry into certain charges laid against him. No date was fixed for the enquiry, and the two remaining members of the committee took no part in the proceedings. The dharmakarta took no notice of the order, whereupon the same three committee-men signed and issued another resolution dismissing him from his post. This resolution was sent to the other two members of the committee, but was not signed by them:—*Held*, that the dismissal was illegal. The dharmakarta, being the holder of an office, could only be removed from it by the corporate act of the committee generally. The acts of a corporation (to which the committee might be likened) must be performed at a meeting convened after due notice to all the members of the body; and though there might be exceptions to that rule, a case in which the matter to be decided involved the rights of third parties and a decision to their prejudice was one in which the rule should be enforced.

Thandavaraya Pillai v. *Subbayyar* 483

2. ——————————— *Trustee's title barred by adverse possession as against his predecessor—Limitation:*

The holder of the office of trustee in a temple succeeded to that office in 1893. His predecessor had remained in office for over twelve years, but had never sued for the recovery of certain lands. A suit being now brought to recover the said lands on the ground that they provided the emoluments of the office of meikaval in the temple:—*Held*, that the suit was barred by limitation, the adverse possession held during the previous office-holder's time barring his successor.

Chidambara Chetti v. *Minammal* 439

3. ——————————— *Suit relating to—Civil Procedure Code—Act XIV of* 1882, *s.* 30—*Suit by worshippers—No leave to sue—Non-joinder of Advocate-General—Maintainability of suit:*

Four worshippers at a temple, who were also entitled to vote at the election of dharmakartas, filed a suit for a declaration that the election of certain persons to that office was void. Notice had not been given to the other worshippers, nor had leave of the Court been obtained prior to the institution of the suit:—*Held*, that the suit was maintainable notwithstanding that the Advocate-General had not been joined as a party; that section 30 of the Code of Civil Procedure being permissive and not prohibitive and dealing with procedure only, and not affecting substantive rights, the omission to state in the plaint that the suit was instituted on behalf of other worshippers having similar rights to sue as the plaintiffs was not fatal to the maintainability of the suit; that the Court was competent, with a view of adjudicating completely and definitively on the matter in dispute, to require an amendment of the plaint, and that the suit need not necessarily be dismissed; that the omission to apply for leave under section 30 of the Code of Civil Procedure is not in itself ground for dismissing a suit, but, on objection being taken, the suit should not be allowed to proceed except on the terms of the plaint being amended and the requisite leave being obtained; and that the granting of leave under

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section 30 is not a condition precedent, and may take place after the institution of the suit. *Jan Ali* v. *Ram Nath Mundul* (I.L.R., 8 Calc., 32) and *Thackersey Dewaraj* v. *Hurbhum Nursey* (I.L.R., 8 Bom., 432) considered.

Srinivasa Chariar v. *Raghava Chariar* 28

RELIGIOUS ENDOWMENTS ACT—ACT XX OF 1863, s. 14—*Suit by persons interested for breach of trust and neglect of duty—Refusal by trustee without adequate reason to accept and utilise offerings for celebration of festivals—Misfeasance and breach of trust in section* 14 *explained:*

In a suit against the trustee of a religious institution under Act XX of 1863 for alleged breaches of trust and neglect of duty by reason of the non-performance of ceremonies, it is not necessary, in order to give jurisdiction to Civil Courts, for the plaintiffs to show that there are any special funds constituting an endowment of the institution. If it be proved that the ceremonies in question have been conducted as a custom for a series of years and that the defendant trustee was not absolutely unable, owing to lack of funds, to carry on those ceremonial observances in the customary manner, he must be held to have been guilty of neglect of duty rendering him liable to a suit under section 14 of the Act. Where it has been usual for the trustee to celebrate festivals with the aid of voluntary contributions it is a breach of duty on the part of the trustee to refuse to celebrate them without adequate reasons if funds are available, and the trustee ought not, contrary to usage, to refuse to receive such offerings and perform the ceremonies for which they are tendered. *Per* SUBRAHMANIA AYYAR, J.—Having regard to the fact that funds voluntarily given to public religious institutions not only enrich the institutions but promote the interests of public worship, it must be regarded as part of the proper functions of the trustee to utilise such income for the purposes of the institution whenever it is available. It is his duty to accept the money and apply it for the specified purpose unless there are proper grounds for its rejection. Though a trustee may exercise a discretion and cannot be charged with misconduct if he acts with an absence of indirect motive, with honesty of intention and a fair consideration of the subject, he may be proceeded against if, from corrupt or improper motives, he refuses to allow voluntary contributions offered for purposes not inconsistent with the principles, rules or usages of the institution to be applied to those purposes. The Courts are bound to restrain a trustee from injuring the interests of the institution under his charge by corruptly, arbitrarily or wantonly departing from the ordinary course of procedure in regard to essential or important matters connected with the institution. The ground upon which the Courts exercise such jurisdiction over him is that such departure on his part amounts to a breach of legal duty incumbent on him. Though the Courts cannot be called upon to decide questions of ritual and worship unconnected with civil rights, it is perfectly competent for them to adjudicate upon such questions also when the adjudication is necessary for the determination of civil rights. *Syed Amin Sahib* v. *Ibram Sahib* (4 M.H.C.R., 112) explained.

Elayalwar Reddiar v. *Namberumal Chettiar* 298

2. ——————————————————————, **ss. 14, 15, 18—***Civil Procedure Code—Act XIV of* 1882, *ss.* 15, 539—*Suit by a general trustee and a worshipper for removal of trustees:*

A suit was filed in a District Court by the general trustee of a temple and a worshipper therein praying that certain trustees might be declared incompetent and removed, that others might be appointed in their place, that the properties belonging to the endowments of the temple might be vested in them, and that a scheme might be settled for the management of the trust. Leave to file the suit had been obtained under the Religious Endowments Act, 1863, and under section 539 of the Code of Civil Procedure:—*Held*, that the suit was maintainable.

Narayana Ayyar v. *Kumarasami Mudaliar* 537

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RELIGIOUS FOUNDATION—*Endowed property—Hereditary managers—Void alienation—Adverse possession—Limitation Act—Act XV of* 1877, *s.* 28, *sched. II, arts.* 124, 144 :

The hereditary managers of the property with which a religious foundation was endowed had purported to sell and assign the management and lands of the endowment to the representative of another institution, the first defendant's predecessor :—*Held*, that there not being any custom of the foundation allowing such an assignment, it was beyond their legal competence, conveying no title ; *Rajah Vurmah Valia* v. *Ravi Vurmah Mutha* [(1876) L.R., 4 I.A., 76; I.L.R., 1 Mad., 235] referred to and followed. The possession delivered to the purchaser was adverse to the vendors. After the twelve years' period of limitation, which expired in the lifetime of the vendor, whose son now sued to recover the hereditary managership and possession of the lands of the endowment, the suit was barred under Limitation Act XV of 1877 :—*Held*, that there was no distinction between the claim to the office and the claim for the property, in regard to the application of article 124 of schedule II of the Act, and of section 28. If there were, article 144 would apply to the claim for the property. In order to fix the starting point for limitation at a date later than that of the transfer, it was contended that the office and title were held in successive life estates. If that contention had been right, the period of limitation would have commenced at the death of the plaintiff's father. The Judicial Committee were of opinion that it must be assumed that the origin of the endowment was by gift from the founder and that, in accordance with the ruling in *Juttendromohun Tagore* v. *Ganendromohun Tagore* [(1872) L.R., I.A., Sup. Vol., 47 ; 9 Beng. L.R., 377], heritable estates could not be created to take effect as successive life estates, and inconsistently with the general law. This applied to both the office and the property :—*Held*, that the law of inheritance did not permit the creation of successive life estates in this endowment ; the above ruling being also contrary to the judgment in *Trimbak Bawa* v. *Narayan Bawa* [(1882) I.L.R., 7 Bom., 188] ; and that the plaintiff could not claim to have been entitled otherwise than as heir to, and from, and through his father, in whose lifetime the title had been extinguished by lapse of time and adverse possession of the defendant.

Gnanasambanda Pandara Sannadhi v. *Velu Pandaram* 271

RENT RECOVERY ACT (MADRAS)—ACT VIII OF 1865—*Regulation XXV of* 1802, *s.* 8—*Non-registration of landholder—Subsequent registration of undivided brother of landholder—Maintainability of suit :*

Suits for exchange of patta and muchalka for fasli 1306 ending June 30th, 1897, were dismissed in the Sub-Collector's Court in August 1897 on the ground that the plaintiffs were not the registered landholders. Patta had been tendered in June 1897. Plaintiffs appealed. Subsequent to the filing of such appeals, namely, in December 1897, the Collector registered the undivided brother of the plaintiffs (who had died in April 1897) and it was contended at the hearing of the appeals that such registration covered all the undivided members of the family :—*Held*, that in the absence of registration under section 8 of Regulation XXV of 1802, the landholder was not entitled to enforce acceptance of patta under the provisions of the Rent Recovery Act, and that there was no cause of action under that Act. The original defect of title was not cured by the subsequent registration of the landholder in the name of the plaintiff's undivided brother.

Raghava Reddi v. *Kanni Gramani* 221

2. ——————————————————————, **ss. 7, 9, 10**—*Patta tendered within fasli—Suit after fasli when patta amended—Maintainability of suit :*

A landholder tendered a patta within the fasli. After the close of the fasli he brought a suit to enforce its acceptance, when the patta was amended. After judgment in that suit, the landholder attached the land ;

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whereupon the tenant sued to have the attachment set aside, on the ground that as no proper patta had been tendered within the fasli, and the suit which resulted in the rectification of the patta had been filed after the close of the fasli, the landholder was precluded from enforcing his claim :—*Held*, that inasmuch as judgment had been obtained, fixing the terms of the patta, the tenant could not plead, in answer to an action for rent, the incorrectness of the patta originally tendered. A landholder has a choice of two alternatives. If he satisfies himself that the patta tendered by him is the right one, he may bring his suit for rent or take other measures to recover it. He takes his chance of some flaw being discovered in the patta. If he is not so satisfied, he institutes a suit under section 10 of the Rent Recovery Act and obtains a judgment which fixes the terms of the patta for that fasli beyond all dispute.

Munisami Naidu v. *Perumal Reddi* 616

3. ——————————————————————, **ss. 9, 51**—*Refusal by tenant to accept patta—"Cause of action"—Period within which summary suit must be brought :*

On 17th June 1897 a landholder tendered a patta to a tenant who, on the same day, refused to accept it. On 5th August 1897 the landholder brought a suit to enforce its acceptance :—*Held*, that the suit was brought in time.

Munisami Naidu v. *Krishna Reddi* 474

4. ——————————————————————, **s. 72**—*Refusal to execute muchalka—Suit for rent :*

By section 72 of the Rent Recovery Act, when a judgment is given for the delivery of a muchalka, if the person required by the decree to execute such muchalka shall refuse to do so the judgment shall be evidence of the amount of rent claimable from such person, or a copy of the judgment under the hand and seal of the Collector shall be of the same force and effect as a muchalka executed by the said person. A landholder, having tendered a patta and obtained confirmation of it by summary suit, sued for rent. The tenant in his written statement denied that the patta was a proper one and contended that he was not bound to accept it :—*Held*, that this amounted to a refusal to execute the muchalka for the delivery of which judgment had been given, within the meaning of section 72, and that the requirements of that section had been complied with.

Venkataramayya v. *Subbanna* 565

REVENUE RECOVERY ACT (MADRAS) ACT II OF 1864, ss. 52, 54—*Madras Hereditary Village Offices Act (Madras)—Act III of* 1895, *s.* 21—*Emoluments due to village officers—Demand for payment under section* 52 *of Revenue Recovery Act—Payment under protest—Suit to recover amount paid—Legality of demand—Limitation :*

By the custom of a zamindari its tenants brought their produce to the threshing-floor, where it was divided, *inter alia*, among the village servants. The lessees of the zamindari altered this system, directing the tenants to bring their produce direct to the granaries of the lessees, who promised to pay the village servants their fees from the said granaries. These fees having been only partly paid, the village servants complained to the Government revenue officials, who applied to the lessees for payment of the arrears, a demand for the same being ultimately issued under section 52 of the Revenue Recovery Act (Madras), 1864. The lessees thereupon paid the amount of the arrears under protest, and a year later filed a suit against the Secretary of State to recover the money so paid :—*Held*, that the lessees had made themselves liable for the fees, and the Collector was entitled to proceed under section 52 of the Revenue Recovery Act (Madras), 1864, to recover them. *Held also*, that inasmuch

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as the suit had not been brought within six months of the time when the alleged cause of action had arisen, it was barred under section 59 of the Revenue Recovery Act (Madras), 1864.

Orr v. *Secretary of State for India in Council* 571

SERVICE INAMS—*Enfranchisement in favour of widow—Right of widow:*

Lands which had been held by a deceased as moniem service inam were enfranchised after his death and sold by his widow. On a claim being preferred by the reversioners for a declaration that the sale was inoperative as against them after the expiration of the widow's life estate:—*Held*, that the right of the widow under the grant was not limited to that of a widow's estate.

Subbaraya Mudali v. *Kamu Chetti* 47

SPECIFIC RELIEF ACT—ACT I OF 1877, s. 9—*Suit for possession by person evicted brought more than six months from date of dispossession against one having better title than himself:*

Certain land belonging to two brothers was mortgaged by one of them and leased to plaintiffs by the mortgagee. The heirs of the other brother, declining to accept the mortgage or the lease which had been granted under it as binding on them, evicted plaintiffs from the land. Plaintiffs now brought this suit against the defendants to recover the possession of which the defendants had deprived them by such eviction. The defendants' title was found to be good:—*Held*, that plaintiffs could not succeed. *Per* SUBRAHMANIA AYYAR, J.—That it is an undoubted rule of law that a person who has been ousted by another who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title. *Asher* v. *Whitlock* (L R., 1 Q.B., 1), *Mussammat Sundar* v. *Mussammat Parbati* (L.R., 16 I.A., 186; I.L.R., 12 All., 51), *Ismail Ariff* v. *Mahomed Ghouse* (L.R., 20 I.A., 99; I.L.R., 20 Calc., 834), referred to; *Nisa Chand Gaita* v. *Kanchiram Bagani* (I.L.R., 26 Calc., 579), distinguished. Also, that section 9 of the Specific Relief Act cannot be held to take away any remedy available with reference to the well-recognised doctrine that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. But that the above propositions were inapplicable to the facts of the present case, where the defendants were found to have good title. *Per* O'FARRELL, J.—The rule is that where a plaintiff in possession without any title seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can only do so under the provisions of section 9 of the Specific Relief Act, and not otherwise. Here the defendants held under a lease granted by person who was found to have title, and a suit to recover possession would only lie under the provisions of section 9 of the Specific Relief Act, and this was clearly not such a suit.

Mustapha Saheb v. *Santha Pillai* 179

2. ——————————, **s. 30**—*Limitation Act—Act XV of 1877 arts. 113, 144—Suit on an award—Meaning of "contract" in Art. 133:*

By an award bearing date 7th July 1893 plaintiffs were held to be entitled to certain immoveable property. On 15th November 1897, they filed a suit to enforce the award. On its being contended that the suit was barred by limitation, under article 113 of the Limitation Act, it being in fact for the specific performance of a contract:—*Held*, that the suit was not barred, the article applicable being article 144. A suit to enforce an award cannot be treated as a suit to enforce a contract, within the meaning of article 113, the word "contract" in that article being used in its ordinary sense. *Sukho Bibi* v. *Ram Sukh Das*, (I.L.R., 5 All., 263), and *Raghubar Dial* v. *Madan Mohan Lal*, (I.L.R., 16 All., 3), referred to.

Sornavalli Ammal v. *Muthayya Sastrigal* 503

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3. ——————————, **s. 42**—*Suit by trustees for a declaration that an appointment to the office of pattamali was invalid—Omission to ask for consequential relief—Custody by pattamali of articles belonging to temple—Possession by trustees not divested where pattamali was acting in the capacity of a mere servant—Maintainability of suit without prayer for consequential relief:*

Some of the trustees of a temple having sued others for a declaration that an appointment by the latter of a person to the office of pattamali was invalid, it was objected by the defendants that even if the allegation were true, the suit must fail as the pattamali (who was also impleaded as a defendant) had taken charge of documents and jewels belonging to the temple, and consequential relief should have been prayed for. The plaint was accordingly amended, but the District Court, whilst holding that the appointment of the pattamali was invalid, dismissed the suit on the ground that the amendment had been made after the lapse of the period of limitation:—*Held*, that the suit for a declaration would lie without consequential relief being prayed for, inasmuch as its object was not to establish any legal character or any right to any property in the plaintiffs but was in effect to have an act done by the other trustees in contravention of duty declared null and void. Even if section 42 of the Specific Relief Act applied to such a decree, which was doubtful, no further relief than the declaration was necessary, as the custody of the documents and jewels by the pattamali was merely that of a servant under the trustees, with whom the possession in fact and in law remained. There was therefore nothing of which delivery could be sought from the possession of the pattamali and no question of limitation arose.

Janardana Shetti Govindarajan v. *Badava Shetti Giri* 385

STAMP ACT—ACT OF 1879, ss. 3, 46, sched. 1, arts. 13, 44 (a)—*"Mortgage deed":*

By a clause in a document referred to the High Court for an opinion as to the stamp duty payable thereon, the A company agreed that, on execution of the document, they would issue and hand to the B company £8,000, part of the £25,000 second debentures, and that such second debentures, together with the £20,000 first debentures already issued to the B company, and the remaining £5,000 first debentures, subject to the prior charges thereon, should be held by the B company as security for a sum of £32,009-15-10 previously mentioned in the deed:—*Held*, that the clause constituted the document a "mortgage deed" within the meaning of the Indian Stamp Act, 1879. The whole debt of £32,009-15-10 being, by the said document, secured not only upon the old security of £20,000 first debentures, but also upon the £8,000 second debentures, and the remaining £5,000 of the first debenture, stamp duty was payable on the new security, though a portion of the debt secured was included in the previous document on which duty had been paid; that the document was not a mere agreement to make a transfer, but an agreement to hand over the debentures on the execution of the document and was therefore in effect an actual transfer; that the "mortgage deed" was one with possession within article 44 (*a*) of schedule I of the Stamp Act, 1879, by which this document was governed; and that in respect of the undertaking to make further advances, the document was liable to further duty as an agreement "not otherwise provided for."

Reference under Stamp Act, s. 46 207

2. ——————————, **s. 34**—*Penalty chargeable only on the original, unstamped, or insufficiently stamped, instrument—Document tendered as secondary evidence not within the section and not admissible:*

By the terms of the Indian Stamp Act, 1879, the provisions of section 34, which apply to documents either unstamped or insufficiently stamped, have no application when the original instrument, which ought to have been properly stamped but was not, has not been produced. The clauses of that section deal with, and exclusively refer to, the admission in evidence of original documents which have been either not stamped at all, or have been insufficiently stamped.

Raja of Bobbili v. *Inuganti China Sitaramasami Garu* 49

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3.————————————, ss. 61, 67—*Defrauding Government of stamp revenue by a contrivance or device not otherwise specially provided for—Receipt of unstamped document—Abetment of an offence under section* 61 *of Stamp Act,* 1879—*Penal Code—Act XLV of* 1860, *s.* 40:

Two letters were written to petitioner in which the writer recommended him to advance sums of money to the bearers of the letters and bound himself to repay those sums, if lent, in case of default on the part of the borrowers. The loans were made by petitioner, who kept the letters. A prosecution having been subsequently commenced against petitioner under section 67 of the Stamp Act, 1879, for defrauding Government of stamp revenue by an illegal device, and he having been convicted on the ground that when the loans were granted the documents became letters of guarantee and as such liable to stamp duty:—*Held*, that the execution of a document which on its face required to be and was not stamped, could not be said to be "an act, contrivance or device not specially provided for by this Act or any other law for the time being in force;" and that punishment for the act of the executant of such a document, if it were punishable at all, was provided for under section 61 of the Stamp Act, 1879, and it could not therefore be dealt with under section 67. Also that the act of a person receiving an unstamped document might amount to abetment of an offence, having regard to section 61 of the Stamp Act, 1879, and to the definition of an "offence" in section 40 of the Indian Penal Code, and if so, would be an act provided for by "any other law for the time being in force," and so not within the terms of section 67 of the Stamp Act, 1879.

Queen-Empress v. *Somasundaram Chetti* 155

SUCCESSION ACT—ACT X OF 1865, s. 114—*Hindu Law—Bequest for immoral consideration—Condition of future cohabitation—Invalidity of bequest:*

A bequest by a Hindu testator, made conditional on the continuance of immoral relations between himself and the legatee, is void.

Tayaramma v. *Sitaramasami Naidu* 613

2.————————————, s. 202—*Estate of intestate Native Christian—Suit for partition of estate by purchaser of widow's share before completion of administration—Dismissal of suit—Only remedy by way of administration suit:*

A person to whom the Indian Succession Act, 1865, applied having died intestate in April 1884, his widow and son were in September of the same year granted letters of administration, which were cancelled for want of stamp duty, a fresh grant being made on 19th January 1885. Plaintiff, alleging that the said widow had executed a promissory note in her favour in September 1884, filed a suit against her on 6th January 1885, and, there being no appearance of the defendant, obtained an *ex parte* decree. In execution of the decree so obtained plaintiff attached portions of the estate of the deceased and brought them to sale, becoming herself the purchaser of the one-third share of the widow in each lot sold. In March 1885 the son was appointed sole administrator; in January 1888 he died and the letters of administration were revoked in consequence, and the amin of the District Court was appointed administrator of the estate until October 1894, when the son's widow was so appointed in his stead. Plaintiff now sued for partition of the property comprised in the estate of the deceased in order that she might obtain delivery of the portions of it which she had purchased in execution of the decree against the widow previously obtained as aforesaid. The estate of the deceased had never been administered or distributed. The defence was that the said previous decree had been obtained by fraud:—*Held*, that under section 44 of the Indian Evidence Act the defendants were entitled to set up this defence; and that the property of the deceased having become vested in his administrator under the Indian Succession Act, it remained so vested until the administrator had distributed the estate, and that, in consequence, the widow had no saleable interest in any part of the estate until in the course of the administration thereof her share had been determined and allotted to her. Until such

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allotment (which had not yet taken place) the only process by which plaintiff could legally claim the widow's interest in the estate was by a suit for the administration of the estate, to which suit the widow, if alive, would be a necessary party. If not alive, letters of administration to her estate would be necessary, the administrator being made a party:—*Held also*, that the suit could not be treated as an administration suit.

Srirangammal v. *Sandammal* 216

3.————————————, s. 271—*Trusts Act—Act II of* 1882, *s.* 56—*Suit by two out of eleven beneficiaries for possession of trust property—Maintainability of suit:*

Two daughters of a testator sued defendants Nos. 1 and 2, the testator's sons and his administrators with the will annexed, and other defendants, for a declaration that certain properties devised by the testator to be held in trust and the rents divided among his eleven children were trust properties, and to recover possession thereof. A decree had been obtained against plaintiff No. 2 and her right, title and interest in the trust property brought to sale. Defendants Nos. 1 and 2 had filed a suit to set aside the sale but afterwards compromised it on the terms that the sale should be cancelled on payment of a certain sum by defendant No. 1, but that in default of such payment the decree should take effect. Default having been made the property was sold:—*Held* (by the whole Court), that the decree of the Court below awarding the plaintiffs possession of the whole property on behalf of themselves and the other beneficiaries must be reversed. *Per* BODDAM, J.—That the alienations made in pursuance of the compromise entered into by the administrators were binding upon the plaintiffs and that therefore neither of them had any cause of action. *Per* O'FARRELL, J.—That under all the circumstances the suit could not be treated as a suit to recover the plaintiffs' shares of the trust property. *Per* SUBRAHMANIA AYYAR, J. (*dissentiente*).—The fact that the plaintiffs had asked for a larger relief than they were entitled to did not warrant the dismissal of the suit altogether; and that the suit fell within the class of cases in which the relief against a third party is such as a Court of Equity will administer, and a *cestui que trust* may be entitled to sue the trustees and the third party jointly, but in which he will be bound to confine his suit to that specific matter in respect of which alone the third party is liable, and not to make it part of a suit for the general administration of the trust; and that plaintiff No. 1 was not precluded from recovering her eleventh share.

Padmanabha Chettiar v. *Williams* 239

TRANSFER OF PROPERTY ACT—ACT IV OF 1882, s. 53—*Debtor and creditor—Intent to delay and defeat creditors—Statute* 13 *Eliz., cap. V:*

A mere preference by a debtor of one creditor to another, and *a fortiori* a mere *bonâ fide* security given to a creditor to the extent of his debt, is not within section 53 of the Transfer of Property Act, 1882,—as it is not within the English Statute of 13 Eliz., cap. V. But where a document given by way of security goes further and secures debts that are not due, the effect is, *quoad* such fictitious debts, to defeat or delay the creditors. Where a party intends to rely upon a document as not within section 53 of the Transfer of Property Act because it merely creates a preference in favour of certain creditors over the rest, he must show strictly that the document is such and nothing more.

Narayana Pattar v. *Viraraghavan Pattar* 184

2.————————————, ss. 60, 62—*Mortgage containing covenant to repay "within" a given time—Right to redeem before the expiration of that time—Mortgagee's right to foreclose:*

Certain premises were mortgaged with possession in 1896, the mortgagor, in the instrument of mortgage, covenanting to repay the mortgage money "within 20th of April 1904." In 1898 the mortgagor sold the mortgaged premises and called upon the mortgagee to receive the principal and interest due and to deliver up possession. On the mortgagee refusing on the ground that the mortgage was not redeemable till 1904:—*Held*,

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that the mortgagor was entitled to redeem. A stipulation for the postponement of payment of mortgage money is *primâ facie* intended for the benefit of the mortgagor; the parties to an instrument of mortgage may, however, by the language of their contract, show their intention that redemption may take place only at the end of a given term. The covenant, as worded, so far from showing an intention to preclude the mortgagor from redeeming, reserved the liberty to redeem at pleasure. *Vadju* v. *Vadju* (I.L.R., 5 Bom., 22) and *Tirugnana Sambandha Pandara Sannadhi* v. *Nallatambi* (I.L.R., 16 Mad., 486) considered.

Rose Ammal v. *Rajarathnam Ammal* 33

3. ——————————————————————, **60, 88, 99**—*Purchase by mortgagee holding decree for sale, of portion of mortgaged property, subject to mortgage—Impossibility of mortgagee freeing himself by such purchase from liability to be redeemed—Civil Procedure Code—Act XIV of* 1882, *ss.* 244, 258—"*Court executing a decree*" *includes proceedings initiated by decree-holder and by judgment-debtor:*

A mortgagee having obtained a decree against his mortgagor for the sale of the mortgaged property, a portion of the latter was subsequently sold, subject to the said decree, in execution of a money decree obtained by a third party against the mortgagor. The mortgagee purchased the portion so sold, whereupon the mortgagor presented a petition under section 258 of the Code of Civil Procedure claiming that the mortgagee was bound to discharge his mortgage debt and should be called upon to certify satisfaction of his decree:—*Held*, that petitioner was not entitled to the relief prayed for, but only to proceed upon the footing that the portion of the mortgaged property which had been purchased by the mortgagee remained, notwithstanding such purchase, redeemable by petitioner together with the remainder of the property. On the question whether the purchase by a mortgagee of a portion of the mortgaged property at a Court sale in execution of the money decree of a third party, involves a taking advantage by the mortgagee of his fiduciary position as mortgagee:—*Held*, that the principle of the impossibility of a mortgagee freeing himself from his liability to be redeemed as affirmed in *Martand* v. *Dhondo* (I.L.R., 22 Bom., 624) and *Mayan Pathuti* v. *Pakuran* (I.L.R., 22 Mad., 347) was applicable, even in the absence of fraud or collusion between the mortgagee and the third party in execution of whose decree the purchase of the equity of redemption had been made, and that such a purchase contravened the principle underlying section 99 of the Transfer of Property Act and expressed in section 88 of the Indian Trusts Act. The provision in section 244 of the Code of Civil Procedure that questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of a decree shall be determined by order of the Court executing the decree, relates not only to proceedings initiated by the decree-holder but also to applications made by the judgment-debtor. Whether the subject-matter of the petition was an "adjustment" of the decree, within the meaning of section 258 of the Code of Civil Procedure—*Quære.*

Erusappa Mudaliar v. *Commercial and Land Mortgage Bank, Limited* ... 377

4. ——————————————————————, **ss. 83, 84**—*Deposit in Court to the account of the mortgagee of amount remaining due on mortgage—Deposit to credit of persons not entitled in addition to persons entitled:*

A mortgagor before bringing a suit for redemption deposited the mortgage money in Court to the credit of persons who were not entitled to it in addition to that of persons who were entitled to it:—*Held*, that he was not entitled to claim the benefit of sections 83 and 84 of the Transfer of Property Act, inasmuch as the persons really entitled to the money could not draw it.

Madhavi Amma v. *Kunhi Pathumma* 510

5. ——————————————————————, **ss. 86, 88**—*Decree for sale—Provision for interest at contract rate until six months from date of decree:*

Defendants promised to pay plaintiffs a sum of money for value received, with interest thereon from the date of the promise until demand at the rate of 8 per cent. per annum, and, after demand, at the rate of 15 per cent. per annum until payment in full; and as further security for such re-payment deposited with plaintiffs the title-deeds of certain immovable property. Demand was made, but was not complied with; whereupon plaintiffs informed defendants by letter that their account carried interest at the higher rate provided for in the promissory note. Plaintiffs now sued for the amount due in respect of principal and interest at the rate of 15 per cent. per annum from the date of their letter till payment: and asked that in default of payment on a day to be fixed by the Court the property might be sold. A decree having been passed in plaintiffs' favour provision was made therein ordering defendants to pay the amount of principal and interest due at the date of the decree, with interest thereon at the rate of 15 per cent. per annum from that date to a date six months thereafter. Objection having been taken to the form of this decree on the ground that payment of interest at the contract rate was only provided for up to the termination of six months from the date of decree, instead of till payment:—*Held*, that the decree was correctly drawn. In principal there is no difference between a mortgage decree which has become absolute and an ordinary decree for money. After the day fixed for payment, or on the passing of the decree, as the case may be, the rights of the parties under the contract become merged in the decree, and afterwards there is no more reason for giving interest at the contract rate in the one case than in the other. *Rameswar Koer* v. *Syed Nawab Mehdi Hossein Khan*, (L.R., 25 I.A., 179; I.L.R., 26 Calc., 39), and *Bakar Sajjad* v. *Udit Narain Singh*, (I.L.R., 21 All., 361), referred to.

Commercial Bank of India v. *Ateendrulayya* 637

6. ——————————————————————, **s. 93**—*Application for sale of mortgaged property on default of mortgagor to redeem—Court in which application should be made:*

In a suit for the redemption of mortgaged property, the District Munsif passed a decree which was, on appeal, modified by the District Court. The mortgagor not having paid the decree amount, the mortgagee applied to the District Court under section 93 of the Transfer of Property Act for an order that the mortgaged property might be sold:—*Held*, that the application should have been made to the Court of the District Munsif. *Oudh Behari Lal* v. *Nageshar Lal* (I.L.R., 13 All., 278), referred to.

Venkata Krishna Ayyar v. *Thiagaraya Chetti* 521

7. ——————————————————————, **ss. 106, 107**—*Duration of tenancy—Presumption of yearly tenancy—Evidence—Burden of proof in action of ejectment by zamindar against tenant as to nature of tenancy:*

Suit for ejectment by a zamindar against two tenants holding under him subject to the payment of an annual cist or assessment. The zamindar was the owner of the kudivaram as well as of the melvaram right, and it was admitted that the tenants' possession was derived from him:—*Held*, that these facts alone were not enough to raise the presumption of a tenancy from year to year. *Per* SHEPHARD, J.—It is not the general rule that the tenants in an ordinary zemindari hold their lands as yearly tenants or as tenants from year to year. Many of the occupants of zamindari lands are not tenants in the proper sense of the word and the fair presumption is that when new occupants are admitted to the enjoyment of waste or abandoned lands the intention is that they should enjoy on the same terms as those under which the prior occupants of zamindari lands held, it being open to the zamindar to rebut that presumption, either by proving that the usual condition of things does not prevail in his estate or that a particular contract was made between him and his tenant. *Per* SUBRAHMANIA AYYAR, J.—The presumption of tenancies from year to year which is well known to English law, because of the general prevalence in England of tenancies in the strict legal sense of the term, would also arise in this country if the tenancies here were proved to be similar. But inasmuch as practically the whole of the agricultural land on zamindaris is cultivated by raiyats who are generally entitled to hold them so long as they desire to do so, subject to the performance of obligations incident to the tenure there is insufficient

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foundation from which such a presumption may be raised. Nor is the fact that the zamindar is the owner of the kudivaram right as well as the melvaram right sufficient to shift on to the raiyat the burden of proving that the tenancy is not one from year to year. In order to discharge the onus which is on him in a case of ejectment the zamindar must do more than merely show that the land when it passed into the hands of the raiyat was at his disposal as relinquished or as immemorial waste land. He must show that the defendants' possession is inconsistent with the *prima facie* view that it is held under the usual and ordinary form of holding prevalent in the zamindaris. *Achayya* v. *Hanumantrayudu* (I.L.R., 14 Mad., 269), explained.

Cheekati Zamindar v. *Ranasooru Dhora* 318

8. ——————————, s. 135 (d)—"*Judgment of a competent Court*"—"*Actionable claim*"—*Suit by assignee of a foreign judgment—Consideration smaller than amount of judgment-debt—Decree for whole amount*:

The assignee of a judgment for Rs. 12,297 passed against the defendant by the Supreme Court of Mauritius sued in a Court in British India to recover the amount of the judgment with interest. Defendant, amongst other defences, contended that the transfer was not supported by consideration; and the Subordinate Judge, finding as a fact that only Rs. 5,500 had been paid therefor, held that the foreign judgment was an actionable claim within the meaning of section 135 of the Transfer of Property Act, and decreed in plaintiff's favour for that amount only, with interest. On appeals being preferred to the High Court:—*Held*, that the plaintiff was entitled to recover the whole amount of the judgment. *Semble*, the word "judgment" in clause (*d*) of section 135 of the Transfer of Property Act includes a foreign judgment.

Vythilinga Padayachi v. *Sitharam Ayyar* 449

TRUSTS ACT—ACT II OF 1882, s. 56—*Suit by two out of eleven beneficiaries for possession of trust property—Maintainability of suit—Succession Act—Act X of* 1865, *s.* 271:

Two daughters of a testator sued defendants Nos. 1 and 2, the testator's sons and his administrators with the will annexed, and other defendants, for a declaration that certain properties devised by the testator to be held in trust and the rents divided among his eleven children were trust properties, and to recover possession thereof. A decree had been obtained against plaintiff No. 2 and her right, title and interest in the trust property brought to sale. Defendants Nos. 1 and 2 had filed a suit to set aside the sale but afterwards compromised it on the terms that the sale should be cancelled on payment of a certain sum by defendant No. 1, but that in default of such payment the decree should take effect. Default having been made the property was sold:—*Held* (by the whole Court), that the decree of the Court below awarding the plaintiffs possession of the whole property on behalf of themselves and the other beneficiaries must be reversed. *Per* BODDAM, J.—That the alienations made in pursuance of the compromise entered into by the administrators were binding upon the plaintiffs and that therefore neither of them had any cause of action. *Per* O'FARRELL, J.—That under all the circumstances the suit could not be treated as a suit to recover the plaintiffs' shares of the trust property. *Per* SUBRAHMANIA AYYAR, J. (*dissentiente*).—The fact that the plaintiffs had asked for a larger relief than they were entitled to did not warrant the dismissal of the suit altogether; and that the suit fell within the class of cases in which the relief against a third party is such as a Court of Equity will administer, and a *cestui que trust* may be entitled to sue the trustees and the third party jointly, but in which he will be bound to confine his suit that specific matter in respect of which alone the third party is liable, and not to make it part of a suit for the general administration of the trust; and that plaintiff No. 1 was not precluded from recovering her eleventh

[redacted] *Chettiar* v. *Williams* 239